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Essay

PUTTING A PRICE ON WHALES TO SAVE THEM: WHAT DO MORALS HAVE TO DO WITH IT?

BY
HOPE M. BABCOCK*

The author explores the moral implication of a proposal to create an international market in whale shares as an alternative to the dysfunctional International Whaling Commission. She finds the proposal amoral because whales, like humans, have an intrinsic right to life. Since this leaves whales vulnerable to whale hunting nations, she suggests that international environmental organizations might help a whale preservation norm emerge in whaling nations by using education and interventionist activities that focus on whaling's cruelty to ultimately encourage the citizens and governments of those nations to change their self-image as whale eating cultures.

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“Environmental law needs ethics because it is blind without values.”¹

This Essay focuses on a commentary published in the journal *Nature* by a professor of natural resource economics at the University of California’s Bren School of Environmental Science and Economics, the Dean of the Bren School, and an ecologist from Arizona State University.² The trio—justifiably troubled by the inability of the International Whaling Commission (IWC) to protect whales because of paralyzing schisms between whaling and non-whaling members, among other problems—suggested instead that the IWC administer an international market in whale shares.³ Under their proposal, member nations would receive allowances to hunt whales at “sustainable harvest levels.”⁴ They could harvest their quotas, hold onto them for a year, or retire them permanently.⁵ Some whale shares would be auctioned off with the earnings going to conservation efforts (not necessarily whale-related), and all allowances would be tradable in a global market.⁶

I found the proposal initially seductive, then troubling, eventually horrifying; and I stepped back to figure out why—hence the genesis of this Essay. I concluded that it was because whales have an intrinsic right to life, that the proposal to kill some whales in order to save others was deeply bothersome and ultimately unacceptable because of its amorality.⁷ Since my conclusion leaves whales to the mercy of unfixable flaws in the International Convention for the Regulation of Whaling and the dysfunction of the IWC, I suggest here that international environmental organizations, through a combination of education and interventionist activities focusing on the cruelty of whaling, might help a whale preservation norm emerge in whaling nations by encouraging the citizens and governments of those nations to change their self-image as whale-eating cultures. That this will not be an easy task is apparent from an article appearing this summer in *The Guardian* indicating that restaurants in Greenland were serving endangered bowhead whale meat to tourists and that its supermarkets were selling endangered fin whale meat.⁸

¹ Jedediah Purdy, *Our Place in the World: A New Relationship for Environmental Ethics and Law*, 62 *DUKE L. J.* 857, 883 (2013).

² Christopher Costello, Leah R. Gerber & Steven Gaines, *Conservation Science: A Market Approach to Saving the Whales*, 481 *NATURE* 139 (2012).

³ *Id.* at 139–40.

⁴ *Id.* at 140.

⁵ *Id.*

⁶ *Id.*

⁷ See generally Joseph Daniels Blosser, *Ethics Before God and Markets: A Theory of Moral Action in Conversation with Adam Smith and Ernst Troeltsch* (June 2011) (unpublished Ph.D. dissertation, University of Chicago) (on file with author) (discussing the importance of interdisciplinary dialogue between theology and economics and exploring how collaboration and compromise between liberal theology and mainstream free-market economics might be achieved through the concept of moral action).

⁸ *Greenland Serving Whale Meat Dishes to Tourists*, *GUARDIAN*, June 26, 2012, <http://www.guardian.co.uk/environment/2012/jun/26/greenland-whale-meat-tourists> (last visited Feb. 17, 2013). On the other hand, Amazon pulled whale meat products from its Japanese

Let me begin with a few words on whales, and the flawed international regulatory regime designed to protect them, before I turn to my arguments on why we owe whales a moral duty not to kill them, why markets are poor exemplars of this principle, and how a whale preservation norm would be the better alternative to ensure their survival.

Whales are magnificent, remarkable animals that have a strong magnetic hold on people—the enduring popularity of *Moby Dick*⁹ and *Free Willy*¹⁰ illustrate how whales grab and hold onto our imagination. A further example of this fascination is whale-watching, which is a billion dollar global industry.¹¹ While hunting is not the only threat to the survival of whales,¹² it is the most visible one and, for our purposes, the one that drew the attention of the journal authors.¹³

Because whales reproduce slowly, reach maturity late, travel in small pods, and are mostly found on the high seas¹⁴ (which are largely

website after it received thousands of messages protesting their sale. Justin McCurry, *Amazon Removes Whale Meat Products from Japanese Site*, GUARDIAN, Feb. 24, 2012, <http://www.guardian.co.uk/environment/2012/feb/24/amazon-whale-meat-japan> (last visited Feb. 17, 2013).

⁹ HERMAN MELVILLE, *MOBY DICK; OR, THE WHALE* (Heritage Press, 1943) (1851).

¹⁰ *FREE WILLY* (Warner Bros. 1993).

¹¹ See William C.G. Burns, *The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission: Toward a New Era for Cetaceans?*, 6 J. INT'L WILDLIFE L. & POL'Y 255, 264–65 (2003) (“The whale-watching sector is one of the fastest growing tourism industries in the world, experiencing approximately 12% growth annually and generating more than \$1 billion in revenue. By contrast, the killing of whales now produces only approximately \$50 million in revenue annually.”).

¹² See, e.g., Susan C. Alker, Comment, *The Marine Mammal Protection Act: Refocusing the Approach to Conservation*, 44 UCLA L. REV. 527, 568 (1996):

In the marine area, one of the largest threats to healthy habitat is not construction or development, but pollution. The ocean is polluted with large amounts of plastic, metal, glass, lumber, and medical waste products; hydrocarbons such as crude oil and natural gas; and offshore dredge spoils, industrial wastes, sewage sludge, explosives, chemical munitions, and radioactive waste. Plastic debris enters the ocean primarily from offshore oil activities and commercial and recreational boating and fishing, which together introduce 6.4 million metric tons of waste to the ocean annually. Plastic waste entangles marine mammals, causing wounds, infections, and feeding problems, which can be deadly. Offshore dumping of poisonous waste products accounts for 10% of all ocean contaminants, and, through feeding, results in high concentrations of toxins in the bodily tissues of marine mammals and other species. Poisons can also deplete oxygen levels in the water to the point where hundreds of miles of marine ecosystem become imbalanced and the marine organisms that require oxygen from the water die. Ecologists argue that the ocean no longer has the ability to assimilate all of these wastes. The combined effects of pollution, over-fishing, and direct destruction of marine habitats has resulted in a 40% decline in marine life over the past few decades, indicating a serious problem with the marine ecosystem as a whole.

¹³ It helps that whales are “morally compelling ‘victims’” and that the harm they suffer at the hands of humans conform to “traditional ideas of harm” as compared to climate change. See Purdy, *supra* note 1 (manuscript at 51).

¹⁴ See 15 MAMMALS IV GRZIMEK'S ANIMAL LIFE ENCYCLOPEDIA 6–9 (Hutchins et al. eds., 2d 2004).

unregulated),¹⁵ they have been especially vulnerable to hunting pressures. For hundreds of years, a form of “frontier economics”¹⁶ operated in the open oceans when it came to whaling. In the early twentieth century, the advent of more lethal and efficient methods of killing whales, like exploding harpoons and factory ships, accelerated the slaughter.¹⁷ Even when it was known that whale stocks were rapidly declining, and with them the fate of the whaling industry, the pressure to continue hunting whales remained.¹⁸ The unrelenting decline in great whales even came to the attention of the League of Nations because of the potential collapse of the whaling industry.¹⁹ By 1948, over 43,000 whales were killed annually.²⁰

Starting in 1918, there were international attempts to stop the slaughter of whales, including one initiative by the whaling industry to protect the price of whale oil.²¹ But all these efforts collapsed because the major whaling nations refused to join in.²² Ironically, Norway and Iceland, two of the most recondite modern whaling countries, were among the first to pass domestic laws limiting whale hunting.²³ Finally in 1946, fifteen nations signed the

¹⁵ See, e.g., KRISTINA M. GJERDE ET AL., REGULATORY AND GOVERNANCE GAPS IN THE INTERNATIONAL REGIME FOR THE CONSERVATION AND SUSTAINABLE USE OF MARINE BIODIVERSITY IN AREAS BEYOND NATIONAL JURISDICTION 1–6, tbls.1 & 2 (2008), available at <http://data.iucn.org/dbtw-wpd/edocs/EPLP-MS-1.pdf> (listing the regulatory and governance gaps for the high sea at a global and regional level).

¹⁶ Gerry J. Nagtzaam, *The International Whaling Commission and the Elusive Great White Whale of Preservationism*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 375, 391 (2009).

¹⁷ Adrienne M. Ruffle, Note, *Resurrecting the International Whaling Commission: Suggestions to Strengthen the Conservation Effort*, 27 BROOK. J. INT'L L. 639, 645 (2002):

The early twentieth century witnessed the development of the modern whaling industry and the subsequent devastation of whale stocks throughout the world. During this period, scientific and technological advancements such as steam engines and exploding harpoon guns led to more efficient kills over a larger geographic area and damaged whale populations almost to the brink of extinction.

See also Ronald J. Haskell, Jr., *Abandoning Recent Whale Conservation Initiatives in Japan* Whaling Association v. American Cetacean Society, 11 HARV. ENVTL. L. REV. 551, 554 (1987) (“Historically, economic protectionism prompted whaling nations to agree on harvest quotas. Later advances in whaling technology, in conjunction with the attendant increase in profitability of whale harvesting, severely diminished whale populations.”).

¹⁸ See Anthony D’Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT’L L. 21, 32 (1991) (discussing the history of the whaling industry and the success and failure of whaling protocols in the twentieth century).

¹⁹ Nagtzaam, *supra* note 16, at 392.

²⁰ See *id.* at 397 (“In the 1946–47 season the number of whales taken jumped to 34,720, and by the following season it had increased to 43,378 [Blue Whale Units].”).

²¹ See *id.* at 394 (“[Whaling companies] created ‘a regime of mutual production restraint,’ known as the International Association of Whaling Companies, to stabilize world oil prices by limiting production of whale oil.”).

²² See *id.* at 395 (“[T]he main whaling states of this period—Japan, Germany, Chile, Argentine, and the U.S.S.R.—refused to be bound by [the IWC] provisions.”).

²³ See *id.* at 392 (“In 1902 Norway passed a law strictly limiting its whaling companies’ activities with the aim of conserving whale stocks as a valuable state asset. The new law stipulated that each whaling station was to have only one catcher and the stations must be fifty miles apart. Iceland was the first state to put in place a domestic whaling moratorium on whaling—for twenty years, starting from 1915.”).

International Convention for the Regulation of Whaling to stop the over-fishing of whales,²⁴ and in 1949, the IWC was formed;²⁵ the animating goal of each was to maintain whale markets.²⁶ The IWC now has eighty-nine members, and the Convention remains the principal legal document governing the whaling practices of member states.²⁷

The first three decades of the IWC's history were extremely disappointing from a whale preservation perspective. The commission's restrictions on killing certain whale species had the opposite effect, setting off what some describe as the "Whaling Olympics."²⁸ Members with strong whaling industries dominated the proceedings and blocked all efforts to establish sustainable whale hunt quotas.²⁹ The result for whales was tragic.³⁰ Unbridled hunting until the mid-1960s led to the commercial extinction of many species like blue, humpback, and fin whales.³¹ Today, blue whales are at 1% of their pre-exploitation levels, humpback whales at less than 5%, and fin whales at approximately 15%.³² Some Antarctic baleen species declined by over 96% from pre-exploitation levels, and six out of eleven great whale species are currently classified as endangered or vulnerable.³³ To give an idea of the scope of the annual slaughter post-formation of the IWC, 55,795 whales were killed during the 1950–1951 whaling season. Eight years later,

²⁴ *Id.* at 398 & n.175.

