

**Cheering the Dismal Science:  
Preference Egoism and International Farm Animal Welfare**

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Go to the meatmarket of a Saturday night and see the crowds of live bipeds staring up at the long rows of dead quadrupeds. Does not that sight take a tooth out of the cannibal's jaw? Cannibals? Who is not a cannibal? I tell you it will be more tolerable for the Fejee that salted down a lean missionary in his cellar against a coming famine; it will be more tolerable for that provident Fejee, I say, in the day of judgment, than for thee, civilized and enlightened gourmand, who nailest geese to the ground and featest on their bloated livers in thy paté-de-foie-gras.

-Herman Melville, *Moby-Dick*, Ch. 65, "the Whale as a Dish"

## I. Introduction

This work seeks to demonstrate how the law and economics literature on rational choice ignores the utility function of non-human agents (hereinafter animals), and how the altruistic utility functions of humans can suffice to meet animals' welfare needs. By limiting the scope of negative externalities to human agents and by narrowly construing the functional parameters of preference egoism, rational choice theorists categorically dismiss social values defending animal interests on their own merits. Nonetheless, a generous interpretation of rational agents' utility function allows altruistic preferences to support animal welfare norms (hereinafter AWN). Once the validity of AWN are established, what remains are the problems of communicating animals' preferences as objectively as possible to humans and of minimizing the negative impacts of bounded rationality on the evaluative decisions of rational deliberators.

Because my analysis hinges on the preferencing of certain term-definitions over others, I try to clearly delineate variant definitions of 'rationality,' 'egoism' 'externality,' 'norm,' and 'interests' that dictate the arena of analysis. My primary argument, as stated above, is quite simple: that while rational choice theory fails to account for animals' interests on their own merits, the custodial human responsibility to address animal interests is compatible with RCT. I also question the division of positive economics (economic theory) from normative economics (welfare economics), inspecting the extent to which value judgments about human nature prescribe the outcome of otherwise predictive models. Finally, I contrast U.S. and E.U. livestock law in light of recent and potential future WTO Dispute Settlement Body rulings over product-product methodologies (PPMs) and the relative

‘likeness’ of humanely and inhumanely raised meat products. As advances in behavioral monitoring techniques combine with questions about the philosophically weak underpinnings of speciesist rationalizations, acceptance of animal sentience is spreading—and will continue to spread—internationally. At base, my argument is less an attack on rationality than a plea to broaden the ambit of humanist discourse to include secular normative thought.<sup>1</sup>

**Part II** presents four increasingly self-interested definitions of egoism and the real-world ramifications of each. Next, since the chosen choice of norm and RCT variant depends upon the scope and breadth of externalities, I demonstrate how a majority of rational choice—and, indeed, theoretical economic—scholarship limit the scope of externalities to human agents. I then look at how valuing collaboration over free-riding would transform the parameters of the prisoner’s dilemma (PD) into an Assurance Game (AG), with the result of altering the prescriptive results of policy outcomes. Conversely, the continued analytical primacy of wealth-maximizing motives may be a self-fulfilling prophecy: we fix the electron’s location when we choose to measure its velocity, but measuring the location fixes a *different* velocity.

I then discuss the methods of revealing animal suffering in as scientific a manner as is currently possible, following Marian Stamp Dawkins’ work on animal health, physiology, and behavior. Upon establishing the surmountability of difficulties in revealing animal preferences, I examine the recent scholarly work on animal rationality in order to reinforce the merits of taking animals’ interests seriously. Part II concludes with an outline of common industry practices in Concentrated Animal Feedlot Operations (CAFOs).

**Part III** analyzes the implications of bounded rationality and information asymmetries in considering how public awareness of CAFO practices corresponds to the presence of ethical

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<sup>1</sup> I follow the late Kurt Vonnegut, honorary president of the American Humanist Association, whose acceptance speech included the following words: “the sort of humanism I represent, to which I am an heir, draws energy not from the Renaissance or from an idealized pre Christian Greece and Rome but, rather, from very recent scientific discoveries and modes of seeking truth.” (Vonnegut 1996) Or, more recently, “we humanists try to behave well without any expectation of rewards or punishments in the afterlife.” (Vonnegut 2003)

consumerism. A Habermasian dialogue is proposed as a means to overcome information asymmetry (while acknowledging that the contrary interests of CAFO operators and industry interests will, and do, limit the scope of public discourse). I argue that deliberative democracy and discourse ethics can help to overcome bounded rationality in the domain of farm animal welfare.

I then inspect the ‘citizen Jekyll’ and ‘consumer Hyde’ distinction (Lewinsohn-Zamir 2000) in which rational actors behave self-interestedly as consumers and are other-concerned as citizens. I contend that while AWN fail to conform to this easy dichotomy, ethical consumerism can be understood as a result of the ineffectiveness of political fora in addressing citizens' concerns. As an ethical byproduct of a global economic integration<sup>2</sup> in which economies of scale are prioritized over animal living conditions, *consumer Jekyll* is a norm entrepreneur.

**Part IV** addresses the related problems of normative indeterminacy and incommensurability. After a discussion of the strengths and weaknesses of applying both models to AWN, I argue that animal welfare norms would be better viewed in terms of value trade-off (VTO) than of incommensurability, where an ordinal hierarchy of interests (with rational human agents at the top) gradually replaces the current speciesist myopia.

**Part V** lays out the arguments favoring the adoption of AWN in RCT. I begin by introducing the view that the forward march of ethical progress is reflected historically in the broadening of the scope of interest consideration, with animal interests being the next logical group to receive consideration. I argue that (1) the close methodological affinity between RCT and utilitarianism, (2) the consequentialist utilitarianism of Peter Singer and the equal consideration of interests, (3) the sociological construction of human rights norms and (4) the related concepts of 'norm entrepreneurs' and 'norm cascades' all combine to provide AWN with powerful normative and positive bases upon which to ground both legal institutionalization and the defense of welfare claims at potential future

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<sup>2</sup> For which see Michael Bordo, Barry Eichengreen and Douglas Irwin, “Is Globalization Today Really Different than Globalization a Hundred Years ago?” *N.B.E.R. Working Paper* no. 7195, 1999.

WTO Dispute Settlement Body hearings.

**Part VI** considers the adverse effects of animal welfare norms on international market competitiveness, analyzing the effects of the GATT 1994 rules on AWN and the future of high European welfare standards. After inspecting different models of citizen participation in the WTO system, I look at the role of ‘consumer Jekyll’ on the international stage, contending that the WTO Appellate Body’s definition of ‘consumer preferences’ hinges on the national actions of ‘consumer Jekyll.’

Part VI also contrasts U.S. with E.U. farm animal law, with the specific aims of indicating the likelihood of future trade disputes and the origins of the widely disparate standards in the two jurisdictional regimes. I close Part VI with a look at the recently developed animal welfare standards of the Organization for Animal Health (OIE), and the extent to which universal standards can help to reassure concerned citizens of national polities that their altruistic preferences are being considered on the international stage.

I conclude by recapitulating the novel insights AWN brings to RCT, and by briefly contrasting the relationships of rational choice to animal welfare and to deep ecology. Unlike many environmental concerns, the other-concerned nature of animal welfare is difficult to frame in egoistic terms without jettisoning the predictive utility of self-interested models generally. However, the myriad public health and human environmental problems created by CAFO systems provide a tenuous model of self-interest upon which to model the accretion of international welfare norms. Such purely instrumental reasoning can only address part of the problem, however, insofar as ‘consumer Jekyll’ has altruistic rather than narrowly instrumental reasons for acting.

## **II. Definitions and the Scope of Interest Considerations**

Animal interests tend to lose out at the definitional stage; if an interest is not included in the scope of concern, the breadth of concern matters little to the excluded interest. I therefore give specific

definitions—or options between definitions—of the various terms I rely heavily on: rationality, egoism, externalities, interests, and animal suffering.

In discussing rationality, my focus is on the scope of egoism in what I consider ‘rationality of end.’ I am not here concerned with ‘rationality of means’, with which this work is reasonably compatible. Rather, I am concerned with the scope of the individual’s utility function and the extent to which analyzing the minutiae of strategic self-interest prescribes selfish behavior in individuals that could otherwise have been more cooperative.

Next, I critique the definition of externality that pertains only to human interests. As I outline in the following section—on animal suffering—and in the discussion of utilitarian ethics (*infra*), the requisite criterion for having interests is the capacity to feel pain and pleasure at a reasonably complex mental level. Under this definition, the consideration of interests extends well beyond the purview of human agents.

## **II. A. Defining Rationality**

The RCT definition of rationality has received voluminous academic attention and is the subject of continuous debate. This paper does not address the great majority of this debate. For my purposes, it is sufficient to distinguish rationality of means from rationality of end. Rationality of means is a navigational quality which presumes that individuals act to advance their utility function (e.g., their preferences). Rationality of end—or egoism of preferences—examines the worth of the preferences themselves. This paper is concerned more with the relative egoism of preferences than with rationality of method, which I critique only to the extent that information asymmetries create conditions of bounded rationality.<sup>3</sup>

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<sup>3</sup> I draw on George Grantham’s assertion that “strong rationality proposes that agents optimize over the whole space of theoretically accessible alternatives, of which they are deemed to be aware; by contrast weak rationality requires merely choosing among alternatives that are immediately discernible and salient. The difference between them is cognitive. Strong rationality assumes a perfect cognitive capacity.” (Grantham 2004, 41) My recourse to deliberative democracy is an attempt to strengthen weak rationality in the consideration of farm animal welfare.

The spectrum of egoism runs from thin to thick, from a definitional tautology to the doctrine of wealth-maximization.<sup>4</sup> Most theorists, however, choose either the 'weak' thin version stating that egoism equals expected utility or the 'weak' thick version in which egoism equates to self-interest narrowly construed. (Korobkin and Ulen 2000, 1061)<sup>5</sup> AWN are inconsistent with the 'weak' thick version but consistent with the 'weak' thin definition.

Rational choice theorists seem to frequently lose sight of the fact that

Rationality is an *instrumental* concept. In the light of one's goals (preferences), if the means chosen (actions) are appropriate the individual is rational; if not, irrational. "Appropriate here refers to *method* rather than *result*. Rational behavior is action calculated on the basis of rules of logic and other norms of validity. (Hirshleifer 1985, 59)

Again, this paper levels no criticisms against the instrumentalist rationality of means described by Hirschleifer. Rather, my goal is to determine the effect of narrowly construed egoism on rational agents' behavior, and to examine the potential applicability of a broader construction of egoism to AWN.

Robert D. Cooter presents an alternative view that potentially strips regulatory law of much of its normative bite by deferring to self-regulating "norms of business communities." Termed the "new law merchant,"<sup>6</sup> this approach can be beneficial in minimizing transaction costs between merchants—and in allowing producers to respond on their own initiative to activist consumers (see *infra*)—but should not be taken as prescribing a blank check to evade industry subjection to potential regulatory control.

A further weakness of thick rationality of end as applied to economics is the devouring nature of the 'selfishness of human nature' mode of thought's status as a self-fulfilling prophecy.<sup>7</sup> As a result, a

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<sup>4</sup> As one commentator notes, "the incompatibility between wealth maximization and non-commodity values is made clear by the methodologies devised to measure the economic value to individuals of collective goods such as environmental quality or more diverse television programming." (Stewart 1983, 1563)

<sup>5</sup> Korobkin and Ulen actually use the terms "thin rationality" and "thick rationality" rather than "thin egoism" and "thick egoism," but for my purposes the term egoism is more appropriate.