²⁵ See INT'L COMM'N ON WHALING, FIRST REPORT OF THE COMMISSION, at 3 (1950), available at <http://iwcoffice.org/cache/downloads/dh7iwgo54nk8c0sk8ok4ck484/RIWC1.pdf> (noting that the IWC "was constituted under the provisions of Article III of the International Convention for the Regulation of Whaling signed at Washington on 2nd December, 1946" and that the first meeting of the IWC convened May 30, 1949).

²⁶ See Ruffle, *supra* note 17, at 646 ("[T]he IWC was empowered to amend the Convention's Schedule of Regulations . . . by designating protected species, open and closed whaling seasons and waters for whaling, determine size limits, methods and intensity of whaling, types of gear to be used, methods of measurement and maximum catch returns.") (citing International Convention for the Regulation of Whaling, art. 5, Dec. 2, 1946, 62 Stat. 1716, 1718–19, T.I.A.S. 1849 [hereinafter ICRW]); see also *id.* at 658 ("[T]he IWC was given authority over all waters in which whaling is carried on by factory ships, land stations or whale catchers.") (citing ICRW art. 1, 62 Stat. at 1717).

²⁷ See Int'l Whaling Comm'n, *Membership and Contracting Governments*, <http://iwcoffice.org/members> (last visited Nov. 6, 2012) (noting that "[m]embership of the IWC is open to any country in the world that formally adheres to the 1946 Convention," listing each contracting government, date of adherence, and current commissioner).

²⁸ See Nagtzaam, *supra* note 16, at 401 ("[R]estrictions on taking certain whale species has had an effect opposite to that intended. It set in train a technological race to create better ships and more advanced killing technologies to achieve designated quotas as rapidly as possible, leading to whalers to refer to the period as the 'Whaling Olympic.'").

²⁹ See Burns, *supra* note 11, at 257 ("The ICRW's history over its first three decades was highly discouraging, with the parties engaged in commercial whaling operations consistently ignoring the recommendations of the IWC's Scientific Committee and opting for wholly unsustainable quotas on most species of great whales.").

³⁰ See Ruffle, *supra* note 17, at 648 ("From its inception until the late 1960's . . . '[w]hale stocks were regularly over-exploited, and scientific advice concerning sustaining catch limits was frequently ignored.'").

³¹ See Burns, *supra* note 11, at 256.

³² *Id.* at 265–66.

³³ *Id.* at 257.

with twenty factory ships operating in the Antarctic, 64,586 whales were slaughtered and processed on the high seas.³⁴ The IWC functioned more like a “whaling cartel,”³⁵ or what Gerry Nagtzaam calls a “whalers’ club.”³⁶ The IWC was clearly not protecting whales.³⁷

In 1972, the United Nations Conference on the Human Environment (Stockholm Conference) recommended a ten-year moratorium on whaling to allow whale stocks to recover.³⁸ That year, United Nations Secretary General Maurice Strong pled the case for whale preservation at the annual meeting of the IWC, and the United States introduced a resolution banning the killing of whales for ten years, which passed unanimously.³⁹ By 1981, most of the world viewed whales as “the heritage of all mankind.”⁴⁰

Between 1979 and 1983 membership of the IWC grew to forty-one countries, many of whom were openly opposed to or had serious doubts about commercial whaling.⁴¹ Two United Nations organizations and the International Union for the Conservation of Nature also began participating in IWC proceedings, and international environmental organizations started attending proceedings as unofficial observers.⁴² In 1982, the changed composition of the IWC combined with the dire condition of great whales enabled the IWC to issue a moratorium on the commercial hunting of sperm

³⁴ Nagtzaam, *supra* note 16, at 402 (“In the 1950–51 whaling period, 55,795 whales were taken globally, the largest number . . . [of] recorded kills until then. By the 1957–1958 season, the number of floating factories operating in Antarctic waters had increased to twenty with two shore stations and 257 catchers, and by the following season whalers killed a new high of 64,586 whales.”).

³⁵ See Ruffle, *supra* note 17, at 640–41.

³⁶ Nagtzaam, *supra* note 16, at 402.

³⁷ See D’Amato & Chopra, *supra* note 18, at 47 (“[T]he IWC’s limited membership was long dominated by the whaling countries.”).

³⁸ Nagtzaam, *supra* note 16, at 405.

³⁹ *Id.* at 405, 408.

⁴⁰ See Ruffle, *supra* note 17, at 650; D’Amato & Chopra, *supra* note 18, at 39 (“[T]he Stockholm Conference may be seen as marking a pivotal point between conservationism and protectionism, a view reflected in the words of Dr. Robert M. White, who spoke for the United States: ‘World whale stocks must be regarded as the heritage of all mankind . . .’”); see also *id.* (“The representative of the International Union for the Conservation of Nature and Natural Resources (IUCN), however, pointed out that ‘the use of a resource belonging to all nations for the marginal benefit of relatively few people seemed unjustified.’”). Even before then, the view of whales as a resource free for the taking by individuals was beginning to change. See Nagtzaam, *supra* note 16, at 397 (quoting the U.S. Secretary of State Dean Acheson in 1946 as saying, “The world’s whale stocks are a truly international resource in that they belong to no one single nation, nor to a group of nations, but rather they are wards of the entire world.”).

⁴¹ See William C.G. Burns, *The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission: Toward a New Era for Cetaceans?*, 6 J. INT’L WILDLIFE L. & POL’Y 255, 258 (2003) (noting that “between 1979 and 1983, membership increased to 41 member countries, many of which were openly hostile to, or had serious reservations about, commercial whaling operations. In 1982, this culminated in the imposition of a moratorium on commercial whaling, which continues in effect today.”) (citations omitted).

⁴² See Ruffle, *supra* note 17, at 647 (“The IWC’s Rules of Procedure allow non-parties and intergovernmental organizations to attend the meetings and to be represented by observers.”); see also INT’L COMM’N ON WHALING, TWENTY-FOURTH REPORT OF THE COMMISSION 14–15 (1974), available at <http://iwcoffice.org/annual-reports> (click on “IWC_1974_Twenty-Fourth Report of the Commission.pdf”) (providing a list of the delegates and unofficial observers who attended the IWC’s 1972 meeting).

whales in the northern Pacific Ocean.⁴³ In 1986, the IWC expanded the moratorium to cover the commercial catch of all types of whales in all whaling areas.⁴⁴ By 1990, all legal *commercial* killing of great whales had ceased.⁴⁵ Although initially intended to be a temporary ban while whale populations rebounded, the moratorium has remained in effect.⁴⁶

However, the refusal of major whaling nations like Norway to join the IWC,⁴⁷ the threat of withdrawal by countries like Japan,⁴⁸ and the actual

⁴³ See Haskell, *supra* note 17, at 562 (“The 1981 IWC Schedule contained a zero quota for the Western Division stock of Northern Pacific sperm whales for the 1982 season.”).

⁴⁴ See *id.* (“In 1982, the IWC enacted a five-year moratorium on all commercial whaling to begin in the 1985–86 season and last until 1990.”).

⁴⁵ See Nagtzaam, *supra* note 16, at 421 (“[F]rom [1990] . . . commercial whaling of the larger whale species had become obsolete.”); see also D’Amato & Chopra, *supra* note 18, at 48 (noting that “[v]irtually all commercial whaling activity [had] ceased” despite the fact that the moratorium only applied to the ten largest species of great whales).

⁴⁶ See, e.g., Keiko Hirata, *Why Japan Supports Whaling*, 8 J. INT’L WILDLIFE L. & POL’Y 129, 145 (2005) (The Japanese regarded “the 1982 moratorium as a temporary measure that was supposed to last only until 1990, when the IWC was scheduled to consider scientific research in determining whether commercial whaling could be resumed in a sustainable way.”); see also Nagtzaam, *supra* note 16, at 408 (“Such a moratorium on whaling was initially perceived as a conservationist measure that would allow stocks to recover over time.”).

⁴⁷ Mark Detsky, Comment, *Developments in Conservation and Living Resources: The Murky Sea over the Magnificent Whale*, COLO. J. INT’L ENVTL. L. & POL’Y 2002 Y.B. 35, 38 (2003) (“Norway never joined the IWC because of its desire to continue commercial whaling, and permits a national take of 674 whales annually.”); see Gail Osherenko, *Environmental Justice and the International Whaling Commission: Moby-Dick Revisited*, 8 J. INT’L WILDLIFE L. & POL’Y 221, 227 (2005) (“Norway and Iceland both have used the scientific exemption to allow limited hunting of whales by shore-based fleets, and Norway resumed commercial whaling in recent years under the objection it filed to the initial moratorium.”). The story of Norway’s continued whaling is enmeshed in that country’s presidential politics. See J. Baird Callicott, *Whaling in Sand County: A Dialectical Hunt for Land Ethical Answers to Questions About the Morality of Norwegian Minke Whale Catching*, 8 COLO. J. INT’L ENVTL. L. & POL’Y 1, 1 (1997) (“In 1986, the [IWC] declared a moratorium on commercial whaling. In the spring of 1993, Norway’s Brundtland Administration—hoping to reverse its declining popularity in an election year—defied the moratorium and unilaterally allowed Norwegian whalers to take 160 minke whales. The political ploy was successful; Gro Harlem Brundtland was reelected. Accordingly, during the summer of 1993, Norwegians killed 153 minke whales.”); see also *id.* at 21 (“By obdurately asserting a right on behalf of its citizens to kill minke whales, the Brundtland Administration may be spending precious moral capital.”). Underlying Brundtland’s decision was national pride. See *id.* at 2 (“Somehow, Norwegian national pride seems bound up with the right to kill whales.”); see also *id.* at 17 (“Norwegians justify whaling, especially minke whaling, by . . . an argument from tradition and culture. Perhaps it is a matter of appropriate attitude and intention.”). Biology may have also contributed to Norway’s pro-whaling stance:

Why, in any case, did the Norwegian government allow only the resumption of minke whaling? For two reasons, one bio-economic, the other bio-cultural. . . . [M]odern commercial whalers did not concentrate their efforts on minkes until the mid-1970s—after the preferred species populations had become so depleted and capture technologies so improved that minke whales were worth pursuing. Fortunately, the minke whale came through this decade of global persecution numerically diminished, but not endangered. Therefore, some believe that further killing can and should be sustained.

Id. at 2–3.

withdrawal by Canada and Iceland⁴⁸ have prevented the IWC from taking more aggressive efforts to protect whales or enforce the moratorium's terms. The Convention allows lethal scientific research on whales and aboriginal hunting,⁵⁰ exceptions that countries like Japan and Norway have relentlessly exploited.⁵¹ Countries may also “opt out” of any regulation they do not like.⁵² Japan is the largest user of the scientific research exemption, killing thousands of whales since the ban against whaling came into effect in 1986⁵³ and making regular use of the opt-out provision.⁵⁴

⁴⁸ Jay Alabaster, *Commercial Whaling: Japan May Quit International Whaling Commission if Ban Stays*, CHRISTIAN SCI. MONITOR, June 15, 2010, <http://www.csmonitor.com/From-the-news-wires/2010/0615/Commercial-whaling-Japan-may-quit-International-Whaling-Commission-if-ban-stays> (last visited Oct. 29, 2012).

⁴⁹ See Alison Rieser, *Whales, Whaling, and the Warming Oceans*, 36 B.C. ENVTL. AFF. L. REV. 401, 417 n.80 (2009) (“The Government of Iceland withdrew from the IWC in 1992 after the IWC voted not to lift the moratorium after its first ten years. It then entered into an agreement creating the North Atlantic Marine Mammal Commission with Norway, the Faroe Islands, and Greenland. Iceland ‘rejoined’ in 2002 after a special meeting and vote allowing Iceland to ‘re-adhere’ to the ICRW with a reservation on the moratorium after 2006.”)(internal citation omitted); Brian Trevor Hodges, *The Cracking Façade of the International Whaling Commission as an Institution of International Law: Norwegian Small-Type Whaling and the Aboriginal Subsistence Exemption*, 15 J. ENVTL. L. & LITIG. 295, 297 (2000) (“Since the passage of the moratorium, both Canada and Iceland have left the IWC.”).

⁵⁰ Ruffle, *supra* note 17, at 651 (“[T]he moratorium went into effect with two compromise clauses—aboriginal subsistence whaling and scientific whaling.”); see also Nagtzaam, *supra* note 16, at 438 (noting that the United States’ use of the aboriginal exemption has allowed states such as Japan, Iceland, and Norway to argue for increased whaling through the device of aboriginal whaling); see also Burns, *supra* note 11, at 271 (“While . . . [the scientific research exemption] was used extremely sparingly prior to the imposition of the moratorium on commercial whaling, Iceland, Norway, and Japan have conducted extensive whaling operations under the rubric of scientific research in the ensuing 15 years, taking more than 7500 whales between them.”).

⁵¹ See Nagtzaam, *supra* note 16, at 417 (“The moratorium was confined to commercial whaling and it allowed exemptions if registered with the IWC, which countries like Japan and Norway were quick to exploit.”).

⁵² See *id.* at 399–400 (“The ICRW also allows dissenting states to opt out of any decision arrived at within the IWC by filing an objection within ninety days and applying for an exemption under Article V(3), a loophole that would allow rogue whaling states significant wiggle room in evading IWC directives.”). See also Ruffle, *supra* note 17, at 642 (“[The] ‘opt out’ provision in the treaty makes it virtually impossible for the Commission to curtail the actions of member nations who oppose a specific regulation.”); *id.* at 652 (“[A]ny country that disagrees with a particular IWC regulation may, by filing an objection, delay its implementation and exempt itself from the regulation pursuant to the opt-out clause of the ICRW.”).

⁵³ See Alexander Gillespie, *Whaling Under a Scientific Auspice: The Ethics of Scientific Research Whaling Operations*, 3 J. INT’L WILDLIFE L. & POL’Y 1, 34 (2000) (“Since 1986, when the moratorium on commercial whaling came into force, Japanese whalers have killed over 3,500 whales under the auspices of the ICRW’s scientific research provision. As of 1997, 1222 whales had been taken from the New Zealand sector (Area V) and a further 1546 from the Australian sector (Area IV) in the Antarctic.”); see also *id.* at 40 (“Despite these resolutions, since 1995, the Japanese government has expanded its annual take of whales from this sector from 300 to 400 (+/-10%) per year.”). See also Burns, *supra* note 11, at 271–72 (“Since 1987, Japan has invoked Article VIII to kill approximately 6000 minke, Bryde’s, sperm whales, and sei whales in the Southern Ocean (including minke whales in the Southern Ocean Sanctuary) and North Pacific.”); Hirata, *supra* note 46, at 135 (“In 2002, JARPN II was expanded further to include additional catches and species (i.e., 50 each of minke whales from coastal waters and sei

The IWC has few enforcement powers over member nations because the Convention allows it only to make “recommendations” to the offending state.⁵⁵ It has no enforcement power over non-member nations, and members can only enforce IWC regulations within their territorial jurisdiction⁵⁶—Australia is an example of a country that has used its power to protect whales in its territorial waters.⁵⁷ The decision in *Japanese Whaling Association v. American Cetacean Society*⁵⁸ blocked the United States from using the threat of economic pressure to compel compliance with IWC regulations.⁵⁹

whales from offshore). As a result, Japan’s scientific whaling programs captured and killed 600 whales that year—440 Antarctic minke whales through JAPRA, plus 100 North Pacific minke whales, 50 Bryde’s whales, 10 sperm whales, 50 sei whales, and 50 minke whales along the Pacific seaboard (through JARPN II). This was double the catch in the initial scientific whaling program (300 Antarctic minke whales in 1988) and the largest kill since the program began.”). Norway, Iceland, and Korea have renewed their scientific research permits perhaps because of Japan’s success at using the exemption to get around the ban. *See* Gillespie, *supra*, at 53 (“Norway has invoked research needs to kill 288 minke whales in the Northeast Atlantic; Iceland 292 fin whales and 70 sei whales in the North Atlantic; and Korea 69 minke whales in the Sea of Japan.”); Burns, *supra* note 11, at 272 (“Iceland, which very recently re-adhered to the ICRW, proposed a scientific research program that would authorize the killing of 100 minke, 100 fin, and 50 sei whales each year for two years.”).

⁵⁴ *See* Ruffle, *supra* note 17, at 651 (“Japan’s objection effectively rendered the IWC powerless to enforce the moratorium against the country pursuant to the opt-out provision of the ICRW.”); *see also* Nagtzaam, *supra* note 16, at 442 (“Japan . . . lodged an objection [to the creation of the Southern Ocean whale sanctuary] and thus can still legally hunt minke whales in the region as well as continue to and try to eliminate the sanctuary exception.”).

⁵⁵ *See* Ruffle, *supra* note 17, at 659 (“The only leverage the Commission retains is the power to ‘make recommendations to any or all contracting Governments on any matter that relates to whales or whaling and to the objectives and purposes of this Convention.’” (quoting ICRW, art. VI, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849)); *see also id.* at 642 (“[T]he ICRW’s only enforcement mechanism for addressing violations of IWC regulations is squarely based on the concept of self-policing.”).

⁵⁶ *See id.* at 653 (“[A]ll authority to punish infractions is vested within the country having jurisdiction over the violations.”).

⁵⁷ *See* Nagtzaam, *supra* note 16, at 414 (“At the 1979 IWC meeting Australia announced that its position would be to prohibit whaling in its own waters and oppose the taking of whales in international waters.”).

⁵⁸ 478 U.S. 221 (1986).

⁵⁹ *See* David S. Lessoff, Note, *Jonah Swallows the Whale: An Examination of American and International Failures To Adequately Protect Whales from Impending Extinction*, 11 J. ENVTL. L. & LITIG. 413, 419 (1996) (“[I]n *Japanese Whaling Association v. American Cetacean Society* . . . the Court found that a taking of whales in violation of the quotas set forth by the IWC was not, in effect, a clear ‘diminishing of the effectiveness’ of the IWC.” (quoting *Japanese Whaling Association*, 478 U.S. at 237)); *see also id.* (“This decision effectively removed any hope in using economic threats to assist in gaining the compliance of Japan and other whaling nations with the IWC quotas.”). *See generally* U.S. Dep’t of State, *Clinton Letter to Congress on Japan’s Whaling Practices* (Dec. 29, 2000), 3 J. INT’L. WILDLIFE L. & POL’Y 311 (2001) (discussing the United States’ history of using the Pelly Amendments to curtail Japan’s use of the scientific research exemption and whaling in protected areas). Reflecting its disgust with Japan’s outlaw posture with respect to the IWC and its resolutions, the Clinton Administration went so far as to recommend that the next meeting of the IWC not be held in Tokyo:

I have personally intervened with Prime Minister Mori. We also joined 14 other governments in making a high-level demarche to the Japanese Government to protest its

Moreover, the IWC has no authority to monitor whaling activities or impose penalties on members who violate its regulations.⁶⁰ Many violations of IWC regulations are undetected or under-reported.⁶¹ This contributes to the indeterminacy of whale stock estimates that undergird hunting quotas on unprotected whales,⁶² making these quotas vulnerable to challenge by whaling members. Even a highly controversial requirement that whaling ships carry at least two inspectors on board has not improved the accuracy of reporting because inspectors are appointed and funded by their own governments and have a tendency to overlook infractions.⁶³ IWC has been unsuccessful in its attempts to encourage DNA testing of whale products, discourage the stockpiling of whale meat, and establish a register of whaling ships to eliminate the practice of vessels flying “flags of convenience.”⁶⁴

Finally, an inherent tension between the Convention’s animating goal of ensuring the whaling industry’s “orderly development” as reflected in its Preamble,⁶⁵ and the more modern goal of protecting whales for their own sake,⁶⁶ has generated acrimonious debate among the member nations and prevented the IWC from achieving either goal.⁶⁷ Today, the IWC is rigidly divided into members who favor permanently preserving whales, and those who want to conserve them only long enough to enable whale stocks to

decision to issue the permits. In September, we canceled a bilateral fisheries meeting that we have been holding annually for more than a decade. We also declined to participate in a ministerial meeting on environmental issues in August hosted by Japan. We have also actively supported the selection of a country other than Japan to host the next intersessional meeting of the IWC. As a result, the IWC voted 17-10 to hold the meeting in Monaco instead of Tokyo.

Id. at 313–14; *see also* Hirata, *supra* note 46, at 134 (“Although the Clinton administration did not in the end impose trade sanctions, it expressed its disapproval of Japan’s new program by boycotting a UN environmental conference in Japan.”).

⁶⁰ Lessoff, *supra* note 59, at 423–24 (“The IWC’s inability to impose penalties against nations has not curtailed harvesting of whales in excess of IWC quotas and, as a result, whale stocks continue to plummet throughout the world.”); Ruffle, *supra* note 17, at 642 (“[T]he IWC has no ability to monitor whaling activities in waters under its auspices.”).

⁶¹ Ruffle, *supra* note 17, at 658 (“[M]any violations [of the Convention] are unnoticed or under-reported and essentially unpunished on an international level.”).

⁶² *See id.*

⁶³ *Id.* at 668 (“[These measures have] proven ineffective since a strong tendency exists for inspectors appointed and financed by their own governments to overlook infractions.”).

⁶⁴ *See, e.g.,* Burns, *supra* note 11, at 261 (“While the parties adopted the [Revised Management Procedure] in 1994, adoption of the [Revised Management Scheme] has been thwarted by continued conflicts between the parties over elements of the inspection and observation scheme, including funding and the level of coverage.”); *see also* Patricia Birnie, *Legal Measures for Prevention of “Pirate” Whaling*, in LEGAL MEASURES FOR THE CONSERVATION OF MARINE MAMMALS 2, 5 (1982) (discussing the widespread use of the “flag of convenience” system and how it allows whaling vessels to register with non-party states for purposes of evading IWC regulations).

⁶⁵ *See* Nagtzaam, *supra* note 16, at 398 (“The Preamble outlined the Convention as being about the orderly development of a commercial whaling industry and the conservation of existing whale stocks.”).

⁶⁶ *See id.* at 387–88 (discussing “preservationism,” which “accords an intrinsic or non-instrumental value to the world”).

⁶⁷ *See* Osherenko, *supra* note 47, at 233; Rieser, *supra* note 49, at 402.

return to sustainable levels so that they can be hunted again.⁶⁸ Strong differences of opinion on the underlying moral rectitude of each side's position and conflicting societal values make it particularly hard to resolve the conflict.⁶⁹ Doremus's comment that "value conflicts complicate environmental policy decisions by polarizing the debate,"⁷⁰ is exactly what has happened on the IWC with respect to the future of whales. These value conflicts:

[M]ake it easy for the contesting sides to demonize each other, and hard for them to find common ground. They tend to encourage both sides to look for alternative "objective" grounds for decisions. Yet they make that search more difficult, by encouraging people to cling tenaciously to any evidence that supports their view, by making it difficult for people to communicate with one another, and by frustrating the search for a common measure of value.⁷¹

The continued division of the IWC into pro- and anti-whaling camps has led to its paralysis and may lead to its dissolution.⁷² Unfortunately, as Doremus notes, environmental conflicts like the one involving whales "are often zero-sum, meaning that no win-win solution is possible."⁷³

The *Nature* authors are right to the extent that the international regulatory system for protecting whales is clearly broken—perhaps beyond repair. So why not create a market in tradeable whale shares, which could lead to fewer whale kills, and might gain the support of both whaling and

⁶⁸ A recent example of this is the IWC's rejection of a proposal by several South American countries to create a whale sanctuary south of the equator between South America and Africa. The sanctuary would have covered breeding grounds for all the great whales swimming in the South Atlantic, which generated opposition from Japan, China, Norway, Russia, and Iceland, among other member states. See Emily Alpert, *Japan, Norway and Allies Vote Down South Atlantic Whale Sanctuary*, L.A. TIMES, July 2, 2012, http://latimesblogs.latimes.com/world_now/2012/07/japan-norwayatlantic-whale-sanctuary.html (last visited Dec. 26, 2012).