<sup>6</sup> Cooter gets his term from medieval England, where "instead of making rules, the English judges allegedly tried to discover those rules that already existed among the merchants, and then selectively enforced them. Thus, the judges dictated conformity to merchant practices, not the practices to which the merchants should conform." (Cooter 1996, 1648)

<sup>7</sup> Indeed, Diane Austin-Broos notes that "the utility theory of culture – culture as practical reason – comes about through

purportedly predictive theory takes on normative dimensions by shaping the world to its preferred standards.<sup>8</sup> Lewinsohn-Zamir is right to assert that "the focus on instrumental value of the good in promoting human welfare elicits self-interested and egoistic preferences."<sup>9</sup> (Lewinsohn-Zamir 2000, 383) She then opposes "existence value" to instrumental value, noting that only the latter plays by the thick egoism rules. On the other hand, existence value, like altruism, is compatible with a thin egoism that accounts for the diversity of agents' utility functions.

As Lewinsohn-Zamir points out, the prisoner's dilemma (PD) and tragedy of the commons (TOC) preference rankings are themselves conditioned upon the primacy of egoism.<sup>10</sup> In response, she develops an assurance game (AG) with the following preference ranking: "(I) everyone contributes, (II) no one contributes; (III) I do not contribute, but others do; (IV) I contribute, but others do not." (Lewinsohn-Zamir 2000, 392) The PD/AG contrast helps to clarify the overriding importance of underlying assumptions, and my basic point is that RCT overvalues *homo economicus* at the expense of *homo sociologicus*.<sup>11</sup> (It comes as no surprise, then, that economics majors are more likely than others to defect in Prisoners' Dilemma runs.<sup>12</sup>)

It is clear that people sometimes play the PD and they sometimes play the AG. Nonetheless, the prevalence of one game choice over the other is not determined neutrally in a cultural vacuum; rather, purportedly predictive models of positive economics end up having clearly prescriptive effects in the

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'economic dominance', through the functional *and* presentational dominance of the market over other modern forms of social institution." (Austin-Broos 1996, 178)

<sup>8</sup> As Flora Gill puts it, "instrumentalism professes to be interested only in the predictive power of theories, yet in practice it often retains the logical positivist conflation of prediction and explanation." (Gill 1996, 127)

<sup>9</sup> This theme is iterated again and again by RCT's critics. According to Richard B. Stewart, "competition for material advantage also assertedly breeds egoism, undermining the infrastructure of mutual trust upon which society (including the market) ultimately depends." (Stewart 1983, 1538)

<sup>10</sup> In this context, Lewinsohn-Zamir writes that "the PD or TOC explanation implicitly acknowledges the accusation that choices in private life are largely motivated by egoism; greed has significant impact on the final outcome, and people's most preferred option is that others toil while they enjoy a free ride. Individuals' behavior, however, displays a much wider range of motivations and interests." (Lewinsohn-Zamir 2000, 389)

<sup>11</sup> Admittedly, as John Elster observes, "we do not seem to have any robust understanding of the relation between the two homunculi found within each of us—*homo economicus* and *homo sociologicus*." (Elster 1985, 141) Admitting incomplete knowledge, however, is a far cry from ceding the entire field to *homo economicus*.

<sup>12</sup> According to Robert Rowthorn, "Marwell and Ames (1981) found that first year graduate students in economics were much more likely than others to free-ride in experiments that called for private contributions to public goods...[and] economists typically named a much lower figure as a fair contribution than did non-economists." (Rowthorn 1996, 19)

real world of strategic and cooperative transactions.

## **II. B. Defining Animal Welfare, Externalities and Interests**

Regardless of which model of rationality of end is adopted, however, the claim to harm can only arise if the agent's interests are listed among the pertinent externalities. This is generally not the case for animal interests. With some notable exceptions, rational human agents acting according to the thick rational egoism that predominates in the business world tend to care about animal welfare only to the extent that it affects animal health. I therefore define the various gradations of animal welfare.

Following D. Fraser, animal welfare requirements can be classified in four broad categories:

- Type I: to maintain basic health and bodily function
- Type II: as responsive to animals' 'affective states'
- Type III: to provide elements of animals' natural behavior
- Type IV: to provide access to light, fresh air and the outdoors (Fraser 2006, 98)

To provide a contrast: European regulations are often broader in scope, encompassing welfare requirements type I through III. US regulations, on the other hand, tend to support only type I requirements, the one category that is directly related to profit maximization.

Of the four welfare categories,<sup>13</sup> type IV is the most difficult to connect directly to a minimalist definition of animal health; a controlled environment (indoors) is, by definition, safer than one that is semi-controlled (outdoors). That type IV welfare requirements also receive the strongest public support from conscientious consumers indicates the priorities of animal welfare norm entrepreneurs.

Such questions tend never to be raised in RCT, however, for externality is often defined more

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<sup>13</sup> It is important to distinguish between animal welfare and animal rights. Nowhere in this analysis do I presume that animals have a right not to be killed, assuming that the slaughter is done humanely in a fashion that limits the mental suffering of the animal. Many animal rights activists believe otherwise, but AWN do not require the extension of rights—which in my mind are a political category reserved for autonomous agents—to animals in order to maintain their justificatory weight. However, some non-human animals—including cetacians and certain primates—might qualify for personhood; these animals would arguably be exempt from my above statement.

narrowly than is warranted. Broadly speaking, an externality is a cost or benefit that can be attributed to an economic activity and which is not incorporated in the price of the goods being produced. The definitions adopted by many rational choice theorists, however, focus almost solely on harmful or beneficial effects *to humans*. For one example of many, see the buildup to Harold Demsetz's definition of externality: "no harmful or beneficial effect is external to the world. Some person or persons always suffer or enjoy these effects." (Demsetz 1967, 347) Demsetz makes a normative individualist leap between his first and second sentences, rendering the subtlety of his subsequent argument immaterial to my argument. For my purposes, the replacement of the words "person or persons" with "sentient being or sentient beings" would correct the problem.

This problem arises more from the definition of interest than from the definition of externality; indeed, Demsetz and other rational choice thinkers are merely using an anthropocentric definition of interest that is shared by many schools of thought which share the common Judeo-Christian tradition of human primacy over the natural world. The Oxford English Dictionary defines interest as "1. the relation of being objectively concerned in something, by having a right or title to, a claim upon, or a share in. a. The fact or relation of being legally concerned; legal concern *in* a thing; esp. right or title to property, or to some of the uses or benefits pertaining to property;" Demsetz's concept of externality is focused mostly on definition '1.a.' of interest. Definition '1', however, accepts of a greater range of constituent parts. 'Being objectively concerned in something' requires only a direct and verifiable concern of 'a claim upon, or a share in' the matter at hand. Taking this definition at face value, a veal calf's 'share in' caring about the conditions of its short and unhappy life are as objective as any such interest in avoiding suffering.

## **II. C. Defining Animal Suffering and Examining Animal Rationality**

Descartes asserted that animals do not suffer because they lack language and reason and are thus "not feeling beings, but mere automata." (Cavalieri 2006, 58) This claim, however, has been

roundly disproved by modern scientific observations.

This paper makes a two-tiered argument about animal suffering and human responsibility. Positively, recent developments in animal physiology help to approach objectivity in revealing the relative strength of animal preferences. Normatively, and flowing from this positive ability, humans have a custodial obligation to enforce AWN wherever such norms are not self-enforcing. I address the latter argument in the section on the moral status of animals (*infra*). First, I discuss how animal preferences are revealed.<sup>14</sup>

Marian Stamp Dawkins defines suffering as “experiencing one of a wide range of extremely unpleasant subjective (mental) states.” (Dawkins 2006, 28) Assessments of suffering are made from a combined inspection of physical health, physiological signs, and behavior. Following a variety of tests that approach objectivity in revealing preferences as accurately as is reasonably possible without the direct verbal communication to which humans have recourse, Dawkins reaches the following conclusion: “animals suffer if kept in conditions in which they are without something that they will work hard to obtain, given the opportunity, or in conditions that they will work hard to get away from, also given the opportunity.” (Dawkins 36, 2006)

In brief, the tests administered are as follows. First, physical signs that can be objectively determined include “changes in hormone level...in the ammonia content of muscles...[and] changes in brain activity, heart rate, and body temperature.”<sup>15</sup> (Dawkins 2006, 31) Second, physiological and behavioral signs are adduced from “asking without words” experiments in which choice tests offer animals two or more alternatives and the ability to “vote with their feet.”<sup>16</sup> (Dawkins 2006, 34) Third,

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<sup>14</sup> The problem of mediation, or how such preferences—once revealed—can be related to the preferences of humans and of other animals, is addressed in the section on incommensurability and valuation (also *infra*).

<sup>15</sup> Aware that mediation problems abound, Dawkins acknowledges that “we would certainly not want to describe an alert and inquiring animal as “suffering.” (Dawkins 2006, 31) Rather, physical signs complement physiological and behavioral indicators in distinguishing between short-term excitement and long-term stress.

<sup>16</sup> Again, this approach is not without its shortcomings. Dawkins writes that “it is obviously something of a problem to decide how to ask animals how they rate one commodity, such as food, against something that may be quite different, such as the opportunity to dustbathe, wallow in mud, or fight a rival.” (Dawkins 2006, 35) Nonetheless, as with all intersubjective valuation, ranking preferences is problematic but not insurmountable.

the problem of rating rival commodities is overcome by “operant conditioning,” which means “giving an animal the chance to learn that by pressing a lever, say, it gets something it likes, such as a piece of food (a reward), or can avoid something it doesn’t like (a punishment).” (Dawkins 2006, 35)

Whereas the demonstration of animal suffering is central to my argument regarding sentience and the equal consideration of interests, I will only briefly address the interesting issue of animal rationality. I do so for a number of reasons. In my view, rationality is a poor test of interest consideration (see *infra* on ethics); the criterion of sentience—which can be established from the evidence adduced above on pain and suffering—is sufficient. Nonetheless, a short look at the evidence of rationality beyond the human scope plays an important role in demonstrating the extent to which the species *homo sapiens* shares a common developmental history with all other sentient life, and, as such, that many of the same interest considerations can logically be said to apply to non-human animals as to humans.

That being said, the question of rationality and self-awareness is extraordinarily complex and multifaceted, as is revealed by a generous sampling of the introduction to a recent Oxford University Press compendium, *Rational Animals*.

Instrumental rationality can be understood as either behavioural or process rationality; classical conceptions of human rationality in different disciplines contrast in this respect. Instrumental rationality is classically conceived by economists in terms of consistent patterns of behaviour (what Kacelnik calls ‘E-rationality’) and by philosophers and many psychologists in terms of the processes that generate behaviour (what Kacelnik calls ‘PP-rationality’)...behavioural rationality does not itself require that reasoning be rehearsed by the agent or that any particular process actually generate her behaviour. Behavioural rationality is thus, in principle, open to the possibility that the processes that actually generate an agent’s rational behaviour do not correspond to the theoretical account of why the behaviour counts as rational. In this sense, behavioural rationality is, in principle, compatible with the use of rules of thumb or *heuristics*. Heuristic[s] are decision-making processes that can reliably generate rational behaviour in specific contexts or environments, even though they do not implement ideal reasoning processes and so may not generate rational behaviour in other contexts or environments.

[. . .]