⁶⁹ See Holly Doremus, *Constitutive Law and Environmental Policy*, 22 STAN. ENVTL. L.J. 295, 297 (2003) ("[T]he bitterness with which environmental disputes have been contested for the past generation demonstrates how strongly they invoke core, and conflicting, values.").

⁷⁰ *Id.* at 321.

⁷¹ *Id.*; see also Osherenko, *supra* note 47, at 233 ("The IWC is caught today in a clash of values between those who wish to protect whale species and ensure healthy stocks of whales and those who argue against commercial harvests of whales not only on environmental and ecological grounds but on the cultural grounds that nonhuman animals (and particularly marine mammals, including whales) have certain rights. Navigating between the polar shores of this debate, the IWC is caught in the ice of the moratorium.").

⁷² See Dan Goodman, *The "Future of the IWC": Why the Initiative to Save the International Whaling Commission Failed*, 14 J. INT'L. WILDLIFE L. & POL'Y 63, 71–72 (2011) (describing the role of anti-whaling NGOs in blocking an initiative to bring the two sides to the table to negotiate a framework for resolving the conflict); see also Rieser, *supra* note 49, at 402 ("[D]eliberations of the [IWC] . . . have deteriorated into an annual confrontation between the proponents of conflicting values: biodiversity preservation versus consumptive use of marine wildlife. The whaling regime has been verging on dissolution over the issue of commercial whaling for almost two decades.").

⁷³ Doremus, *supra* note 69, at 321. Here too, expanding the pie through conserving whales until sustainable populations are achieved would not eliminate the conflict over whether whales should be hunted at all. See *id.* at 322 ("We cannot avoid conflicts by expanding the pie.").

whale preservation members to end the deadlock on the IWC?⁷⁴ For one reason, “an unfettered market is unable to determine appropriate value and will result in under-value and over-use of the environment.”⁷⁵ For another reason, market-based trading programs, like the one proposed by the three academics, do not create an incentive to go beyond a set point. For example, in the case of carbon dioxide reductions, implementing a cap on emissions lowers incentives to reduce pollution below that level—what Nicholas and Juergensmeyer call the “equilibrium point.”⁷⁶ Indeed, the academics’ proposal would allow whales to be killed up to the equilibrium point of whale stock sustainability⁷⁷—a point that cetacean scientists say is based on inadequate science⁷⁸ and one that the flawed international regulatory system would be incapable of reducing should it not be low enough to protect whales.⁷⁹ While there are additional problems with relying on markets as a substitute for regulation, such as distinguishing between legal and illegal activities, non-transparency, and valuation challenges,⁸⁰ this Essay focuses only on the moral bankruptcy of the proposal based on what I believe is a whale’s entitlement to life. This Essay also argues that markets have moral limits, as Michael Sandel suggests in his 1998 Oxford Tanner Lectures,⁸¹ and that there are some things money simply cannot buy, one of which is the life

⁷⁴ Costello, Gerber & Gaines, *supra* note 2, at 140.

⁷⁵ Stephanie E. Curran, *The Preservation of the Intrinsic: Ecosystem Valuation in New Zealand*, 9 N.Z. J. ENVTL. L. 51, 60 (2005). Purdy also argues that the focus on economics in environmental law has emphasized the value of welfarism, which emphasizes the “sum . . . of the whole,” and in turn can lead to “disregarding or sacrificing inconveniently situated individuals or sloughing over values that some people treasure.” Purdy, *supra* note 1, at 882. Purdy goes on to state that “no maximizing strategy—even one also concerned with distribution—genuinely approximates the individualistic Pareto criterion, with its requirement that changes make no one worse off. Maximizing strategies generate distributive decisions, which, for practical purposes, always disadvantage some individuals relative to plausible alternatives.” *Id.*

⁷⁶ See James C. Nicholas & Julian Conrad Juergensmeyer, *Market Based Approaches to Environmental Preservation: To Environmental Mitigation Fees and Beyond*, 43 NAT. RESOURCES J. 837, 851 (2003) (“[M]any tradeable emissions programs fail to provide an incentive for continuous pollution reduction.”). Nicholas and Juergensmeyer call this “the equilibrium point.” See *id.* at 851–52 (defining the “equilibrium point” as the state at which “no incentive remains to further reduce pollution”).

⁷⁷ See *id.* at 848–49 (“Polluters are then allowed to continue to pollute up to the level authorized by their credits or sell the credits they possess to other polluters in the same program.”).

⁷⁸ Lessoff, *supra* note 59, at 422 (“What data exists [sic] are questionable in many aspects, fragmentary, and at best, highly speculative. Information on the marine ecosystem necessary for any real understanding of living whales is almost totally lacking.”) (quoting Dr. L. Talbot, a former U.S. delegate to the IWC and member of the IWC Scientific Committee).

⁷⁹ See *id.* at 428–29.

⁸⁰ See, e.g., Todd S. Aagaard, *Environmental Harms, Use Conflicts, and Neutral Baselines in Environmental Law*, 60 DUKE L.J. 1505, 1543–44 (2011) (“Many environmental consequences are difficult to monetize because they are not traded in markets and thus are often excluded from cost-benefit analyses.”).

⁸¹ See generally Michael J. Sandel, Professor of Gov’t, Harvard Univ., What Money Can’t Buy: The Moral Limits of Markets, Delivered at Brasenose College, Oxford (May 11 & 12, 1998), in TANNER LECTURES ON HUMAN VALUES, 1997–1998, at 89, available at <http://tannerlectures.utah.edu/lectures/documents/sandel00.pdf> (discussing how the moral importance of goods can be degraded by market valuation and exchange).

of a being with moral worth. If an argument can be made that whales have a right to life, then it is morally wrong to deprive them of it, and we should not condone the academics' proposal.

This Essay uses criteria that animal rights scholars such as Cass Sunstein, Gary Francione, Tom Regan, and David Hoch employ to build a case that animals like whales have a right to life based on their moral worth, and that humans have a moral duty to respect that right.⁸² For example, animal rights scholars like Francione consider animals to be “autonomous subjects” with a capacity to have preferences and to act on those preferences.⁸³ Francione calls this a “core consciousness”—a “continuous mental existence” that translates into an interest in survival and not being killed.⁸⁴ To Francione a right to life is based on an animal's consciousness and nothing more.⁸⁵ Hoch says an animal's interest in survival creates in humans a moral duty toward them,⁸⁶ and anything that impedes the realization of this duty, like killing them, is against the animal's interests and goals, and is therefore morally suspect.⁸⁷ He also says that animals have

⁸² See, e.g., Ian Sample, *Whales and Dolphins 'Should have Legal Rights'*, GUARDIAN, Feb. 20, 2012, <http://www.guardian.co.uk/world/2012/feb/21/whales-dolphins-legal-rights> (last visited Nov. 8, 2012) (describing an initiative by the American Association for the Advancement of Science and various ethicists to have dolphins and whales be considered “nonhuman persons” to enable their protection under international law based on the intelligence, self-awareness, and complex behavior of marine mammals). *But see Whales Not Slaves Because They Are Not People, Judge in SeaWorld Case Rules*, GUARDIAN, Feb. 9, 2012, <http://www.guardian.co.uk/environment/2012/feb/09/whales-not-slaves-judge-seaworld> (last visited Feb. 17, 2013) (describing the dismissal of a lawsuit brought by People for the Ethical Treatment of Animals against Seaworld on the ground that “[t]he only reasonable interpretation of the 13th Amendment's plain language is that it applies to persons and not to non-persons such as orcas”).

⁸³ See Ellen P. Goodman, *Book Review: Animal Ethics and the Law*, 79 TEMP. L. REV. 1291, 1300 (2006) (reviewing ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds., 2004)) (“The basic tenet of animal rights is that animals who can be considered autonomous subjects have rights, and humans have associated duties.”).

⁸⁴ See *id.* at 1301–02 (referring to Francione, and noting that “[a]ny animal that has a sense of self, he says, has an interest in continued existence in addition to an interest in happiness”); see also *id.* at 1302 (“Animals who possess this core consciousness, even if they lack an autobiographical sense of their lives, have ‘a continuous mental existence,’ which Francione contends gives them ‘an interest in their lives’ and in not being killed.” (quoting Gary L. Francione, *Animals—Property or Persons?*, in ANIMALS RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 108, 128 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004))); *id.* at 1307 (noting that “animals have dignitary interests”).

⁸⁵ See, e.g., *id.* at 1301 (“Francione makes a right to life dependent on animal consciousness, not mere sentience.”).

⁸⁶ See David Hoch, *Environmental Ethics and Nonhuman Interests: A Challenge to Anthropocentric License*, 23 GONZ. L. REV. 331, 346 (1987–88) (“If animals have interests, we have moral obligations toward them.”).

⁸⁷ See Patrick Lee & Robert P. George, *The Nature and Basis of Human Dignity*, 21 RATIO JURIS 173, 179 (2008) (“One can then say that what promotes the organism's survival and flourishing is *in its interest* and what diminishes its chances of survival or flourishing is *against its interests*.”); see also Gillespie, *supra* note 53, at 14 (“[T]his construct suggests that individual animals, as is the case with humans, that possess inherent value may not be sacrificed for utilitarian goals.”).

inherent rights that humans are bound to respect.⁸⁸ Regan suggests that an animal's goals give it an inherent value beyond any instrumental value it might have, and "since inherent value cannot be ranked," animals are "entitled to equal, inviolable, moral treatment vis-à-vis other possessors of inherent value."⁸⁹

While possessing freedom of choice or autonomy from human control does not necessarily mean that animals "have full basic and inherent dignity (moral worth) or rights,"⁹⁰ humans recognize moral worth in animals and feel a sense of moral responsibility towards them because of their "intrinsic value."⁹¹ This sentiment may be based on a sense of affection and empathy people feel for animals like whales⁹² because of analogous neurological features and feelings,⁹³ as well as social and psychological needs.⁹⁴ Barbara

⁸⁸ See Hoch, *supra* note 86, at 336 ("Regan claims that animals have certain inherent rights that moral agents are ethically bound to recognize and honor.").

⁸⁹ See Gillespie, *supra* note 53, at 14; see also *id.* at 13 ("Regan argues that beings that are the subject of life, and have goals important to them, should be deemed to possess inherent value. In turn, inherent value should make them valuable in their own right, irrespective of any instrumental value they may possess in the eyes of humans.").

⁹⁰ See Lee & George, *supra* note 87, at 179 ("[F]lourishing includes pleasure and lack of pain (though it also includes other things such as their life and their activities). Yet it does not follow from these points that they have full basic and inherent dignity (moral worth) or rights."); see also Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 399 (2003) (The "goal [of animal rights advocates] can be taken far more ambitiously, as an effort to say that animals should have rights of self-determination, or a certain kind of autonomy. Hence some people urge that certain animals, at least, are 'persons,' not property, and that they should have many of the legal rights that human beings have.").

⁹¹ See Goodman, *supra* note 83, at 1293 ("[An approach to animal protection] influenced by Kantian philosophical traditions . . . takes as its starting point the claim that animals have moral claims to life and liberty. If such rights exist, then, it follows, it is wrong to treat animals as a means to human ends."); see also Sunstein, *supra* note 90, at 396 ("[A]nimals have intrinsic as well as instrumental value.").

⁹² See Lessoff, *supra* note 59, at 413–14 ("The behavioral similarities between whales and man have long been established by the scientific community, and these similarities have raised considerable concern about man's reluctance to allow these creatures to live beside us unharmed. The Federation of American Scientists has noted that there is a good deal to be said for empathizing with whales, as the area of the whale[']s brain associated with the control of emotion is equally well developed to that of man. Additionally, whales, like man, communicate with others of their same kind in a language which has been described as an 'abstruse mathematical poetry.' And unlike man, whose ability to communicate with other species is rudimentary at best, whales have developed interspecies communication with other sea creatures such as dolphins. Like man, whales care for their young and the young reciprocate affection after being reared and finding independence from their mothers. Whales are social animals who live in large groups, and some species live monogamous lives, taking only one mate. Documented evidence exists of incidents in which a whale is harpooned and taken ashore and its mate has lingered, waiting offshore for days, and sometimes weeks before departing out to sea.") (internal quotation marks omitted).

⁹³ Barbara Newell, *Animal Custody Disputes: A Growing Crack in the "Legal Thinghood" of Nonhuman Animals*, 6 ANIMAL L. 179, 183–84 (2000):

According to neurologist Dr. David O. Wiebers: "The EEGs of animals are analogous to those of humans This is not surprising given that the brain structure and other central and peripheral nervous system structures and circuitry, down to the cellular level, are analogous in humans and other animals These structures include . . .

Newell says this affection has moved public opinion from viewing animals as “mere property” to “recognizing that they are sentient and emotive beings,” deserving protection.⁹⁵

The moral duty humans feel toward animals may also flow from their capabilities—in the case of whales, from the size of their brains and the superior intelligence they display in their ability to communicate and hunt cooperatively.⁹⁶ To J. Baird Callicott, since whales are members of the same biotic community of intelligent, “warm blooded, live-birthing, long-lived, suckling, nurturing, playful, curious, learning beings”⁹⁷ as humans are, they should be owed comparable moral respect. If Sunstein is right that what animals deserve in terms of human treatment should be related to their capacities,⁹⁸ then killing whales that have capacities comparable to humans is equivalent to “murder,”⁹⁹ and therefore amoral, according to Taimie Bryant. An animal’s rational nature may also be the basis for granting them “full moral worth,” even if they cannot conceptualize, sense anything other than their existence, project into the future in their deliberations, or choose between options like humans.¹⁰⁰

sensory systems for pain and touch perception, vision, hearing, taste, and smell; and, in many cases, centers which mediate mood and personality.” Other physicians and scientists have made similar observations about the minds of humans and other animals. The eminent British neurologist Lord Walter Russell Brain (1895–1966) observed . . . “I at least cannot doubt that the interests and activities of animals are correlated with awareness and feeling in the same way as my own”

Id. (quoting David O. Wiebers, *Healing Society’s Relationship with Animals: A Physician’s View*, 44 *SUNRISE* 164, 164–65, 167 (1995), available at <http://www.theosociety.org/pasadena/sunrise/44-94-5/an-wieb2.htm>).

⁹⁴ See *id.* at 184 (“Biologists and ethologists likewise have established that mammals have their own needs and desires, including those of a social and psychological nature, as well as physical.”).

⁹⁵ Newell, *supra* note 93, at 182 (“As Judge Andell stated: “[t]he law must be informed by evolving knowledge and attitudes. Otherwise, it risks becoming irrelevant as a means of resolving conflicts. Society has long since moved beyond the untenable Cartesian view that animals are unfeeling automatons and, hence, *mere* property. The law should reflect society’s recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live.”) (quoting *Bueckner v. Hamel*, 886 S.W.2d 368, 377–78 (Tex. App. 1st 1994)).

⁹⁶ Ruffle, *supra* note 17, at 667 (“Proponents of whale preservation tend to base their arguments on scientific knowledge of whales indicating that the animals are intelligent, sentient beings capable of communication. For example, studies suggest that the large brain size of whales coupled with systematic and cooperative hunting techniques exhibit the superior mental abilities of marine mammals. Further evidence of whales’ intelligence is found in their ability to communicate with one another. Much remains unknown about the species. This deficiency in knowledge can be remedied through use of non-lethal scientific research.”).

⁹⁷ Callicott, *supra* note 47, at 23.

⁹⁸ Sunstein, *supra* note 90, at 401 (“[T]he rights that animals deserve should be related to their capacities.”).

⁹⁹ See Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, 39 *RUTGERS L.J.* 247, 256 (2008).

¹⁰⁰ Lee & George, *supra* note 87, at 187 (“Neither sentience nor life itself entails that those who possess them must be respected as ends in themselves or as creatures having full moral worth. Rather, having a rational nature is the ground of full moral worth.”). But it should be

According to Francione, the capacity of animals to feel creates another source of moral duty towards them; thus creating a basic “liberty right[]” for animals.¹⁰¹ Bentham argued that the shared capacity with humans to feel pain creates a moral duty towards them;¹⁰² to modern animal welfare scholars, this shared capacity to feel pain raises the ethical bar and gives animals “moral worth” comparable to humans.¹⁰³ Thus, from a theoretical perspective, while animals like whales are certainly not human, that does not mean they are devoid of moral worth and have no entitlement to life.

Then there are pragmatic reasons to grant whales a right to life. They occupy a critical place in an ecosystem upon which humans depend. According to Mark Coeckelbergh, this dependency makes it unjust to exclude these animals from our “moral sphere and related conceptual frameworks.”¹⁰⁴ Viewing whales as “co-operands” diminishes the importance of ontological similarities or dissimilarities between whales and humans¹⁰⁵—we only need to see that they are “an integral and necessary part of a wider co-operative (quasi-)social scheme.”¹⁰⁶ Therefore, to Coeckelbergh, excluding animals like whales from a moral scheme is an unjustifiable conceit and an indefensible “value-laden belief.”¹⁰⁷ Under modern ethical principles, this respect should at a minimum imply non-interference with other members of our biotic community.¹⁰⁸ While hunting may be an exception to these principles, it should not cause unnecessary suffering. Causing an animal to suffer—what Sunstein calls “unconscionable barbarity”¹⁰⁹—debases humanity, while treating animals well improves

noted that Lee and George believe that only humans possess this trait. *See id.* at 191 (“[H]uman beings are animals of a special kind. They differ in kind from other animals because they have a rational nature, a nature characterized by having the basic natural capacities for conceptual thought and deliberation and free choice.”).

¹⁰¹ Goodman, *supra* note 83, at 1301 (“Francione, perhaps most radical of the animal rights theorists . . . argu[es] that animals qualify for basic liberty rights merely because they feel.”).

¹⁰² Hoch, *supra* note 86, at 334–35 (“Bentham argued that if animals are capable of suffering then humans have more duties toward them.”).

¹⁰³ *See* Lee & George, *supra* note 87, at 176 (“Animal welfarists argue that the criterion of moral worth is simply the ability to experience enjoyment and suffering.”).

¹⁰⁴ Mark Coeckelbergh, *Distributive Justice and Co-Operation in a World of Humans and Non-Humans: A Contractarian Argument for Drawing Non-Humans into the Sphere of Justice*, 15 RES PUBLICA 67, 70–71 (2009).

¹⁰⁵ *Id.* at 70 (“[T]here is no need to assume or demand that the co-operands be moral or ontological equals.”).

¹⁰⁶ *See id.* at 74–75 (“If we take seriously the fact that the human world *depends* on the non-human world, then it is not even necessary to blur the categorical line between the moral status of humans and that of non-humans to understand non-humans as an integral and necessary part of a wider co-operative (quasi-)social scheme.”).

¹⁰⁷ Coeckelbergh, *supra* note 104, at 72.

¹⁰⁸ On the topic of environmental ethics and environmental law, see generally Purdy, *supra* note 1, at 859–60 (arguing for the continuing relevance and importance of environmental ethics in developing a theory of nature and the place of humans in it).

¹⁰⁹ *See* Sunstein, *supra* note 90, at 401 (“I believe that in the long run, our willingness to subject animals to unjustified suffering will be seen as a form of unconscionable barbarity—not the same as, but in some ways morally akin to, slavery and the mass extermination of human beings.”).

human welfare.¹¹⁰ Whale hunting is anything but humane¹¹¹ and therefore should not be countenanced as an exception to these ethical precepts.

Additionally, whales occupy a place in the pyramid of life that Aldo Leopold's *Land Ethic* famously celebrates.¹¹² When so little is understood about whales, a keystone species in the marine ecosystem, the land ethic dictates that it is wiser not to kill them.¹¹³ Recognizing the interconnectedness of life forms also increases the importance of the survival of each part of the natural system and should temper the proclivity of humans towards destroying parts of it.¹¹⁴ Although humans should feel morally responsible for maintaining the integrity of marine ecosystems, Allison Rieser laments that whales have "become a symbol of human-kind's inability to find common ground and cooperate to protect the global environment."¹¹⁵ "Where we identify values that are both important and fragile, we should craft policies that favor their survival."¹¹⁶ The lack of information about whales affects the assessment of the costs and benefits of their protection, as well as the consequences of different responses to their plight.¹¹⁷ For example, figuring out what a sustainable population of various whale species might be can "generate consequences and ramifications that

¹¹⁰ See Goodman, *supra* note 83, at 1303 ("[H]umans should treat animals well to enhance human welfare.").

¹¹¹ Callicott, *supra* note 47, at 15 (noting the practical impediments to quick, humane whale hunting techniques).

¹¹² See ALDO LEOPOLD, *The Land Ethic, in A SAND COUNTY ALMANAC, AND SKETCHES HERE AND THERE* 201, 214–17 (1949).

¹¹³ See Callicott, *supra* note 47, at 8 ("Significantly interfering with poorly understood complex population equilibria courts disaster."); see also J. Barkmann & R. Marggraf, *The Long-Term Protection of Biological Diversity—Lessons from Market Ethics*, 3 *POIESIS & PRAXIS* 3, 6 (2004) ("Human production and consumption need a number of services—environmental or ecosystem services—from nature.").

Option benefits stem from values for which it is uncertain to which degree they will be actualised in the future. Just from keeping the option of a future benefit, the present decision-maker can enjoy an option benefit. Despite the best ecological research we do not know all biodiversity and ecosystem services, and we do not always know in time if and how we endanger them. As a result, there prevails fundamental ecological uncertainty. In turn, these uncertainties result in ecological risks that are at least partly unknown today, although potentially catastrophic results may occur.

See id.

¹¹⁴ *See id.* at 5 ("Of this multitude of potential reasons why biological diversity should be protected, its capacity to prevent the break-down of the global life-support systems in an unpredictably changing world is particularly important. Safeguarding the global life-support systems for this and future generations is a minimum requirement for sustainable development. In a 'morally free zone,' it is nearly impossible to achieve these objectives. Can we trust upon economics to help achieve these objectives?"); see also *id.* ("Gauthier (1986) argues that a perfectly competitive market is a 'morally free zone.' Many economists convey an image of moral indifference, to put it carefully, who point relentlessly at the 'economic rationality' of questionable behavior such as free-riding, tax evasion, illegal employment, etc.").

¹¹⁵ Rieser, *supra* note 49, at 401–02.

¹¹⁶ Doremus, *supra* note 69, at 297.

¹¹⁷ *Id.* at 332. Doremus also notes that "the level of information realistically available simply will not support objective choices among possible alternatives, even without the added complication of ambiguous goals." *Id.*

are difficult to foresee,” making it hard to predict the effectiveness of a particular solution.¹¹⁸ If the proposed solution is ineffective, then there exists the possibility that there might be irreversible environmental harm.¹¹⁹ As Doremus observes, “environmental policy choices tend to be sticky, carrying lasting consequences that may be difficult to foresee and are certainly difficult to reverse.”¹²⁰

Being reluctant to interfere in the functioning of an important ecosystem is also justified by a moral duty toward future generations¹²¹ and preserving their “fair access to resources.”¹²² It is unlikely that future generations will “be prepared to accept a deterioration of the environmental life-support systems on which they are most likely to depend.”¹²³ Indeed, “safeguarding [these] global life-support systems for this and future generations is a prime objective and a minimum requirement of sustainable development,” because if these systems are lost, “no more human production or consumption is possible.”¹²⁴ Ironically, if the academics’ proposal were applied in this context, there would be “nothing left that could be exchanged for any profits.”¹²⁵

¹¹⁸ *Id.* at 333.

¹¹⁹ *Id.* (noting that “even theoretically reversible impacts can be practically irreversible”).