On [a] more radical view, metacognition is not needed for rational processes; using heuristics can be a rational process even if their use is not in turn selected by a process of reasoning...using them may just be an evolved feature of the way our minds work, perhaps implemented by associative mechanisms...The more radical suggestion is that the use of heuristics could still qualify as a rational process...This would make room for more process rationality in animals. Many animals have problem-solving capacities that are specific to a particular task or environment, which they cannot generalize and apply to other tasks. (Hurly and Nudds 2006, 7 and 13)

The distinction between human and animal rationality, then, is one of employing reason<sup>17</sup> versus using heuristics, but the cognitive link connecting reasoning but not heuristics to rationality has come under attack. Without delving further into this complex field, it is sufficient to note that recent work from various fields reinforces the evolutionary origins of rationality.<sup>18</sup>

## **II. D. Introducing Concentrated Animal Feedlot Operations: A CAFO Case Study**

Before moving to the specifics of deliberative fora and active consumers, I outline a case that attracts the lion's share of active consumers' attention—concentrated animal feedlot operations (CAFOs)—and their role in the industrial agricultural system. From a utilitarian perspective, the scale of livestock production dwarfs all other animal welfare considerations: 17 billion land animals were raised and killed in the U.S. and Europe in 2001 alone. (Matheny 2006, 13) It is in this light that the animal interests deserve overwhelmingly to be heard, and CAFOs provide the most telling descriptive measures of precisely why this is so.

The intensive livestock system's hazards include environmental degradation, public health concerns, and low animal welfare standards. First, *Livestock's Long Shadow*, a joint 2006 report of the Food and Agriculture Organization (FAO) and the Livestock, Environment and Development Initiative (LEAD), reveals that global livestock production's environmental toll ranges from climate change and land degradation to water depletion, air pollution and eutrophication. Second, high animal stocking densities in CAFO systems requires a constant and ever-growing regimen of antibiotics and hormones. Third, livestock animals are subject to a variety of particularly cruel practices; if we take poultry

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<sup>17</sup> Classical rationality is predicated on reasoning insofar as “on [the classical] view, being rational is a matter of working out the means to one's ends and of reaching decisions and judgements by a normative process of rationing: by carrying out explicit probabilistic, logical, or decision-theoretic inferences. Both theoretical and practical instrumental rationality are seen to demand reasoning; reasoning can be aimed at solving a problem, making a decision, planning a course of action, arriving at a judgment or prediction...Reasoning is often thought to involve some such stronger form of reflective normativity: to require not just thinking in accord with rules but also a capacity for reflection on the processes of thinking that lead to a decision, for some form of metarepresentation.” (Hurly and Nudds 2006, 11)

<sup>18</sup> John Gray's “Are We Born Moral” from the May 10, 2007 *New York Times Review of Books* 54, no. 8 provides a good overview of the literature in question, which includes popular works like Richard Dawkins' *The Selfish Gene* and Matt Ridley's *The Origins of Virtue*.

production as a template, the husbandry practices to which chickens are subjected include: debeaking, forced moulting (forced starvation to speed up the laying cycle), live disposal of male chicks, and intensive stocking.<sup>19</sup>

Over the last half-century, CAFO facilities have undergone a paired intensification of animals per plant and geographical concentration of plant location.<sup>20</sup> Such concentration necessitates a constant source of food input.<sup>21</sup> 37% of the world's grain, and 66% of U.S. grain, is fed to livestock. (Horrigan *et al*) Intensive hog production is also a major contributor to ammonia volatilization, a primary cause of acid rain, and the concentration of NH<sub>4</sub> inputs in CAFO waste and nitrogen crop fertilizers are also responsible for oceanic eutrophication and the altering of the global nitrogen cycle.

CAFO conditions have equally detrimental effects on animal welfare types I-IV. Higher stocking densities for poultry result in: increased mortality, a greater incidence of leg problems, increased contact dermatitis and carcass bruising, increasingly disturbed resting behavior, decreased pecking and locomotion, and altered lying and preening patterns. (Hall 2001, 23) Problematic housing conditions include high levels of atmospheric ammonia, carbon dioxide, and heat, which combine to

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<sup>19</sup> Indicators of pain and stress in cage eggs include: injury caused by pecking, space constraints on preening, bone and muscle weakness, abnormal repeated behavior, abnormal behavior due to impaired access to litter for dust-bathing and to nest sites for laying, and feather loss. (Bennett *et al*, 4) Regarding swine and cattle, Wolfson writes: "pigs are castrated and have their tails removed without anaesthetic. Moreover, gestating (pregnant) sows and farrowing (birthing) sows are housed in stalls where they are unable to turn around. Such intensive farming practices result in health problems, including lameness or high death rates, which are aggravated by uncontrolled genetic selection for production traits such as rapid growth . . . day-old baby calves are transported from the dairy farm before they are able to walk, resulting in calves being thrown, dragged, or trampled. This practice is becoming increasingly accepted . . . Veal calves are housed in stalls where they are unable to turn around. The calves are fed a liquid diet that does not allow the normal function of the calf's rumen. In addition, cattle are dehorned, castrated and hot-iron branded without anaesthetic." (Wolfson 1996, 134)

<sup>20</sup> Thus, between 1967 and 1997, the number of swine farms plummeted from over a million to 157,000, the top 3% of which produce 60% of U.S. hogs. (Horrigan *et al*) In 2000, operations with 5,000 or more hogs comprise 50% of U.S. production. (Speir *et al*) The poultry and beef industries show similar intensification. See also Lawrence Busch, who writes, "first, within each industry concentration is growing rapidly...tractors...agrochemicals...the seed industry...the food processing industry...Second, vertical coordination and integration are becoming more commonplace. Supermarkets can and do dictate to their suppliers the precise form that fresh produce should take...Third, what was once a first world phenomenon is spreading rapidly in what was the second and what still is the third world." (Busch 2003, 461)

<sup>21</sup> To provide the soy protein and corn energy needed by CAFO facilities, industrial agriculture requires: fossil fuel and water expenditure, topsoil degradation, chemical pesticides and fertilizers, and crop monocultures. The relative inefficiency of consuming meat effectively multiplies crop agriculture's environmental harm twofold for poultry, fourfold for pork, and sevenfold for beef.

lower air quality.<sup>22</sup>

Lowered air quality is also a public health danger, and CAFOs present a range of health problems that go well beyond human and animal respiratory problems. Animal pathogens like cryptosporidia cause community outbreaks,<sup>23</sup> and the preventative antibiotics required by close mutual proximity grants resistance to transferable airborne bacteria.<sup>24</sup> Similarly, the World Organization for Animal Health (OIE) states that 75% percent of recently emergent human diseases are zoonotic (i.e., transferred from animals to humans). (Steinfeld *et al* 2006, 293)

I present this outline to demonstrate the complexity of dealing with intensive livestock production, which itself cannot be divorced from intensive agricultural production. The difficulty of balancing AWN against short and long-term environmental safety and disease control highlights the costs of functioning in a world of bounded rationality. However, the above outline also demonstrates that large firms prioritizing globally provisioned supply and economies of scale value the capitalist set of interests above AWN and long-term environmental protection. Deliberative fora can correct for bounded rationality by pushing for legal regulation to balance the financial bottom line against ecological and ethical exigencies.

### **III. Bounded Rationality and Information Asymmetries**

Bounded rationality describes the costs which rational agents incur from cognitive limitations and from the processing of information. The complexity and ambiguity of decision-making also tend to result in suboptimal rational choices. (Korobkin and Ulen 2000) In this context, then, the consuming public's lack of awareness about CAFO conditions produces suboptimal results for the animals in question. This kind of informational asymmetry could even be labeled a market failure, insofar as it

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<sup>22</sup> See Marion Stamp Dawkins, Christl A. Donnelly and Tracy A. Jones, "Chicken Welfare is Influenced More by Housing Conditions than by Stocking Density," letter to *Nature* 427, no. 22 (2004): 342-44.

<sup>23</sup> See K. J. Donham, "The concentration of swine production. Effects on Swine health, productivity, human health, and the environment." *Food Animal Practice* 16, no. 3 (2000): 559-597.

<sup>24</sup> See Amy Chapin, "Airborne Bacteria in CAFOs: Transfer of Resistance from Animals to Humans." *Environmental Health Perspectives* 113, no. 2 (2005).

cripples informed individual choice.<sup>25</sup> I therefore establish the parameters of a deliberative forum on intensive livestock production.

Given greater informational symmetry, consumers would be more likely to display what Amartya Sen terms "sympathy" or "commitment."<sup>26</sup> Studies using the contingent valuation method, which judges willingness to pay (WTP) for other-considering goods like animal welfare and non-use motivated environmental protection, show that people's WTP varies according to the amount of information they are given. (Sen 1996, 42) This kind of study supplements IR theory's dichotomy separating the altruistic citizen from the egoistic consumer with an other-concerned consumer that acts as a norm entrepreneur in domains where the citizen's public interest function is underrepresented. The relative success of deliberative fora on intensive livestock in propagating the epistemic facts of CAFO conditions will determine the extent to which 'consumer Jekyll' acts on his or her information.

### **III. A. A Habermasian Framework of Public Discourse**

To establish a parameter<sup>27</sup> of deliberative discourse, I take a page from Loren King's "Deliberation, Legitimacy, and Multilateral Democracy," which itself derives from seminal works by John Rawls, Jürgen Habermas, and Hans-Georg Gadamer.<sup>28</sup> King points to epistemic, transformative, and justificatory uses of deliberation. He argues that the complexity of certain problems limits deliberation's ability to add depth and breadth to issues, while the legitimating or "reason-giving" argument is helpful whenever out-group externalities are imposed on in-group decisions.

In essence, the function of King's deliberative associations and James Fishkin's "deliberative

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<sup>25</sup> Richard Stewart makes this argument when he asserts that "natural monopolies, environmental spillovers, and highly imperfect information represent market failures precisely because they disable individual or associational choice." (Stewart 1983, 1573)

<sup>26</sup> "If the knowledge of torture of others makes you sick, it is a case of sympathy; if it does not make you feel personally worse of, but you think it is wrong..., it is a case of commitment...it is action based on commitment rather than sympathy which would be non-egoistic in [the sense being discussed]." (Sen 1977, 327)

<sup>27</sup> For a broader introduction to the key academic players in the field of deliberative democracy, see also Marco Verweij and Timothy E. Josling, "Special Issue: Deliberately Democratizing Multilateral Organization," *Governance: An International Journal of Policy, Administration, and Institutions* 16, no. 1 (2003): 1-21.

<sup>28</sup> Indeed, King's Habermasian deliberative assemblies attempt to create circumstances amenable to the veil of ignorance, upon which Rawls' *Theory of Justice* is predicated and Gadamer's hermeneutics builds.

polls” is to more closely correspond policy action with public sentiment.<sup>29</sup> More than just linking policy to public opinion, however, deliberative fora can actually transform the public debate, especially in cases where one set of interests has a strong incentive to obfuscate the nature of their practices.

The intensive livestock industry, and industrial agriculture in general,<sup>30</sup> is badly in need of a deliberative forum. In many cases, the basic problem has less to do with ethical inconsistency than with information asymmetry. As Gaverick Matheny points out,

What separates pets from the animals we abuse in factory farms and in labs is physical proximity. Our disregard for “food” or “lab” animals persists because we don’t see them. Few people are aware of the ways in which they are mistreated and even fewer actually see the abuse. When people become aware, they are typically appalled—not because they have adopted a new ethical theory, but because they believe animals feel pain and they believe morally decent people should want to prevent pain wherever possible. (Matheny 2006, 24)

The consuming public, then, is in a state of deeply bounded rationality; the simulacra of farm idylls to which Western urban infants are exposed combine with livestock producers’ incentives to withhold information symmetry to explain the logically pathetic ethical double standard which many people apply to pets and farm animals.

A public debate on AWN would begin the process of correcting this asymmetry, with the desired goal of mitigating bounded rationality to the fullest extent possible. Such a forum would be composed of epistemic, transformative, and justificatory elements. Epistemically, an intensive livestock forum would broaden the scope and breadth of public awareness concerning the animal welfare, public health, and environmental effects of CAFO facilities. Transformatively, the forum would search for solutions that account for all the interests concerned, including the human responsibility towards animals’ immediate interests and long-term human health and environment interests. Justificatorily, the forum would force livestock producers to account for practices that currently are subject in many jurisdictions only to nominal oversight. Furthermore, both the epistemic and the justificatory feed into the

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<sup>29</sup> As King notes, “such [deliberative] negotiations are fundamentally about conflicting preferences.” (King 2003, 36) Although deliberative debate could lead to a paralyzing incommensurability of competing interests, it could also add epistemic depth and transformative breadth to the issue being discussed.

<sup>30</sup> To the extent that intensive livestock moves in lock step with the intensive agriculture that provides the necessary feed, it is directly responsible for many of the problems caused by the application of N-fertilizers and pesticides to corn and soy crops.

transformative: greater public awareness would make consumers think twice before accepting the supermarket smörgasbord at face value, and having to justify an abhorrent practice is the first step in acknowledging its inutility.

### **III. B. Citizen Jekyll and Consumer Hyde?**

In addition to deliberative fora, the idea of ‘consumer Jekyll’—an other-concerned rather than egoistic consumer—can help to correct for the overly Manichaeian citizen vs. consumer split. Although standard economic theory rejects a sharp consumer/citizen distinction, mounting evidence indicates that the two roles perform different functions: the citizen contributes to public goods and factors other-concerning values into their behavior, while the consumer maximizes egoistic self-interest. As a result, "the consumer is seen as passive and unpolitical...[governments] use cost-benefit analysis and other expert techniques to tackle food safety problems, but these techniques fall short of the characteristics of consumer concerns." (Korthals 2001, 202-3) The consumer versus citizen dichotomy is thus applicable only when individuals’ altruistic preferences can be addressed by public political channels. Cases like AWN spawn a new kind of consumer who acts as a norm entrepreneur to eventually bring their chosen value to the public policy setting.

Unlike passive consumers, active consumers take claim with the limiting of public participation to "political" concerns, which often exclude four kinds of decisions: private, corporate, administrative, and technoscientific. (Busch 2003, 472) Contrarily, active consumer concerns include: organic certification, fair trade status, sustainable harvest denominations, cage-free and free-range poultry and pork products, and an ever-growing diversity of other such concerns. As global economic integration continues apace, the normative concerns of active consumers will increasingly run up against the demands of international comparative advantage and national market strength.

I contend that consumer Jekyll emerges most frequently where a polity’s public policy has failed to address the interests in question. In the case of CAFO regulation, American animal law,

dominated by livestock producers' interests, has moved to exempt food animals from its otherwise stringent anticruelty statutes. Thus, the American Animal Welfare Act does not apply to animals raised for food; more than any other livestock animal, poultry is exempted from US animal law, in part due to the lobbying power of the twenty companies producing eighty percent of U.S. poultry. (Wolfson 1996, 140) The American consumer Jekyll therefore acts in part as ethical consumer and in part as norm entrepreneur to get CAFO issues on the political agenda.

Although it is true that active consumers realize otherwise neglected norms because their values differ from collectively held preferences, I contend that the collectively held preferences would themselves be subject to change if the conditions of bounded rationality were mitigated. Under the current corporatist conditions flourishing in the U.S. livestock sector, the majority of citizens are actively dissuaded from considering the welfare conditions of CAFO animals. In such a situation, consumer Jekyll uses the market to speak when governmental channels are not listening. If he or she speaks loudly enough through their actions as consumers, the government should begin to hear.

#### **IV. Addressing Incommensurability and Indeterminacy in Valuation**

A primary problem in addressing any international "trade and..." issue is sprawling interdisciplinarity<sup>31</sup> and the ensuing difficulty of cross-disciplinary valuation. As the domain of the ethical progressively expands (see *infra*), the often interstitial and sometimes conflicting overlap with the international free trade regime inevitably increases.<sup>32</sup> As a result, any true consideration of farm animal welfare must of necessity take the exigencies of international trade and comparative advantage into account.<sup>33</sup> To do otherwise would ignore the powerful influence that factors exogenous to welfare

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<sup>31</sup> Jan Staman and Frans Brom note that consumer concerns for international agrifood trade "are studied by experts in several disciplines: technical experts, hygiene experts and veterinarians, public administration experts, lawyers, philosophers, ethicists, sociologists, and, of course, economists." (Staman and Brom 2000, 211)

<sup>32</sup> In other words, "if economics is permeated with ethical values, then there is every reason to expect that economists must deal with ethical arguments." (Weston 1998, 42)

<sup>33</sup> Andrew Linklater puts it well when he states that "all appeals to discourse and dialogue are incomplete without the critique of the economic and political structure and cultural practices which obstruct the development of a universal

consideration have on the welfare standards established. Furthermore, since many of the recent laws outlawing certain farm animal practices in Europe are just coming into effect or have yet to come into effect (section V, *infra*), the issue of “trade and animal welfare” will become considerably more pronounced as European livestock producers face both fierce competition from foreign imports with lower welfare standards and the threat of claims at the WTO Dispute Settlement Body.

Ignoring or denying the incommensurability of values thus benefits only the dominant discipline’s values (in this case, economic theory and the compromise of embedded liberalism). The alternate extreme of focusing monomaniacally on the difficulty of intersubjective valuation, however, stymies any action at all and leads only to a paralyzing stasis. A middle course, acknowledging a plurality of values but nonetheless comparing them as fairly as possible with a single metric wherever overlap occurs within a single jurisdictional regime, is the optimal strategy for the consideration of AWN.

As distinct from incommensurability, indeterminacy—or “the lack of clear, distinct, and rationally persuasive knowledge” (Gregg 2003, 1)—applies to AWN to the extent that the moral status of animals is unclear. Strong objectivism is not required to determine whether or not AWN hold in a given situation;<sup>34</sup> rather, deliberative democratic fora could determine their relative normativity.

#### **IV. A. Tempered Incommensurability in the Consideration of Animal Welfare**

For Cass R. Sunstein, “*incommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized.*” (Sunstein 1994, 796, italics in the original) He argues that RCT’s conflation of diverse kinds of value to a single metric goes against the very nature of valuation.<sup>35</sup> Indeed, the

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communication community.” (Linklater 1998, 79)

<sup>34</sup> “Something can be “objective” if it can sustain tests of “reflective scrutiny.... Yet a weakly objective standpoint is still distinct from the strong objectivism of putatively universally valid or transhistorical standards. Weak objectivism refers to less-than-absolute objectivity.” (Gregg 2003, 2)

<sup>35</sup> Therefore, “valuations, like preferences and beliefs, are not a presocial given, but a product of a complex set of social

necessary interdisciplinarity of analyses of incommensurability increases the tendency for the dominant discipline to apply its own values unilaterally.<sup>36</sup>

However, in this case the best is the enemy of the good.<sup>37</sup> Although it is true that "incommensurability makes the comparative computation as well as the ordinal ranking of payoffs impossible," (Hadari 1988, 660) an *approximate* computation and ordinalization can and must be adopted, for two distinct reasons. First, the overpowering dominance of positivist economic modes of thought on the international stage reveals the futility of having distinct metrics with comparable political sway. Second, in most cases, animal welfare cannot be analytically divorced from doctrines of economic theory without resulting in a winner and a loser; without AWN, welfare loses by default.

It is not, as Sunstein contends, that the rational choice theoretic conflation of qualitatively diverse interests misrepresents and misvalues certain kinds of interests. Rather, it is the exclusion of certain interests *altogether* from the domain of consideration that most harms the cause of AWN in particular. A realistic assessment acknowledges that compromises must be made if any incremental large-scale progress is to be achieved.

#### IV. B. The Value Trade-Off Model

I believe a value trade-off model presents a more useful framework than either pure incommensurability or indeterminacy, both of which can bog down policymakers in a miasma of confused inaction.<sup>38</sup> In my view, the adoption of such a model is the logical consequence of taking

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forces, including law." (Sunstein 1994, 822)

<sup>36</sup> Thus does Saguiv Hadari reference Ronald Beiner's *Political Judgment*, which asserts that normative conflicts "cannot develop without a modicum of conceptual contact between the competing claims." (Hadari 1988, 671)

<sup>37</sup> Or, in Saguiv Hadari's paraphrase of Walzer's *Spheres of Justice*, "the search for unity, although a hallowed tradition since Plato, must be recognized as a misguided philosophic reflex." (Hadari 1988, 666) Interestingly, Walzer's proposal for dealing with incommensurability "is to create a separate "sphere of justice" for every good to be distributed." In response, Hadari correctly points out that "surely spheres are not single-principled." (Hadari, 1988, 667) To the extent that AWN are deeply intertwined with economic theory and the liberalized international trading system, Walzer's solution would similarly fail to promote animal welfare.

<sup>38</sup> In Sunstein's words, "those who believe that goods are valued in different ways need not reject the possibility of rational choice or even some form of trade-off among them. On the contrary, believers in diverse kinds of valuation would do well to insist that choices occur and that they might well be judged rational or not." (Sunstein 1994, 793)

indeterminacy and incommensurability seriously.<sup>39</sup> Saguiv Hadari is right to indicate that the extremes of pure utilitarianism (easy reducibility of all normative problems to a single metric) and Weberian decisionism (the ultimate irreducibility of normative antinomies) are both insufficient, but he is wrong to imply that they are *equally* insufficient.<sup>40</sup> Given the alternative of considering only the interests and ‘utils’ of rational human agents, a purely utilitarian approach that acknowledges a greater plurality of interests may be the closest our lower-case good can come to the Good.

## V. The Arguments for Animal Welfare Norms (AWN)

In Aldo Leopold’s essay “The Land Ethic,” he cites Odysseus’ hanging of a dozen slave girls whom he found had been disloyal to him. The act was ‘not wrong’, however, because they were his property, and could be disposed of as such.<sup>41</sup> This simple example demonstrates the extent to which the domain of the ethical has grown over the last two and a half millennia.

Although Leopold goes on to posit that the land deserves ethical consideration *in se*,<sup>42</sup> my claim is more modest and less revolutionary: whereas Leopold seeks to expand the domain of the ethical to a variety of non-sentient life, bringing the interests of sentient non-human animals into the sphere of ethical consideration is a more logical next step in the forward march of moral progress. In the words of historian W. E. H. Lecky, “at one time the benevolent affections embrace merely the family, soon the circle expanding includes first a class, then a nation, then a coalition of nations, then all humanity, and finally, its influence is felt in the dealings of man with the animal world.” (Lecky 1869)

Richard Rorty makes a more limited argument: that moral progress is “an increase in our ability

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<sup>39</sup> Hadari writes that value trade-off “stems from the combined difficulties of “normative pluralism” (i.e., the ever-present possibility of conflicts among values within one moral system) and incommensurability (i.e., the lack of a common unit to measure relative gains and losses in the implementation of different values).” (Hadari, 655)

<sup>40</sup> For Hadari, “rationalistic reductionism and irrationalist defeatism continually reinforce one another. Yet, in truth, for both approaches the same narrow model of rationality creates a blind spot on the crucial issue of value trade-offs: while the first fails to perceive their existence, the latter cannot envision their nonarbitrary resolution.” (Hadari, 663)

<sup>41</sup> As Leopold writes, “the ethical structure of the day covered wives, but had not yet been extended to human chattels. During the three thousand years which have since elapsed, ethical criteria have been extended to many fields of conduct, with corresponding shrinkages in those judged by expediency only.” (Leopold 1949, 202)

<sup>42</sup> In his words, “the land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land.” (Leopold 1949, 2004)

to see more and more differences among people as morally irrelevant.”<sup>43</sup> (Rorty 1998, 11) However, Rorty’s axiom, that personhood is a necessary predicate of ethical consideration, is at odds with a basic premise of utilitarianism: that the purpose of ethics is to maximize pleasure and to minimize pain. Recent technical advanced in behavioral psychology, neurobiology, and a variety of other applicable domains force ethicists to question the popularly held speciesist bias of which Rorty and Demsetz’s statements are indicators; if a wide variety of non-human animals can be said to feel pain and fulfillment comparable to that felt by humans, why should the absence of human levels of rationality exempt animals from the equal consideration of interests? If rationality is our measuring stick, why not preference rational animals over human infants, or—to the extent that males are aggregately more systems-oriented, and thus more rational, than females—human males over human females? (Matheny 2006, 18)<sup>44</sup>

In this section, I contend that animal welfare is defensible on various normative grounds, many of which are closely related to RCT’s central working premise of utilitarian preference maximization. Although such a broadening of normative scope may indeed seem worrisome to many choice theorists, I seek here to demonstrate that AWN and RCT are closer in doctrinal and epistemological underpinnings than they may seem at first glance. Next, after presenting Peter Singer’s utilitarian case for AWN, I favorably contrast the development of AWN to the growth of human rights norms in the 20<sup>th</sup> century. Finally, I contend that such norm entrepreneurs as consumer Jekyll provide a primary driving force in AWN’s rapidly growing acceptance.