¹²⁰ *Id.*

¹²¹ See Charles K. Wilber, Book Review, 55 J. ECON. BEHAV. & ORG., 437, 440–41 (2004) (reviewing R.M. Blank & W. McGurn, *IS THE MARKET MORAL? A DIALOGUE ON RELIGION, ECONOMICS & JUSTICE* (2004)):

A clear illustration is provided by asking what consideration is owed the interests of future generations in making decisions today. Of course, the market in most cases is blind to such considerations, since it is oriented to the purchasing power of those who are alive today. If it is determined that future generations indeed should have some sort of moral standing in our deliberations, then we have a failure of the market and some kind of intervention (government?) on their behalf may be needed. In instances when government intervention is already taken for granted, as in cases in which cost-benefit analysis is being used to evaluate a project, the interests or needs of the future represent at least an additional factor to be added to the analysis. Assuming that one decides to take into account the interests of future generations and that one decides to do so in a quantified, utilitarian way, one question that arises is whether and by how much costs and benefits in the future should be discounted. There may not be an answer without the guidance of philosophic or theological ethics.

Id.; see also Barkmann & Marggraf, *supra* note 113, at 3 (“Because the fairness principle of market ethics requires that economic agents who cause ‘external’ costs must, at least, compensate those who are burdened with these costs, the interests of future generations have to be included in responsible economic decision-making.”); *id.* at 13 (“Negative external effects are an ethical problem because there is usually no agreement between the economic agent causing the external cost, and the economic ‘patient’ who suffers a loss of benefits.”).

¹²² Curran, *supra* note 75, at 60.

¹²³ Barkmann & Marggraf, *supra* note 113, at 14.

¹²⁴ *Id.* at 6.

¹²⁵ *Id.* see also *id.* at 9–10 (refuting the notion that “economic agents do not have a moral attitude”). Barkmann and Marggraf acknowledge that “future generations are *strange, anonymous* transaction partners with respect to the external effects of today’s production and consumption activities.” *Id.* at 13. They are “unable to send market signals and can not be investigated empirically,” nor are their “preferences for market and non-market goods” known to present generations. *Id.* at 13–14.

To the extent that there are market ethics, they demand that individuals alive today respect the limits of the willingness of future generations to trade.¹²⁶ This means that present generations should “pay particular attention to the long-term conservation of biological diversity and to the pro-active protection of the capacities of ecological systems to self-regulate and self-organise which implies safeguarding the long-term function of the main biogeochemical processes.”¹²⁷ While “we cannot force the future to share our values,” we can try to be sure that the way in which we deal with environmental problems gives the solutions “the temporal durability they need” so that “future generations have the opportunity to share our views.”¹²⁸ Unfortunately, “[t]he indeterminate nature of environmental problems necessarily implies similar indeterminacy about solutions. No finite set of possible solutions among which to choose can be universally agreed upon, because what counts as a solution depends upon how the problem is defined.”¹²⁹ With respect to whales, inadequate information has led to differences of opinion as to what the problem is.¹³⁰ Additionally, because people are more likely to accept information that is consistent with their pre-existing views and to reject information that is not, when the information on a topic that people feel strongly about is mixed, this can act to “polarize[] their views”—which is exactly what has happened on the IWC—instead of creating “common ground” for decision-making.¹³¹

I believe these points argue in favor of granting whales full moral worth and a right to life—either in their own right, or because of our dependence on them, or both. If this conclusion is correct, then harming whales, let alone depriving whales of their right to life under any circumstances, is morally wrong, thus making the economists’ proposal morally suspect.¹³²

¹²⁶ See *id.* at 14 (“[T]he future ethics derived from market ethics can only demand of an individual living today that she respects the limits of the willingness-to-trade of future generations without restriction *if she has sufficient resources for her own survival.*”)

¹²⁷ *Id.* (citation omitted).

¹²⁸ Doremus, *supra* note 69, at 329.

¹²⁹ *Id.* at 332.

¹³⁰ See Lessoff, *supra* note 59, at 422 (“What data exists [sic] are questionable in many aspects, fragmentary, and at best, highly speculative. Information on the marine ecosystem necessary for any real understanding of living whales is almost totally lacking.”). In a 1972 meeting of the IWC, a “selective moratorium” concept called the New Management Procedure was introduced: “It was intended to manage whale stocks by utilizing the idea of ‘Maximum Sustainable Yield’ (‘MSY’). This program was implemented in 1975 and reduced quotas for whales. However, the program was ineffective in preventing the exploitation of whales due to poor biological data on whale species and their decline.” Nagtzaam, *supra* note 16, at 409–10; see also Ruffle, *supra* note 17, at 667 (“[C]urrent methods for ascertaining whale populations have proven dangerously inaccurate because the data is subject to individual biases and methodological flaws.”).

¹³¹ Doremus, *supra* note 69, at 359. Indeed, according to Doremus, the search for “rational” decisions is more likely “to entrench starting positions and exacerbate the opposing sides’ distrust of one another.” *Id.* Again, this appears to be the situation with regards to what has happened on the IWC.

¹³² Purdy identifies as a “major theme” in any discussion of environmental values a “resistance to harming another entity that is recognized as having moral value. This *aversion to doing harm* has organized much of the extension of moral concern to animals, plants, and less

A second flaw in the academics' proposal is their extension of markets to a sphere of life where they should not go—namely, to a market mechanism that trades in the life of a being with moral worth.¹³³ Like Sandel, I would like to resist this “tendency” because it is “by and large a bad thing.”¹³⁴ Sandel objects to extending markets and “market-oriented thinking” on two grounds: coercion and corruption.¹³⁵ Only the latter has relevance here.

Sandel's corruption objection is based on “the degrading effect of market valuation and exchange on certain goods and practices,” such as “moral and civic goods.”¹³⁶ At the heart of the corruption objection is the “moral importance of the goods at stake.”¹³⁷ As he says, “[t]here are, in a civilized society, some things that money cannot buy,¹³⁸ and commodifying

obvious entities such as species and ecosystems.” Jedediah Purdy, *Our Place in the World: A new Relationship for Environmental Ethics and Law*, (manuscript at 27), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5179&context=faculty_scholarship.

¹³³ See Sandel, *supra* note 81, at 93 (bemoaning “the extension of markets and market-oriented thinking to spheres of life once thought to lie beyond their reach”); see also Wilber, *supra* note 121, at 440 (“Free market capitalism fails to provide adequate housing, medical care, education, socio-economic security, and meaningful participation in economic life for all families, including the poorest. Its unrestrained profit motive results in environmental destruction, promotes a soulless consumerism, and destroys the human environment needed by a community of persons.”).

¹³⁴ Sandel, *supra* note 81, at 94. Similarly, Blosser has noted that:

Economists cannot continue to believe that their models are morally neutral and directly lead to accurate policy prescriptions. They must take responsibility for the kinds of symbolic universes they create because their voices are important shapers of our society. Our government is full of economists and so are the cable news shows. Economists shape the symbolic universes of others, and they are responsible for the views of the world they teach.

Blosser, *supra* note 7, at 455; see also Barkmann & Marggraf, *supra* note 113, at 18 (“[A] pure market solution to cover potentially catastrophic [ecological] risks . . . is doomed to fail.”).

¹³⁵ Sandel, *supra* note 81, at 93–94.

¹³⁶ See *id.* (providing as an example the sale of human body parts such as a kidney to argue that such “valuation and exchange” violate the sanctity of the human body); see also Blosser, *supra* note 7, at 349 (“As George Stigler once answered his own question—where do economists get their ethical systems? My answer is wherever they can find them.” (quoting George J. Stigler, *The Ethics of Competition: The Friendly Economists* 12 (Univ. of Chi. Ctr. for the Study of the Econ. & the State, Working Paper No. 12, 1980)), *available at* <http://research.chicagobooth.edu/economy/research/articles/12.pdf>); Barkmann & Marggraf, *supra* note 113, at 8 (“Safeguarding the global life-support systems for this and future generations is a prime objective and a minimum requirement of sustainable development. In a ‘morally free’ market zone, these objectives and requirements may be impossible to achieve. Can economic theory preoccupied with self-interested individuals and oriented towards an ideal market system be trusted to help achieve these goals?”).

¹³⁷ Sandel, *supra* note 81, at 95.

¹³⁸ *Id.* at 100 (quoting a New Jersey Supreme Court judge in *In re Baby M.*, 537 A.2d 1227, 1249 (N.J. 1988) (referring to the sale of a baby)); see also Doremus, *supra* note 69, at 323 (“Opponents [of cost-benefit analysis] . . . argue that some things cannot be meaningfully monetized, and that these non-fungible resources will be systematically undervalued if their value must be expressed in monetary terms. They also worry that a market model, even one that relies on virtual rather than real markets, will shape the way society values those things.”).

such goods degrades them “by using them as instruments of profit.”¹³⁹ This objection, Sandel says, is intrinsic to the good itself because it cannot be remedied by changing “the background conditions within which market exchanges take place.”¹⁴⁰ Here, killing a being with moral worth and an entitlement to life degrades the intrinsic value of that good, and this problem cannot be remedied by changing the way the market works as long as it is necessary for a whale to die. Sandel does not argue that commodifying certain goods or practices should be legally prohibited, but merely argues that it can be “morally objectionable.”¹⁴¹ However, “[t]he moral status of a contested commodity should figure as one consideration among others in determining its legal permissibility.”¹⁴²

Looking at the moral worth of a good to determine whether it should be part of a market exchange does not require determining that good’s monetary value, but rather determining “what mode of valuation is fitting or appropriate to that good.”¹⁴³ In other words, it requires determining the good’s intrinsic worth—something markets are not designed to do.¹⁴⁴ Quantification of objects is necessary for a market economy to work,¹⁴⁵ and quantifying an object with intrinsic value, like moral worth, creates problems for markets because it has no other features that can be monetized.¹⁴⁶ Here, the good being exchanged is not just a whale with an external commercial value, but a whale imbued with intrinsic moral worth, the sale of which under the academics’ proposal will “diminish” or “corrupt” its character.¹⁴⁷ There is no external value that can be put on a whale’s moral worth any more than value can be ascribed to a human’s moral worth.

Sandel also argues that the corruption objection to using a market in certain circumstances “call[s] into question” a basic tenet of “market-oriented thinking” that “all goods are commensurable, that all goods can be

¹³⁹ Sandel, *supra* note 81, at 100; *see also* Blosser, *supra* note 7, at 368 (“[Adam] Smith is absolutely right to worry about the extent to which the commercial life isolates and erodes the moral sentiments.”).

¹⁴⁰ Sandel, *supra* note 81, at 95; *see also* Doremus, *supra* note 69, at 326 (“No individual could similarly modify the market to align the incentives of market participants with environmental costs or benefits.”).

¹⁴¹ *Id.* at 96.

¹⁴² *Id.*

¹⁴³ *Id.* at 101.

¹⁴⁴ *See id.*

¹⁴⁵ *See* Curran, *supra* note 75, at 77 (“[S]ome quantification is required for a market economy to operate. The market economy is recognised as being an efficient and flexible method of providing this quantification and enabling allocation of resources to meet individual needs and preferences.”). In contrast, “[l]egal and moral concepts such as rights assumed the importance of things independent of any satisfaction of human preferences.” Purdy, *supra* note 1, at 865.

¹⁴⁶ *See* Curran, *supra* note 75, at 59 (“The very term, ‘intrinsic value’ exacerbates this conflict; Black’s Law Dictionary defines intrinsic value as ‘the inherent value of a thing, without any special features that might alter its market value.’” (quoting BLACK’S LAW DICTIONARY 1587 (8th ed. 2004))).