## **V. A. Rational Choice and Utilitarianism and Kindred Disciplines**

Modern utilitarianism and RCT are like long-lost siblings with a common ancestry. Like

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<sup>43</sup> As the section on rationality (*supra*) implies, it is at least plausible that a number of non-human animals deserve consideration of ‘personhood’.

<sup>44</sup> Matheny provocatively speculates that “if species membership is a justification for excluding sentient animals from moral consideration, then why not race or gender?” (Matheny 2006, 19)

economics, utilitarianism is universalist, welfarist,<sup>45</sup> consequentialist, and aggregative. (Matheny 2006, 14) However, although both utilitarian ethics and economic theory are products of the Enlightenment,<sup>46</sup> in the early 20<sup>th</sup> century the increasing dominance of thick rationality of end<sup>47</sup> paired with the positivist adherence to economic dogma that was then in vogue combined to divorce RCT from the equal consideration of interests required by utilitarian ethics. This was a great boon to economists, because such restrictive models have great predictive power, but it came at the high price of distorting and narrowing the scope of interests.

Lionel Robbins' 1932 "Essay on the Nature and Significance of Economic Science" attempted to logically divorce economics from ethics, contending that economists deal with 'ascertainable facts' and ethicists with 'valuations and obligations.' For Robbins, economics is "a science of choice in which ends (exogenously given) and scarce, substitutable means were rigidly separated." (Groenewegen 1996, 1) Subsequent economic and rational choice theory has often viewed narrow self-interest as the overriding 'exogenously given' end,<sup>48</sup> resulting in what many outside of the economic discipline view as a "jaundiced view of human nature." (Rowthorn 1996, 20)

As jaundiced as the economic *weltanschauung* may be when contrasted with utilitarian ethics, however, utilitarianism and RCT are methodologically quite similar; Amartya Sen has even set as his meaning of 'utility' something resembling "*that which utilitarians believe to constitute good.*" (Broome

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<sup>45</sup> Whereas positive economics is universalist, consequentialist, and aggregative, only normative economics is also welfarist.

<sup>46</sup> Before writing *The Wealth of Nations*, Adam Smith dedicated much of *The Theory of Moral Sentiments* to social ethics. "According to Smith, hope for improving human virtue and thus for improving society lies in social evolution and socialization. Social evolution brings the improvement of the human condition through stages: from the rude stage of hunting and gathering, through the progressively more productive and refined stages of pasturage and agriculture, to the most advanced stage, a commercial society. Since each stage requires a progressively more refined system of human values, the movement of a society from stage to stage is simultaneous with the development of that society's value system. For human progress to occur, each generation must refine the values it inherited from the last, and then must pass those enhanced values on to the next generation through the socialization of its children." (Evensky 1998, 10) This analysis fits with the view of moral progress as a continual reexamination of the valid objects of moral consideration.

<sup>47</sup> See George Grantham: "The triumph of strong rationality dates to the 1930s. The seminal works were *Value and Capital* (1939) by John Hicks...*Foundations of Economic Analysis* (1947) by Paul Samuelson...and *The Theory of Games and Economic Behaviour* (1944) by John von Neumann and Oskar Morgenstern." (Grantham 2004, 42)

<sup>48</sup> See George Grantham, who writes that "the four decades following the publication of Samuelson's *Foundations* (1947) were the imperial age of strong rationality. Constrained optimization found applications across the whole range of conventional economic analysis...This confluence of analytical and computational technique produced a standardized research methodology in which an optimizing outcome was identified analytically and then tested for statistically using observable proxies for the theoretical variables analyzed in the analytical exercise." (Grantham 2004, 57)

1999, 26, italics in the original) Axiomatic utility theory, like utilitarianism, denies incommensurability by establishing utility functions that represent preferences (as long as the preferences conform to certain axioms). (Broome 1999, 21) John Harsanyi's support for the average principle of utility as the necessary keystone of "any social welfare function that is both rationally and morally acceptable" (Nunan 1981, 586) would be similarly amenable to the vision of Bentham's *Utilitarianism*.

## **V. B. Peter Singer's Strict Utilitarianism: Revisiting Interests**

Since RCT focuses on the maximization of aggregate interest, it is helpful to examine why certain agents are accorded interest status and others not. Singer writes that

The capacity for suffering and enjoyment is a *prerequisite for having interests at all*, a condition that must be satisfied before we can speak of interests in a meaningful way...The capacity for suffering and enjoyment is, however, not only necessary, but also sufficient for us to say that a being has interests—at an absolute minimum, an interest in not suffering. (Singer 1990, 7-8)

In Singer's view, interests are then weighted according to the agent's level of sentience; (Singer 1993) thus a pig deserves more ethical consideration than a chicken, and a human deserves more than either pig or chicken.

The rational choice perspective, on the other hand, is one of normative individualism, with the individuals in question being uniformly human. However, rationalist normative individualism could be maintained in a manner friendly to AWN by establishing a hierarchy of interest consideration; RCT could thus keep its necessary centrality of rational human agents' preferences by placing human interests at the top of the value-weighting pyramid of interest consideration.

Although I don't see that there is any logical or rational reason to restrict the domain of interest considerations to humans (beyond the questions of revealing and mediating animal preferences), a purely human-oriented model of interest consideration would suffice to protect AWN as long as altruistic and custodial preferences are included in the RCT model of 'thin' egoism. Calculating the hierarchy of interest consideration among and between levels of sentient beings is, like any such intersubjective analysis, an admittedly difficult task. No doubt, many specific techniques could help to

point policymakers and industry health experts in a productive direction, but the categorization of these methods is beyond the realistic scope of this paper.

### **V. C. Analogizing the Sociological Construction of Human Rights Norms**

As a preliminary aside pursuant to animal welfare and human welfare, it deserves noting that AWN can only be reasonably addressed in the absence of widespread or severe human welfare deficiencies. In the most basic sense, altruistic preferences are secondary to the fulfillment of primary egoistic preferences like food, shelter, companionship, and freedom from violence. Nothing in this paper should be taken to undermine or reject this most foundational of points.

That being said, it is not necessary to assert that animals have inherent rights *in se* to establish the necessary custodial obligations in rational and fully aware human agents. Concrete rights in the ‘human rights’ sense are political rights granted to autonomous agents. Many sentient but non-person animals do not qualify for autonomy, such that the rightness or wrongness of raising and killing them rests on utilitarian—rather than deontological—considerations. Thus, to say that animals do not have political rights in a contractarian sense does not mean that they do not have interests; while the former requires personhood and the capacity for formalizable mutuality, the latter requires only the ability to feel pleasure and pain at a reasonably complex mental level.

Contrasting AWN to human rights norms, the strengthening of human rights norms from 1945 to the present reveals how quickly international law can adopt a new peremptory norm; fifty years from now, AWN may have progressed similarly far.<sup>49</sup> For example, the Universal Declaration of Human Rights was markedly *not* a codification of customary international law circa 1948; rather, it marked the progressive legal development of emerging norms that have since become generally accepted rules of

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<sup>49</sup> For a quick look at how quickly AWN have progressed over the last half-century, see Peter Singer’s introduction to *In Defense of Animals: the Second Wave*. “In 1970 the number of writings on the ethical status of animals was tiny. Sixteen years later, when the first edition of this book appeared, it was small. In a comprehensive bibliography of writing on this subject, Charles Magel (1989) lists only 94 works in the first 170 years of the Christian era, and 240 works from 1970 to 1988, when the bibliography was completed. The tally must now be in the thousands.” (Singer 2006, 2)

customary international law.

On the other hand, non-Western criticism of the universality of human rights claims combines with the status of human rights claims as wholly constructed<sup>50</sup> to support the view that norms—like rights—are contingent, and that an AWN has no less ontological validity than a human rights norm (the hierarchical importance, however, may be justifiably lower).

In a practical sense, rights and duties change over time. As Karl Klare notes, “rights discourse can be transformed to accommodate the...criticisms” of emergent social norms. To provide specific cases in point, he outlines the realignment of rights and duties in the domains of “cigarette smoking; corporate misconduct; air and water pollution; sexual harassment; and racist and sexist speech.” (Klare 1991, 97) In each example, people who had previously been free to do as they please are becoming subject to social norms and legal prohibitions. The idea that rights were only subject to change upon emergence from the age of patriarchy and slavery is clearly untrue; new norms emerge regularly, and are enforceable contingent upon social support and legal institutionalization.

## **V. B. 2. IR Theory’s ‘Norm Entrepreneurs’ in Context**

International Relations theory posits that emerging moral norms have the following life cycle: norm emergence, tipping point, norm cascade, and internalization. (Finnemore and Sikkink 1998) AWN have emerged over the last thirty years with whirlwind speed relative to similar norms of racial or gender equality. I argue that conscientious consumers defending AWN are norm entrepreneurs engaged in “strategic social construction,”<sup>51</sup> and that recent events show how a tipping point may be nearing that will push AWN from social norm to moral norm status.

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<sup>50</sup> As Valerio Pocar writes, “sociologically speaking, a right represents an interest which happens to be supported by sufficient strength on the part of some individual or group to enable it first to be asserted as a legal rule, and thereafter maintained as an effective rule governing the relationship between members of a community.” (Pocar 1992, 215)

<sup>51</sup> Finnemore and Sikkink define ‘strategic social construction’ as norm entrepreneurs’ “making detailed means-end calculations to maximize their utilities, but the utilities they want to maximize involve changing the other players’ utility function in ways that reflect the normative commitments of the norm entrepreneurs.” Interestingly, they go on to note that “the first half of this process fits nicely in a rational game-theoretic framework. The second half does not.” (Finnemore and Sikkink 1998)

In one case, an Austrian court is hearing arguments from a group of primatologists who argue that Hiasl, a 26-year-old chimpanzee, deserves to be accorded human rights. They cite the chimp's sharing 96.98 percent of its DNA with *homo sapiens* and mirror-recognition as key factors.<sup>52</sup> A positive ruling would force many questions about the arbitrariness of restricting normativity to human agents. Earlier this year, Wolfgang Puck<sup>53</sup> and Burger King have pledged to source only from cage-free poultry and pigs, joining Chipotle (owned by McDonalds) in branching AWN out from more niche upper-end markets like Whole Foods.

Consumer Jekyll therefore *is* prompting markets to change. Following Joel P. Trachtman's work on the allocation of vertical and horizontal prescriptive jurisdiction, (Trachtman 2001-2002) the market action responding to consumer Jekyll's demands raises the possibility that industry players will create a market for humanely raised meat if the demand is strong enough.

## **VI. International Legal and Economic Ramifications of Animal Welfare Norms**

Michael Pollan recently defined industrial food as food the provenance of which is so complex that expert advice is required to ascertain it. (Pollan 2006) This sentiment captures many of the difficulties of tackling normative concerns on the unstable international stage of embedded liberalism. Pollan's observation also addresses a key difficulty in locating agency and causality across overlapping academic disciplines.<sup>54</sup> Industrial food also makes it difficult for consumer Jekyll to fulfill his or her function as norm entrepreneur, given the complexity of food system networks and the staggering difficulty of determining causal links.

This section begins by considering the WTO trading system's particular implications for AWN consideration against the general backdrop of embedded liberalism. I then contrast European to U.S.

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<sup>52</sup> Kate Connolly, "Court to Rule if Chimp has Human Rights," *The Guardian*, April 1, 2007.

<sup>53</sup> "Mr. Puck's Good Idea," *The New York Times*, March 26, 2007, editorial.

<sup>54</sup> The internationalization of AWN is therefore inseparable from a bigger and more endemic issue: the voiding of domestic social preferences on the international stage. This inseparability also stems from the overlap of animal welfare concerns with global environmental concerns and public health hazards.

animal law and regulatory practice in order to contextualize the Organization for Animal Health's (OIE) attempt to formulate universal animal welfare standards.

Throughout this section, I maintain as a given that AWN and profitability are often at cross purposes. This is not to say that welfare and the bottom line can never go together harmoniously. Rather, there are many observable situations in which the two are simply not maximizing the same set of preferences and thus lead to different resource allocations. For a case in point, chickens are debeaked in order to prevent adverse pecking conditions in high stocking densities. The argument that this is a benevolent action intended to increase the chickens' net welfare stretches the limits of credulity: as poultry ethologist Dr. Ian Duncan states, "chopping off parts of young animals in order to prevent future welfare problems is a very crude solution." (Mason and Finelli 2006, 113)

#### **VI. A. AWN and the WTO Trading System**

Recent appellate body rulings have possibly legitimized the defense of non-economic public concerns like AWN<sup>55</sup> in a World Trade Organization system that otherwise seems generally skeptical of measures defending AWN. (see *infra*) The Appellate Body (AB) ruling in the *Tuna-Dolphin* (I and II), *Shrimp-Turtle*, and *Asbestos* cases all reach promising rulings from the perspective of determining product 'likeness' and the role of consumer preferences.

Available measures defending AWN range from the codification of AWN by international organizations and the negotiation of multilateral agreements to unilateral trade restrictions intended to defend high internal welfare standards.<sup>56</sup> In theory, the WTO dispute settlement system is a last resort

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<sup>55</sup> The *Turtle-Shrimp* Appellate Body concluded that environmental unilateral trade restrictions were GATT compliant as long as avoided the chapeau's restriction on "arbitrary or discriminatory" methods. *Turtle-Shrimp* also implies a definition of "like" products that acknowledges process-product methodologies (PPMs). Furthermore, *Asbestos* accepts "consumer preference" as one of four factors defining likeness.

<sup>56</sup> Elsewhere, I argued that the E.U. could implement the following defense at a panel hearing on welfare-motivated import restrictions: an E.U. defense should make the following points, in the following order:

- **A.** Adaptivism: the progression from *Tuna-Dolphin* to *Turtle-Shrimp* reveals an evolutionary reading of the GATT 1947, opening the door for environmental and welfare-concerned non-tariff barriers to trade.
- **B.** GATT Preamble: excessively intensive livestock production is not environmentally sustainable.

to be relied upon only following the demonstrable failure of Multilateral Agreements and the collapse of domestic eco-labelling schemes. In practice, however, the omnipresent need to conform to trade duties has kept AWN-related issues away from the center of the policy agenda to date.

#### **VI. A. 1. The Trade Stakeholders Model**

In the WTO trade regime, the choice of model dictates the outcome for the consideration of animal interest: although Regime-oriented legalism<sup>57</sup> is vastly preferable to the Efficient Market Model of legalism, what Richard Shell terms the Trade Stakeholders Model<sup>58</sup> would go further than either in addressing both the other-concerning preferences of individuals and the more general instability of embedded liberalism. The shortcomings of the Efficient Market Model for AWN concerns are the same as those about the scope of rationality transposed internationally. Alternatively, the Regime-oriented model—like IR theory generally—would support AWN to the extent that state parties do so.

The Trade Stakeholders Model is preferable to both because it approximates the Habermasian dialogue in which the plurality of interests that include AWN can be acknowledged and bargained against each other. Again, as long as animal interests are represented indirectly by custodial human preferences, animal interests do not themselves need to be directly included.

#### **VI. A. 2. Consumer Jekyll on the International Stage**

To date, there seems to be little room for consumer Jekyll internationally. Rather, NGO activism

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- **C.** GATT article III: livestock produced at higher rather than lower stocking densities are not ‘like’ products, either according to consumer preference for process distinctions or to content-related public health risks.
  - **D.** GATT article XX(b): the link between high stocking densities, animal stress, and zoonotic disease transference demonstrates that animal welfare standards are “necessary to protect human or animal life and health.”
  - **E.** GATT article XX(a): E.U. animal welfare law, public opinion, and secular ethics hint that animal welfare concerns may be “necessary to protect public morality.”

<sup>57</sup> Counting trade scholar John Jackson and many IR theorists as its supporters, regime legalism “assert[s] that international legal rules can induce states to negotiate “in the shadow of the law” rather than purely on the basis of power relationships even though international law lacks a centralized police power.” (Shell 1995, 835)

<sup>58</sup> “The Trade Stakeholders Model...emphasizes broader participation in trade adjudication, democratic processes for resolving trade conflict, and open dialogue regarding the goals of economic trade.” (Shell, 1995, 836)

provides the corresponding norm entrepreneurial behavior supporting AWN.<sup>59</sup> This is not to say that active consumers do not exist on the international field, but to accept that the increasing complexity of international agricultural trade makes it exceedingly difficult for all but the most dedicated and informed of consumers to make truly informed purchasing decisions.

That being said, the role of consumer preference in WTO Panel and Appellate Body jurisdiction presents an avenue for contesting the “like products” clause of article III: 4 of the GATT 1994. Although the international relevance of national consumer preference by active consumers is still pending a Panel/Appellate Body ruling on the permissibility of requiring inhumanely produced meat to be labeled as such,<sup>60</sup> consumer preferences have an important role to play in determining the ‘likeness’ of products. In *Asbestos*, the Appellate Body asserts that “the necessity or appropriateness of adopting a “fundamentally” economic interpretation of the “likeness” of products under article III: 4 of the GATT 1994 does not appear...to be free from substantial doubt.”<sup>61</sup> Intensive livestock farming, which deals in the upbringing of sentient beings capable of pleasure and pain, arguably does not deserve “a “fundamentally” economic interpretation.”

The Appellate Body significantly nuanced the Panel’s ruling in *Asbestos* by allowing “consumer preference” as a partial determinant of “likeness.” Originally, the WTO panel asserted, in *Asbestos*, that

“It is not necessary for domestic products to possess all the properties of the imported product in order to be a like product. It suffices that, for a given utilization, the properties are the same to the extent that one product can replace the other. (*Asbestos*, ¶ 8)

The Appellate Body disagreed: “A panel *cannot* conclude that products are ‘like products’ if it *does not examine* evidence relating to consumers’ tastes and habits.” (*Asbestos*, ¶ 192) The Appellate Body emphasized the importance of looking at each case on its own particular merits.

Consumers’ tastes and habits are included in Appellate Body’s four-part definition of like

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<sup>59</sup> NGOs themselves act as conduits funneling critical information up to policymakers and down to the general public. As Geradin and McCahery write, NGOs “often help foster the internalization of regulatory norms. For example, it is unlikely that the certification of diamond[s] as ‘war-free’ or tropical hardwoods as ‘sustainable’ would have occurred but for the NGOs trying to create a new social norm.” (Geradin and McCahery, 25)

<sup>60</sup> For which see *The Wall Street Journal*, January 24 2006, “EU Executive Arm Endorses Labels On ‘Humane’ Food.”

<sup>61</sup> WTO Appellate Body Report on *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, Mar. 12, 2001, WT/DS135/AB/R ¶ 35.

products in *Asbestos*. The four general criteria are:

(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits—more comprehensively termed consumers' perceptions and behavior—in respect of the products, and (iv) the tariff classification of the product. (*Asbestos*, ¶ 9)

The Appellate Body specifically noted that their definition lacks *stare decisis* power, but it nonetheless corresponds in the acknowledgement of consumer taste with *Border Tax Adjustments* and *Japan-Alcoholic Beverages*.

Furthermore, the Appellate Body overruled the Panel's distrust for consumer tastes as lacking in clarity:

The Panel declined to examine or make any findings relating to the third criterion, consumers' tastes and habits, "[b]ecause this criterion would not provide clear results." There will be few situations where the evidence on the "likeness" of products will lend itself to "clear results". In many cases, the evidence will give conflicting indications, possibly within each of the four criteria . . . A panel cannot decline to inquire into relevant evidence simply because it suspects that the evidence may not be "clear" (*Asbestos*, ¶ 23)

The Appellate Body affirms in *Asbestos* that "ultimate consumers may have a view about the 'likeness' of two products that is very different from that of the inventors or producers of those products." (*Asbestos*, ¶ 93)

Such rulings, then, provide an avenue through which consumer Jekyll, acting nationally, may impact the development of international jurisprudence through the WTO Dispute Settlement Body.

## **VI. B. International Farm Animal Welfare**

In addition to Fraser's welfare types I-IV, International farm animal welfare encompasses animal slaughter practices and animal transport. Existing welfare standards are currently higher in the E.U. zone than in the U.S. (although as federal systems both cases have exceptions), and work is underway to codify international animal welfare standards in the WTO-supported Organization for Animal Health. This section first outlines the disparity between E.U. and U.S. farm animal law, then connects the relative welfare floors to the proposed standards of the Organization for Animal Health (OIE), a body sanctioned by the Sanitary and Phytosanitary (SPS) Measures agreement (and, by

extension, the GATT).

## **VI. B. 1. Contrasting E.U. to U.S. Animal Law**

To date, animal interests have largely lost out to market efficiency in the international trade domain.<sup>62</sup> GATT article XI has forced the European Union to ignore its 1991 ban on leghold traps in European Community-marketed fur, for fear of disrupting trade relations with the U.S., Canada and Russia. (Stevenson 2002, 119) Also to avoid violating article XI, the E.U. watered down a 1993 directive prohibiting foreign and domestic marketing and testing of cosmetics tested on animals to a purely domestic ban on testing.

The growing disparity in intensive livestock welfare between Europe and the United States (and, increasingly, the developing world) itself increases the likelihood of an eventual trade dispute: the US is able to externalize its costs by lowering animals' well-being, but European producers are bound by E.U. and national laws to maintain stocking density ceilings and welfare minimums. Whereas animal welfare measures are steadily improving in the European Union, in the United States—where a majority of states prohibit the application of anticruelty statutes to livestock (Wolfson 1996, 123)—they are beholden to producers' interests.

While American animal law, dominated by livestock producers' interests, has moved to exempt food animals from its otherwise stringent anticruelty statutes, EU livestock laws have grown progressively more welfare-conscious. For a telling example: American statutory law allows twenty-eight hours of continuous animal transport by rail, and some states allow thirty-six or even forty-eight, but Britain allows fifteen and the European Community eight. (Wolfson 1996, 125-6)<sup>63</sup>

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<sup>62</sup> For which see Daniel Tarullo: market-corrective trade law “provides relief when a foreign industry or government has engaged in certain “unfair acts” to the detriment of a domestic industry...“unfair acts” are defined as deviations from “natural” rules for efficient, competitive markets.” (Tarullo 1987, 549) Under this definition, domestic social norms protecting animal welfare floors in livestock production qualify as unfair acts.