¹⁴⁷ Sandel, *supra* note 81, at 104.

translated without loss into a single measure or unit of value.”¹⁴⁸ A common criticism of cost benefit analysis¹⁴⁹ is that it forces the reduction of multiple values into a single numeric value.¹⁵⁰ While quantitative criteria “promise transparency, predictability and consistency,” and “offer confidence that neutral principles, rather than personal biases of the decision maker or other extraneous factors” control decisions,¹⁵¹ regrettably, according to Doremus, these “appeals to objectivity are frequently disingenuous, misguided, or both.”¹⁵² There is simply no “objectively right or wrong answer” to the whale problem.¹⁵³ This search for “objective certainty is more likely to produce paralysis than improved policy decisions,”¹⁵⁴ which appears to be exactly what has happened with respect to whales, as each side searches for

¹⁴⁸ *Id.*; see also Blosser, *supra* note 7, at 374 (“[T]he particular danger of economic power [is] that the ‘technological imperative—because we *can*, we *should*—risks reducing everything to instrumental value, to price, in the pursuit of technological goods as a final value.’ Human power is a perennial concern of Schweiker’s and he warns in words reminiscent of Troeltsch that ‘the radical extension of human power in our time threatens to overwhelm moral reason, making all moral reflection instrumental to the simple purpose of furthering human power.’ What we need today is a morality that does not buckle under the human quest for power but makes such specialized economic power responsive to theological, political, and social values.” (quoting WILLIAM SCHWEIKER, *RESPONSIBILITY AND CHRISTIAN ETHICS* 27 (1995))); Wilber, *supra* note 121, at 440 (“Social scientists, including economists, do need to understand that a conception of virtuous living needs to be revived in the public debate over workable policies.”).

¹⁴⁹ Another criticism of cost-benefit analysis leveled by Lawrence Tribe is that it turns “obligation into self-interest.” Laurence Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 *YALE L. J.* 1315, 1331 (1974); see also Barkmann & Marggraf, *supra* note 113, at 19 (noting that each development project creates “an incremental loss of ecosystem potential to adapt to challenging environmental conditions,” and the ability of an ecosystem “to self-organise is progressively diminished,” and recommending that “[t]his loss of an insurance value should be included in [cost-benefit analysis],” which “will make environmentally damaging projects more difficult to justify economically”). For these reasons Barkmann and Marggraf recommend the adoption of a “safe minimum standard” to protect ecosystems, noting that the use of such a standard “does not allow for a computational compensation in monetary terms” because such compensation “[is] of little help in this worst case of global change.” *Id.* at 18.

¹⁵⁰ See Aagaard, *supra* note 80, at 1543 (“Cost-benefit analysis involves inventorying the consequences of a decision option, monetizing the consequences, and then aggregating monetized values to produce a net value of the option [I]t is cost-benefit analysis’s insistence that policy effects ‘should be aligned along a single numerical metric . . . that often forces the [cost-benefit] analyst to adopt methods of quantification and monetization that attract criticism.” (quoting Douglas A. Kysar, *It Might Have Been: Risk, Precaution and Opportunity Costs*, 22 *J. LAND USE & ENVTL. L.* 1, 17 (2006))); see also Tribe, *supra* note 149, at 1325–26 (objecting to cost benefit analysis because, while it can accommodate different types of values, it treats “individual need and desire as the ultimate frame of reference”); Purdy, *supra* note 1 (manuscript at 16) (noting that “[c]ost-benefit analysis also achieved a certain kind of neutrality by rendering competing values into a single currency at a time when neutrality’s value was on the rise”). Purdy also notes that “[l]egal and moral concepts such as rights assumed that rights holders mattered, regardless of whether their existence satisfied any human preferences.” *Id.* at 865.

¹⁵¹ Doremus, *supra* note 69, at 330.

¹⁵² *Id.* at 331.

¹⁵³ *Id.* To make matters worse, “observers with different perspectives and values describe [environmental problems] very differently.” *Id.* This is one reason Doremus describes environmental problems as “wicked.” *Id.*

¹⁵⁴ *Id.* at 334.

definitive, scientific support for its position.¹⁵⁵ The emphasis on value-neutral information is also a way of “sweeping” a discussion about values “under the rug,” an approach that “systematically favors a particular, utilitarian perspective, which may not accurately reflect societal ethical intuitions.”¹⁵⁶

According to Doremus, “there is substantial evidence that the existence and form of markets, which are framed by law, affect the development of societal values, tastes, and preferences.”¹⁵⁷ This means that a market in whale shares could have a powerful influence on those values. The academics’ proposal is even more problematic from a broader societal perspective in light of Doremus’ insight—that markets, which act to “frame problems and choices,” can “contribute to perceptions of entitlement and fairness . . . [and] encourage the exercise of self-regarding, rather than other-regarding, preferences.”¹⁵⁸

To distinguish between goods that can be exchanged in a market place, Sandel relies on two factors: “moral intuition” and some “conception of the good” in situations when the commodification of that good is “morally contested.”¹⁵⁹ Sandel might argue that the “good” here is a life, the corruption or degradation of which cannot be allowed. Just as selling people (e.g., slavery) is morally unacceptable, so too is trading in the lives of animals that possess moral worth. As Sandel says, there are “dimensions of life that lie beyond consent, in the moral and civic goods that markets do not honor and money cannot buy.”¹⁶⁰

Finding the academics’ proposal morally wanting still begs the question: how can whales be protected? This Essay suggests that the answer lies in norms. Norms informally guide people in what is socially correct behavior, and, therefore, may offer an effective alternative to both the flawed international regulatory regime and the academics’ morally suspect proposal.¹⁶¹ Norm-forcing holds appeal because “internalized norms can provide efficient decentralized mechanisms for governing behavior,”¹⁶² which can be particularly useful when there is no centralized governmental support for the behavioral change, as is the case in most whaling countries like

¹⁵⁵ See Lessoff, *supra* note 59, at 422 (“[W]haling nations exploited the differences of opinion which existed in the scientific community to justify continued whaling practices.”); see also *id.* at 421–22 (“[A]lthough many nations demanded more research be performed prior to the imposition of a moratorium or quotas limiting the harvesting of specific types of whales, this research was rarely accomplished. To exacerbate the problem, current scientific methods used to determine the viability of the whale stocks were imprecise and often inaccurate, and thus, there was little in the way of scientific support for the imposition of such restrictions.”).

¹⁵⁶ Doremus, *supra* note 69, at 298.

¹⁵⁷ *Id.* at 310.

¹⁵⁸ *Id.* Doremus also notes that by providing rewards like payments, markets can decrease the intrinsic pleasure people receive from engaging in voluntary activities. *Id.*

¹⁵⁹ Sandel, *supra* note 81, at 107.

¹⁶⁰ *Id.* at 122.

¹⁶¹ See Barkmann & Marggraf, *supra* note 113, at 11 (“[P]urely self-interested individuals comply with general social norms, with the rules of market ethics, or with the ecological long-term interests of future generations.”).

¹⁶² Doremus, *supra* note 69, at 313.

Japan.¹⁶³ Behavioral change can “lead indirectly to changes in values as people internalize the new norms.”¹⁶⁴ Norms also cost little to enforce, as citizens under their influence “will impose sanctions on themselves, ensuring perfect detection and punishment.”¹⁶⁵

While some norms, such as the duty to maintain biodiversity and protect species from extinction, have gained the status of becoming customary international law,¹⁶⁶ this is not true for the whale preservation norm. The continuing controversy over commercial whaling on the IWC and the use of exemptions allowing whales to be killed show the lack of universal acceptance of such a norm and why it is not yet customary international law. However, there is a growing international consciousness that killing whales is morally repugnant, which is an indication of an emergent international whale preservation norm.¹⁶⁷ That consciousness is apparent from the fact that only a few countries adhere to a different norm.¹⁶⁸ Collectively, the refusal of those countries to hunt whales manifests an international awareness of a legal obligation towards whales—perhaps even of the existence of a right to life with commensurate legal and moral obligations owed by humanity.¹⁶⁹ If this emerging international whale preservation norm could be successfully dispersed to whaling countries, it might move the citizens of those countries to undertake actions that protect whales without requiring the sacrifice of whales to save them.

¹⁶³ See Hirata, *supra* note 46, at 146 (“Japan has virtually no legislative advocates for the antiwhaling cause and no legislative supporter of antiwhaling activism.”).

¹⁶⁴ Doremus, *supra* note 69, at 313–14.

¹⁶⁵ *Id.* at 313; see also Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 957 (1997); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 368–69 (1997).

¹⁶⁶ See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

¹⁶⁷ See D’Amato & Chopra, *supra* note 18, at 22–23 (“This essay examines the history, and argues for the ‘presentiation,’ of a broadening international consciousness about whaling amounting to an *opinio juris*—the psychological component of international customary law. When this component is added to the evolving practices of states toward whaling, the combination of psychological and material elements arguably constitutes binding customary law. The dynamic element of that custom and its underlying philosophy generate, we conclude, an emergent entitlement *of* whales—not just *on behalf of* whales—to a life of their own.”); see also Nagtzaam, *supra* note 16, at 447; Robert L. Friedheim, *Introduction: The IWC as a Contested Regime*, in TOWARDS A SUSTAINABLE WHALING REGIME 9 (Robert L. Friedheim ed., 2001) (“The preservation norm has gone through a ‘tipping point’ [in the whaling community] and has ‘cascaded’ throughout the world community, and all that needs to be done is to have it ‘internalised’ by the peoples and governments of the world.”).

¹⁶⁸ See *supra* notes 47–54 and accompanying text (describing the refusal of certain whaling countries to comply with the IWC moratorium); see also *infra* notes 177–79 and accompanying text (noting that these countries persist in challenging the moratorium at every annual IWC meeting).

¹⁶⁹ Nations that maintain a contrary position in the face of such an emerging universal norm threaten to undercut the nature of international law as a reflection of general norms that bind states. See D’Amato & Chopra, *supra* note 18, at 56 (“If any state could claim sovereign rights in the teeth of an international norm to the contrary, international law (as a set of general norms binding on states) would not exist.”).

However, diffusion of a whale *preservation* norm is complicated by the existence of another whale norm—the whale *conservation* norm, which emphasizes the wise use and conservation of natural resources.¹⁷⁰ This norm finds wide support in many different cultures because it is a “utilitarian, human-centered perspective that seeks the greatest good for the greatest number of humans.”¹⁷¹ Pro-whaling countries like the whale *conservation* norm because it supports their goal of resuming whale hunts once sustainable populations are reached.¹⁷² Although the whale *preservation* norm, which has a non-instrumentalist view of whales,¹⁷³ appears to be ascending on the international stage, the IWC has not yet adopted it because of the disagreement among the anti-whaling members over which whale norm should prevail.¹⁷⁴ This norm stalemate has neutralized the IWC as a force for wider norm change. It is unlikely to change any time soon given the fact that both sides are buoyed by other national cultural norms and moral beliefs.

In addition, even though the ban against commercial whale hunting is “reasonably understood and adhered to” by most nations,¹⁷⁵ the whale preservation norm is a weak behavioral guide for those not inclined to follow it. Its weakness is apparent from the fact that whales are still being killed pursuant to scientific research permits and by aboriginal subsistence hunters, despite the questionable scientific and anthropological basis for those exemptions.¹⁷⁶ Other indications of the weakness and questionable durability of the whale preservation norm include the persistent violation of the ban by a number of countries;¹⁷⁷ the fact that its continuation is challenged at every annual IWC meeting;¹⁷⁸ and that the major whaling nation, Japan, has threatened to set up a rival organization based on sustainable use—the *conservation* norm—if the ban is not repealed.¹⁷⁹ While

¹⁷⁰ Nagtzaam, *supra* note 16, at 386–88.

¹⁷¹ *Id.* at 387.

¹⁷² *Id.* at 423.

¹⁷³ *Id.* at 388.

¹⁷⁴ In this, the whale conservation norm is consistent with “[o]ld, influential constituencies support[ing] [use of] natural resources for economic profit” in many countries, including the United States. Purdy, *supra* note 1, at 880; *see also* Blosser, *supra* note 7, at 448 (noting that “the power of the ‘dismal science’ that assumes humans are self-interested utility maximizers results from the reality that all too often humans act the way economists predict”).

¹⁷⁵ Nagtzaam, *supra* note 16, at 444.