<sup>63</sup> See also: Per Von Holstein, “Protection of Animals by Means of International Law, with Special Reference to the Convention for the Protection of Animals during International Transport,” *The International and Comparative Law Quarterly* 18, no. 3 (1969): 771-775.

The British Brambell Committee, in contrast, has had considerable success popularizing the “Five Freedoms” of animal movement: ability to turn around, groom, stand, lie down, and stretch. (Wolfson 1996, 140) As a direct result, the UK Parliament banned the veal crate in 1987, enacted the Pig Husbandry Law of 1991, and is planning to phase out intensive battery cage and broiler poultry farming. Similar national regulations abound throughout Western Europe, particularly in the north. To give just two examples: the Swiss Animal Welfare Act of 1981 banned battery cages in 1991, and, as of May 27, 1988, Swedish law focuses on the centrality of both health and contentedness to good husbandry practices and grants animals the right to an environment supporting their natural behavior. (Wolfson 1996, 144)

At the E.U. level, three legal instruments are available: regulations (which become binding and controlling law within all member states), directives (which bind member states to shape domestic law accordingly), and decisions (which are non-binding and recommendatory in nature). Between 1968 and 1987, the Council of Europe enacted six Conventions on animal welfare issues, including transport (1968), farm animals (1976), slaughter (1979), wildlife (1979), experimentation (1986), and pets (1987). (Hughes and Meyer 2000, 29) A first wave of Directives on laying hens (1988) and pigs and calves (1991) required incremental improvements in space allowance and other welfare indicators and have been amended (1997-2001) to include: a ban on veal calf crates by 2006, a ban on standard battery cages by 2012 (larger cages will be permissible), and a ban on stalls for pregnant sows by 2013. (Fraser 2006, 94)

EU protocols have repeatedly made clear the E.U.’s commitment to animal welfare. The 1992 Treaty on European Union contains a binding Declaration on the Protection of Animals, and the EU adopted a binding Protocol at the June 1997 Amsterdam Inter-Governmental Conference (EU Treaty 1997) that recognizes animal sentience and obliges members to ‘pay full regard to the welfare requirements of animals’ agriculture, transport and research. (Brooman and Legge 2000, 83) More recently, on October 12, 2006, the European Parliament adopted an Action plan on the Protection and

Welfare of Animals 2006-2010, by 565 votes to 29.

The extraordinary public reaction in Europe to animal welfare concerns presents an interesting case study for American attempts at invigorating a deliberative dialogue about CAFO AWN. The chain of events seems to have been set off by the British reaction to the veal crate; popular protests in 1994 against exporting calves to crates on the continent. (Druce and Lymbery 2006, 126) The protests subsequently spread to continental European countries, and to other welfare issues. It is interesting to note that the original public opposition was sparked by an issue that addresses welfare in *another* national jurisdiction (notwithstanding the special circumstances of overlapping jurisdiction in the European polity), which points to the transboundary concerns that many AWN supporters have, and to the resulting likelihood of a conflict with WTO rules against extraterritoriality.

## **VI. B. 2. Establishing International Animal Welfare Standards**

Large disparities in European and American livestock practices indicate the pressing need for international animal welfare standards that do more than just mimic common industry practice. Currently, the Organization for Animal Health (OIE) is the WTO-endorsed body establishing such welfare standards. It values only science-based standards—Fraser’s welfare types I and II—but accepts the input of groups like the International Coalition for Farm Animal Welfare (ICFAW).

The OIE’s criteria for assessing animal welfare are divisible into design criteria and animal-based criteria; design criteria concern the animals’ living environment, and animal-based criteria directly assess the animals’ behavioral, physiological and immune registers. Although easiest to catalogue and enforce, design criteria suffer from inflexibility and from failing to account for certain practices of local systems. (Passillé 2005)

Although the OIE endorses only science-based standards, it acknowledges the importance of work by NGOs like ICFAW and the National Society for the Prevention of Cruelty to Animals. These include the ‘five freedoms’ endorsed by the Brambell Committee.

The OIE acknowledges that animal welfare standards can conflict with food safety and environmental protection,<sup>64</sup> (Passillé 2005) and they are well aware that “if animal welfare standards are based solely on design or engineering criteria, then there is increased risk that any conflict with food safety and environmental regulations will be resolved to the detriment of one of these issues, most probably animal welfare.” (Passillé 2005, 758) This realization reinforces the need to surmount incommensurability in valuation; barring a balanced examination of competing interests, animal welfare interests are the most likely to be discarded or left unconsidered.

The OIE’s insistence on treating only science-based welfare claims relates to the difficulty of mounting successful ethical claims in the international trading system. Of the science-based claims, the OIE cites: stress and immunosuppression, the link between poor welfare and higher rates of disease and bacterial shedding, the link between higher welfare and reduced antibiotic use/resistance. Such instrumentalist claims are clearly valuable, but only the extent to which the OIE truly considers input from NGOs will determine the extent to which OIE can address consumer Jekyll’s altruistic preferences (or, for that matter, the altruistic extraterritorial preferences, of citizen Jekyll).

## VII. Conclusion

As the global economic system becomes more and more integrated, many of the moral concerns of political societies may become increasingly difficult to protect without provoking accusations of unjustified non-tariff barriers to trade. A polity’s choice to defend AWN is a case in point. However, since many of the E.U. zone’s farm animal welfare standard laws are just coming into effect as of 2007, much of the potential trade fallout has yet to take place.

Just as the ramifications of AWN-motivated trade protectionist measures have yet to come to the

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<sup>64</sup> For instance, *Livestock’s Long Shadow* revealed that ruminant and ranging cattle contribute far more to global warming and desertification than had previously been thought; in this case, as in cases where land use prioritization is crucial to protect biodiversity or other valued resources, intensification of livestock operations would seem to be the most environmentally friendly course of action. Similarly, EU legislators are considering reducing the use of fully slatted flooring in pig houses on welfare grounds, but slatted floors can reduce *salmonella* infections and ammonia emissions. (Passillé 2005, 758)

fore—especially if the distance between European and U.S. legal standards continues to grow—the animal welfare movement is itself gaining ground at a momentous pace. Significantly, much of this momentum is building social capital outside of academia, a fortuitous sign for the potential utility of deliberative fora and discourse ethics. For a recent case in point, *The New York Times* “Dining In” section of Wednesday, April 25, 2007, titled “Eating Well While Eating ‘Green,’ was in large part devoted to reconciling animal welfare concerns with the market for such products as *foie gras*.<sup>65</sup>

In conclusion, this paper seeks to establish a template to integrate altruistic concerns into choice theoretic frameworks. Following Trachtman’s work on allocation of vertical and horizontal prescriptive jurisdiction, (Trachtman 2001-2002) I have sought to establish whether governmental or market forces would be an optimal allocation of authority. In the case of AWN, I have found that market forces fail to internalize the externality of animal interests, resulting in market failure from the AWN perspective. However, demand from consumer Jekyll has recently begun to push market supply for humanely raised meat. In the European jurisdictional domain, governmental authorities rather than market forces are correcting for this failure by prescribing E.U.-wide law establishing welfare floors to which all members must conform.

Animal welfare may not yet be ripe for a clear allocation of governmental versus market authority; norm maturation is still taking at a local and regional level. Greater livestock industry transparency and civil society dialogue would speed up the process.

Although a causation problem makes it hard to determine the source of European welfare norms definitively, civil society and NGO activism has clearly had more effect in the E.U. than in the U.S. In a perfectly constituted marketplace of ideas, this dichotomy would indicate that the European utility function preferences AWN over national market competitiveness and the American utility function preferences national market competitiveness over AWN. However, as I demonstrated with regard to public awareness of CAFO conditions, American public knowledge of intensive livestock practices is

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<sup>65</sup> *The New York Times*, Wed, April 25, 2007, “Eating Well While Eating Green.”

highly subject to bounded rationality. Bound by a debilitating information asymmetry, the utility function of U.S. citizens is thus potentially flawed.

Broadly, this paper uses the focusing lens of farm animal welfare to probe and examine a set of larger and deeper questions: is altruism truly compatible with RCT in an international market competitiveness context? Are the purportedly predictive models of positive economics actually prescriptive? How can bounded rationality be overcome when industry groups have large incentives to conceal information? What is the role of the individual consumer in shaping national and international public policy? What lessons can be learned in one jurisdiction from citizen and consumer activism to force legislation in another?

Finally, much the same analysis of perceived market failure could be applied, with variations, to Aldo Leopold's deep ecology (and to James Lovelock's Gaia hypothesis). Like AWN, deep ecology contains elements of long-term rational self-interest: prudential grounds exist both for mitigating global health and oceanic crises and for maintaining ecological stability. On the other hand, only a disingenuous valuation could deny that AWN and deep ecology are both foundationally altruistic (albeit a more holistic altruism in the case of deep ecology).

Normative conflict has been a central theme in Western intellectual history at least since Greek tragedy; caught between loyalty to family and loyalty to city-state, Antigone is forced to choose between competing goods. Tragedy, then, is tragic precisely because such choices are as unsavory to the honorable as they are to the base.<sup>66</sup> I contend that the plight of farm animals in intensive livestock production can be understood similarly: producers' interests in market competitiveness and citizens' interests in national economic strength must be balanced against the competing interests of farm animal welfare and environmental health. AWN demonstrate how the anthropocentric construction of

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<sup>66</sup> In modern discourse, the concept of rights conflict is central to the works of Isaiah Berlin, Michael Ignatieff, and Cass Sunstein. However, whereas Berlin argues for radical incommensurability, Ignatieff takes a more practical approach. While acknowledging that "if rights conflict and there is no unarguable order of moral priority in right claims, we cannot speak of rights as trumps," (Ignatieff 2001, 20) Ignatieff favors adopting a calculus of interest balancing. I share this approach.

externalities and interests reflects the longstanding centrality of humankind to our vision of the world. But after Galileo, after Darwin, and after Freud, we can at the very least acknowledge one glaring reality: that “a mouse...ha[s] an interest in not being kicked along the road, because it will suffer if it is.” (Singer 1990, 8)

## REFERENCES

- Amadae, S. M.** *Rationalizing Capitalist Democracy: The Cold War Origins of Rational Choice Liberalism*. Chicago: The University of Chicago Press, 2003.
- Austin-Broos, Diane.** "Morality and the Culture of the Market." In *Economics and Ethics?* ed. Peter Groenewegen, 173-83. New York: Routledge, 1996.
- Bennett, R.M., D.M. Broom, S.J. Henson, R.J.P. Blaney and G. Harper.** "Assessment of the Impact of Government Animal Welfare Policy on Farm Animal Welfare in the UK." *Animal Welfare* 13 (2003): 1-11.
- Boyle, James.** "The Politics of Reason: Critical Legal Theory and Local Social Thought." *University of Pennsylvania Law Review* 133, no. 4 (1985): 685-780.
- Brennan, Geoffrey.** "The Economist's Approach to Ethics: A Late Twentieth Century View." In *Economics and Ethics?* ed. Peter Groenewegen, 121-137. New York: Routledge, 1996.
- Brooman, S. and D. Legge.** "Animal Welfare vs. Free Trade – Free Trade Wins: An Examination of the Animal Welfare Implications of R. v Ministry of Agriculture, Fisheries and Food *ex p* Compassion in World Farming (1998)." *Animal Welfare* 9 (2000): 81-85.
- Broome, John.** *Ethics Out of Economics*. Cambridge, UK: Cambridge University Press, 1999.
- Busch, Lawrence.** "Virgil, Vigilance, and Voice: Agrifood Ethics in an Age of Globalization." *Journal of Agricultural and Environmental Ethics* 16 (2003): 459-77.
- Cavaleri, Paola.** "The Animal Debate: A Reexamination." In *In Defense of Animals: The Second Wave*. ed. Peter Singer. Malden, MA: Blackwell Publishing Ltd., 2006.
- Chong, Dennis.** "Values Versus Interests in the Explanation of Social Conflict." *University of Pennsylvania Law Review* 144, no. 5 (1996): 2079-2134.
- Cooter, Robert D.** "Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant." *University of Pennsylvania Law Review* 144, no. 5 (1996): 1643-96.
- Dawkins, Marian Stamp.** "The Scientific Basis for Assessing Suffering in Animals." In *In Defense of Animals: The Second Wave*. Ed. Peter Singer. Malden, MA: Blackwell Publishing Ltd., 2006.
- Demsetz, Harold.** "Toward a Theory of Property Rights." *American Economic Review*.
- Druce, Clare and Philip Lymbery.** "Outlawed in Europe." In *In Defense of Animals: The Second Wave*. ed. Peter Singer. Malden, MA: Blackwell Publishing Ltd., 2006.
- Dunfee, Thomas W.** "Corporate Governance in a Market with Morality." *Law and Contemporary Problems* 62, no. 3 (1999): 129-57.
- Elster, Jon.** "Rationality, Morality, and Collective Action." *Ethics* 96, no. 1 (1985): 136-55.
- Evensky, Jerry.** "Ethics and the Invisible Hand." In *Economics, Ethics, and Public Policy*. ed. Charles K. Wilber. New York: Rowman & Littlefield Publishers, Inc. 1998
- Finnemore, Martha and Kathryn Sikkink.** "International Norm Dynamics and Political Change." *International Organization* 52, no. 4

(1998): 887-917.

**Fraser, D.** "Animal Welfare Assurance Programs in Food Production: a Framework for Assessing the Options." *Animal Welfare* 15 (2006): 93-104.

**Geradin, Damien and Joseph A. McCahery.** "Regulatory Competition and Coopetition." Amsterdam Center for Law and Economics Working Paper no. 2005-06 (2005).

**Gill, Flora.** "On Ethics and Economic Science." In *Economics and Ethics?* ed. Peter Groenewegen, 138-56. New York: Routledge, 1996.

**Grandin, Temple and Catherine Johnson.** *Animals in Translation: Using the Mysteries of Autism to Decode animal Behavior*. New York: Harcourt, Inc, 2005.

**Grantham, George.** "Rationality Revised: The Evolution of an Axiom in Economics." In *The Social Sciences and Rationality: Promises, Limits, and Problems*. eds. Axel Van der Berg and Hudson Meadwell, 41-80. London: Transaction Publishers, 2004.

**Gregg, Benjamin.** *Coping in Politics with Indeterminate Norms: A Theory of Enlightened Localism*. New York: State University of New York Press, 2003.

**Groenewegen, Peter,** ed. *Economics and Ethics?* New York: Routledge, 1996.

**Haas, Ernst B.** "Is there a Hole in the Whole? Knowledge, Technology, Interdependence, and the Construction of International Regimes." *International Organization* 29, no. 3 (1975): 827-76.

**Hadari, Saguiv A.** "Value Trade-off." *The Journal of Politics* 50, no. 3 (1988): 655-76.

**Hall, A. L.** "The Effect of Stocking Density on the Welfare and Behavior of Broiler Chickens reared Commercially." *Animal Welfare* 10 (2001): 23-40.

**Harvey, Colin.** "Governing after the Rights Revolution." *Journal of Law and Society* 27, no. 1 (2000): 61-97.

**Hetcher, Steven A.** *Norms in a Wired World*. Cambridge, UK: Cambridge University Press, 2004.

**Horrigan, Leo, Robert S. Lawrence, and Polly Walker.** "How Sustainable Agriculture can Address the Environmental and Human Health Harms of Industrial Agriculture." *Environmental Health Perspectives* 110, no. 5 (2002).

**Hughes, Elaine L. and Christiane Meyer.** "Animal Welfare Law in Canada and Europe." *Animal Law* 6, no. 23 (2000).

**Hurly, Susan and Matthew Nudds.** "The Question of Animal Rationality: Theory and Evidence: Editors' Introduction." Introduction to *Rational Animals?* eds. Susan Hurly and Matthew Nudds. Oxford: Oxford University Press, 2006.

**Ignatieff, Michael.** *Human Rights as Politics and Idolatry*. Princeton: Princeton University Press, 2001.

**King, Loren A.** "Deliberation, Legitimacy, and Multilateral Democracy." *Governance: An International Journal of Policy, Administration, and Institutions* 16, no. 1 (2003): 23-50.

**Klare, Karl.** "Legal Theory and Democratic Reconstruction." *University of British Columbia Law Review* 69 (1991).

**Korobkin, Russell B. and Thomas S. Ulen.** "Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics." *California Law Review* 88, no. 4 (2000): 1051-1144.

**Korthals, Michiel.** "Taking Consumers Seriously: Two Concepts of Consumer Sovereignty." *Journal of Agricultural and*

*Environmental Ethics* 14 (2001): 201-15.

**Lewinsohn-Zamir, Daphna.** "Consumer Preferences, Citizen Preferences, and the Provision of Public Goods." *The Yale Law Journal* 108, no. 2 (2000): 377-406.

**Linklater, Andrew.** *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era*. Columbia: South Carolina UP, 1998.

**Leopold, Aldo.** *A Sand County Almanac, and Sketches Here and There*. Oxford: Oxford University Press, 1949.

**Mahoney, Paul G. and Chris W. Sanchirico.** "Competing Norms and Social Evolution: Is the Fittest Norm Efficient?" *University of Pennsylvania Law Review* 149, no. 6 (2001): 2027-62.

**Mason, Jim and Mary Finelli.** "Brave New Farm?" In *In Defense of Animals: The Second Wave*. ed. Peter Singer. Malden, MA: Blackwell Publishing Ltd., 2006.

**Matheny, Gaverick.** "Utilitarianism and Animals." In *In Defense of Animals: The Second Wave*. ed. Peter Singer. Malden, MA: Blackwell Publishing Ltd., 2006.

**McAdams, Richard H.** "Relative Preferences." *The Yale Law Journal* 102, no. 1 (1992): 1-104.

**McCormick, John P.** "Three Ways of Thinking 'Critically' about the Law." *The American Political Science Review* 93, no. 2 (1999): 413-28.

**McKenna, Erin and Andrew Light,** eds. *Animal Pragmatism: Rethinking Human-Nonhuman Relationships*. Indianapolis, Indiana: Indiana University Press, 2004.

**Nunan, Richard.** "Harsanyi vs. Sen: Does Social Welfare Weigh Subjective Preferences?" *The Journal of Philosophy* 78, no. 10 (1981): 586-600.

**Passillé, A. M. de and J. Rushen.** "Food safety and environmental issues in animal welfare." *Rev. Sci. Tech. Off. Int. Epiz.* 24, no. 2 (2005): 757-766.

**Pocar, Valerio.** "Animal Rights: A Socio-Legal Perspective." *Journal of Law and Society* 19, no. 2 (1992) 214-30.

**Pollan, Michael.** *The Omnivore's Dilemma: A Natural History of Four Meals*. New York: Penguin Press, 2006.

**Posner, Richard A.** *The Problematics of Moral and Legal Theory*. Cambridge, MA: Belknap Press of Harvard University Press, 1999.

**Rorty, Richard.** *Truth and Moral Progress: Philosophical Papers*. Cambridge: Cambridge University Press, 1998.

**Rowthorn, Robert.** "Ethics and Economics: An Economist's View." In *Economics and Ethics?* ed. Peter Groenewegen, 15-33. New York: Routledge, 1996.

**Sen, Amartya K.** "Rational Fools: A Critique of the Behavioral Foundations of Economic Theory." *Philosophy and Public Affairs* 6 (1977): 317-44.

**Shell, Richard G.** "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization." *Duke Law Journal* 44, no. 5 (1995): 829-927.

**Shelton, Dinah.** "Normative Hierarchy in International Law." *The American Journal of International Law* 100, no. 2 (2006): 291-323.

**Singer, Peter.** *Animal Liberation*. Rev. ed. New York: Avon Books, 1990.

**Singer, Peter.** *Practical Ethics*. Cambridge, UK: Cambridge University Press, 1993.

**Singer, Peter and Jim Mason.** *The Way We Eat: Why Our Food Choices Matter*. New York:

Rodale, 2006.

**Smith, Vernon L.** "Constructivist and Ecological Rationality in Economics." *The American Economic Review* 93, no. 3 (2003): 465-508.

**Speir, Jerry, Marie-Ann Bowden, David Ervi, Jim McElfish, and Rosario Pérez Espejo.** "Comparative Standards for Intensive Livestock Operations in Canada, Mexico, and the US." Prepared for the Commission for Environmental Cooperation. 4 February 2002.

**Staman, Jan and Frans W. A. Brom.** "Proposal for a Transatlantic Platform for Consumer Concerns and International Trade." *Journal of Agricultural and Environmental Ethics* 12 (2000): 207-14.

**Steinfeld, H., P. Gerber, T. Wassenaar, V. Castel, M. Rosales, C. de Haan.** *Livestock's Long Shadow: Environmental Issues and Options*. A joint report of the UN Food and Agriculture Organization and the Livestock, Environment and Development program (LEAD), 2006.

**Stevenson, Peter.** "The World Trade Organization Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare." *Animal Law* 107 (2002).

**Stewart, Richard B.** "Environmental Regulation and International Competitiveness" *The Yale Law Journal* 102, no. 8 (1993): 2039-2106.

**Stewart, Richard B.** "Regulation in a Liberal State: The Role of Non-Commodity Values." *The Yale Law Journal* 92, no. 8 (1983): 1537-90.

**Sunstein, Cass R.** "Incommensurability and Valuation in Law." *Michigan Law Review* 92, no. 4 (1994): 779-861.

**Tarullo, Daniel K.** "Beyond Normalcy in the Regulation of International Trade." *Harvard Law Review* 100, no. 3 (1987): 546-628.

**Ten, Chin Liew.** "Ethics and Economics: A Philosopher's View." In *Economics and Ethics?* ed. Peter Groenewegen, 34-45. New York: Routledge, 1996.

**Trachtman, Joel P.** "Economic Analysis of Prescriptive Jurisdiction." *Virginia Journal of International Law* 42, no. 1: 2001-2002.

**Van der Berg, Axel and Hudson Meadwell,** eds. *The Social Sciences and Rationality: Promises, Limits, and Problems*. London: Transaction Publishers, 2004.

**Varoufakis, Yanis.** "O Tempora, O Mores! Economics as the Ethos of our Times." In *Economics and Ethics?* ed. Peter Groenewegen, 157-172. New York: Routledge, 1996.

**Vonnegut, Kurt.** Available at <http://www.americanhumanist.org/KVSpeech.php>

**Weston, Samuel C.** "Toward a Better Understanding of the Positive/Normative Distinction in Economics." In *Economics, Ethics, and Public Policy*. ed. Charles K. Wilber. New York: Rowman and Littlefield Publishers, Inc., 1998.

**Wolfson, David J.** "Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production." *Animal Law* 2, no. 123 (1996).

**Wilkins, D. B., C. Houseman, R. Allan, M. C. Appleby, D. Peeling and P. Stevenson.** "Animal Welfare: the role of non-governmental organizations." *Rev. Sci. Tech. Off. Int. Epiz.* 24, no. 2 (2005): 625-38.