¹⁷⁶ *See* D’Amato & Chopra, *supra* note 18, at 62 (finding “little justification for current claims of whaling for scientific research, and only a *prima facie* justification of whaling for aboriginal subsistence needs”).

¹⁷⁷ *See* Ruffle, *supra* note 17, at 658 (“[M]any violations are unnoticed or under-reported and essentially unpunished on an international level.”).

¹⁷⁸ *See* Nagtzaam, *supra* note 16, at 420 (“While preservationism is now ascendant, it hangs by a slim thread that is challenged yearly at IWC meetings by those seeking to roll back the ban.”); *see also* Erik Jaap Molenaar, *Marine Mammals: The Role of Ethics and Ecosystem Considerations*, 6 J. INTL. WILDLIFE L. & POL’Y 31, 42 (2003) (“The 55th Annual Meeting of the IWC (2003) once again gave rise to speculations about a competitor of the IWC.”).

¹⁷⁹ *See* Nagtzaam, *supra* note 16, at 446 (“Japan seems to be losing faith in the process altogether . . . and it threatened to quit the IWC and to set up an alternative organization based on sustainable utilization.”); *see also* North Atlantic Marine Mammal Commission, Agreement

a norm against animal cruelty might be deployed in support of a whale preservation norm, considering the cruelty of whale hunting, there is nonetheless no international animal welfare norm. Even though the majority of member nations at the IWC are concerned about the cruelty of whaling, the organization's reluctance to stop whale hunting stems from the equal desire to preserve aboriginal subsistence hunting, despite its cruelty.¹⁸⁰ A weak animal welfare norm has not been able to defeat a strong aboriginal subsistence norm on the global stage, and the exception for subsistence hunting shows no sign of disappearing.¹⁸¹ So it is highly unlikely that a whaling country will spontaneously adopt the whale preservation norm, since all it would gain would be international reputational benefits, which might not be sufficient to offset domestic opposition to the change.¹⁸²

Since norms are “constructed through shared understandings”¹⁸³ about what constitutes good behavior, “a new social meaning . . . must be created” about the activity in question for a new norm to be adopted.¹⁸⁴ When social understandings change, the institutions and rules that depend on them change as well.¹⁸⁵ Most times, these changes happen imperceptibly because they occur “against a backdrop of shared understandings and social institutions that give them meaning and anchor them in the shared reality of

on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic, Apr. 9, 1992, Vol. 1945, I-33321, available at http://treaties.un.org/doc/publication/unts/volume_1945/volume-1945-i-33321-english.pdf (describing treaty between Norway, Greenland, Iceland, and the Faroe Islands).

¹⁸⁰ See Peter J. Stoett, *Of Whales and People: Normative Theory, Symbolism, and the IWC*, 8 INT'L J. WILDLIFE L. & POL'Y 151, 170 (2005) (“But an intense ethical question arises regarding the aboriginal hunts: The more traditional-style hunts were almost certainly agonizing affairs for the whales involved, involving hours of bleeding.”).

¹⁸¹ Indeed, the IWC recently increased the whaling quotas for aboriginal peoples in the United States, Russia, St. Vincent, and the Grenadines and extended the quotas until 2012. See Erin Lorry, *Controversial Caribbean Whaling Approved with U.S., Russian Aboriginal Hunts*, L.A. TIMES, July 4, 2012, <http://www.latimes.com/news/local/environment/la-me-gs-controversial-caribbean-whaling-approved-with-us-russian-aboriginal-hunts-20120704,0,2970925.story> (last visited Dec. 29, 2012).

¹⁸² Compliance with a norm legitimizes an actor, giving her credibility and status—the affect of being a good citizen; noncompliance makes her an outcast. This affect can extend to countries as well. See Nagtzaam, *supra* note 16, at 432 (commenting on how Japan's noncompliance with the whale preservation norms makes it stand out “as the exception that proves the norm, which is becoming more deeply entrenched among IWC members”). Once norms are internalized, they can guide behavior without outside interference. Until then they can be informally enforced through measures like shaming. See *id.* at 378; see also Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 HARV. ENVTL. L. REV. 117, 134 (2009) (“Norms are informal obligations or social rules that are not dependent on government either for their creation or enforcement.”).

¹⁸³ See Jaye Ellis, *Fisheries Conservation in an Anarchical System: A Comparison of Rational Choice and Constructivist Perspectives*, J. INT'L L. & INT'L REL., 2007, at 1, 14 (discussing how categories of ocean spaces “are social constructions, created through densely layered shared understandings and subject to change as those shared understanding begin to shift”).

¹⁸⁴ Babcock, *supra* note 182, at 146.

¹⁸⁵ See Wilber, *supra* note 121, at 440 (“[McGurn] goes on to argue: ‘To change laws in any meaningful sense we must first do what Wilberforce and Wesley did in Britain over slavery: change minds. And change hearts I might add.’ (quoting William McGurn, *Creative Virtues of the Economy*, in IS THE MARKET MORAL? A DIALOGUE ON RELIGION, ECONOMICS, AND JUSTICE 142 (2004)).

the various interested actors.”¹⁸⁶ This was the case with the emergence of the anti-whaling norm in western countries, which coincided with a general surge in environmental consciousness in those countries.¹⁸⁷ However, changing norms is not easy, especially when it means abandoning previously acceptable behavior long-practiced—which is the case in whaling countries.¹⁸⁸

To the extent that norms guide people into behaving in ways that conform to community expectations, such expectations in pro-whaling countries will have to change first. This can be done by changing the salience of the new norm in the targeted country. For the whale preservation norm to be salient and exert any prescriptive pressure on the behavior of whaling nations, the adopting country must perceive it to be legitimate and widely held. However, the acceptance of a whale preservation norm is not universal, especially given the popularity of the competing whale conservation norm, and its legitimacy is open to question, considering the recovery of many whale species and the non-threatened status of the commonly-hunted minke whales.¹⁸⁹ On the other hand, proponents of the whale preservation norm have fundamentally changed how the world thinks about whale hunting. So, although the whale preservation norm is not yet strong enough to be part of a new cultural identity in whaling nations, it is robust at the international level where it has in all likelihood reached a “tipping point,” making its reversal unlikely.¹⁹⁰ Moreover, internalization of

¹⁸⁶ Ellis, *supra* note 183, at 39.

¹⁸⁷ See, e.g., Cinnamon Pinon Carlarne, *Saving the Whales in the New Millennium: International Institutions, Recent Developments and the Future of International Whaling Policies*, 24 VA. ENVTL. L. J. 1, 6–8 (2005) (discussing how increased environmental awareness and international cooperation led to international efforts to oppose whaling).

¹⁸⁸ See Doremus, *supra* note 69, at 314 (“It seems likely that true value-forcing would work only incrementally; the mere enactment of a law is unlikely to undermine strongly held core values or to deter behavior that provides a strong financial or other benefit.”).

¹⁸⁹ See Detsky, *supra* note 47, at 37 (“Some whale populations have experienced the largest reward the [United Nations Convention on the Law of the Sea] could offer—a recovery from near extinction.”); see also Nagtzaam, *supra* note 16, at 407 (“[W]hen nations like Japan were able to argue plausibly that there was no threat of extinction of certain species (such as minke whales), anti-whaling states and ENGOs shifted ground to argue that it was simply unethical to kill whales.”). But see Callicott, *supra* note 47, at 21 (“[I]f, standing upon a venerable tradition of whaling, the Norwegian government feels justified in flouting international agreements and allowing its citizens to kill the number of minke whales that it believes to be sustainable, surely the governments of Iceland, Russia, Portugal, Brazil, South Africa, Japan, and all the other countries with a whaling ‘tradition’ will soon feel equally justified in doing the same thing. This presents another slippery slope of which to be wary. If the number of minke whales killed annually by Norwegians is sustainable, what happens when other governments, following Norway’s lead, unilaterally allot comparable catch limits to their would-be whalers? At the bottom of this slippery slope lies the tragedy of the commons.”).

¹⁹⁰ See Friedheim, *supra* note 167 (“The preservation norm has gone through a ‘tipping point’ [in the whaling community] and has ‘cascaded’ throughout the world community, and all that needs to be done is to have it ‘internalised’ by the peoples and governments of the world.”); Nagtzaam, *supra* note 16, at 447; see also, Doremus, *supra* note 69, at 313 (“Under the right circumstances, a relatively small nudge of publicity can set off a ‘norm cascade,’ ‘tipping’ society to a new equilibrium, in which a much larger proportion of people acts on, or perhaps has internalized, the norm in question.”); Babcock, *supra* note 182, at 143 (discussing how a

the whale preservation norm by countries like the United States, Australia, France, and the Netherlands have made them powerful proponents for further norm change on the global stage.¹⁹¹

Wider diffusion of a new norm also depends on the cultural characteristics of the target society and the extent to which it “resonates with domestic values.”¹⁹² The whale preservation norm does not resonate at all with the cultural values of a country like Japan, which sees itself as a whale-eating nation,¹⁹³ even though the country’s taste for whale meat is a post–World War II phenomenon.¹⁹⁴ The Japanese have no particular affinity for whales and certainly no belief in their entitlement to life.¹⁹⁵ Killing whales is also consistent with the high value Japan places on protecting its traditional coastal communities,¹⁹⁶ and with other strong norms they adhere to, such as the nationalism norm.¹⁹⁷ On the other hand, any cultural dissonance from adopting the whale preservation norm by a whaling country might be overcome if it is seen as representing a higher norm, like the animal welfare norm. Killing whales, which is unquestionably cruel,¹⁹⁸ is not consistent with Japan’s strong support of a domestic anti-animal cruelty

“tipping point” occurs when a “critical mass” of other actors “become norm leaders and adopt new norms”).

¹⁹¹ See, e.g., PETER J. STOETT, *THE INTERNATIONAL POLITICS OF WHALING* 66 (1997) (“Australia’s delegation, pushed by domestic opposition, slowly turned to oppose commercial whaling.”); *id.* at 85 (“Since the early 1970s, the United States has presented a consistent anti-whaling policy to the world.”); *id.* at 90–91 (noting that, although “European states are as a whole opposed to whaling,” France and the Netherlands have been particularly vocal opponents).

¹⁹² Hirata, *supra* note 46, at 141; see also Doremus, *supra* note 69, at 315 (“Values are at least as likely to be molded by the characteristics of the physical, institutional, and social world that law creates as they are to be determined by law’s messages.”).

¹⁹³ See Doremus, *supra* note 69, at 314 (“Laws that run counter to deeply ingrained norms or values are likely to prove spectacular failures. Widespread violation could signal that the law does not reflect a genuine consensus, encouraging even more violation. That cascade would not only undermine the expressive value of the law in questions, it might even threaten to undermine the general norm of compliance with law.”). Doremus also notes that while “law may be useful in strengthening weakly held values, or in pushing the undecided toward one of a pair of closely contested values,” “value forcing is likely to be slow, since children are probably more susceptible to inculcation with new values than their parents.” *Id.*

¹⁹⁴ See Hirata, *supra* note 46, at 141 (noting “the eating of whale only became commonplace in Japan after World War II”).

¹⁹⁵ See *id.* at 141–42 (“[M]ost Japanese lack any special affinity for whales and disagree with Western animal rights activists who insist on whales’ rights.”).

¹⁹⁶ See Osherenko, *supra* note 47, at 228 (“[A]rtisanal whaling holds cultural, religious, and social importance for Japanese coastal communities.”).

¹⁹⁷ See Hirata, *supra* note 46, at 149 (“Militant action against the Japanese government, through the physical blockage of whaling vessels or shaming campaigns, may backfire, strengthening the nationalist sentiments of the Japanese public and policy makers.”).

¹⁹⁸ See Callicott, *supra* note 47, at 15 (“It can also be appreciated that, as a matter of fact, in more than half of all cases the whale’s death is prolonged and its agony proportionately protracted. Thus, for reasons not of logical but of practical necessity, whaling violates the first land ethical rule of respect for nonhuman fellow-members of the biotic community. It is inherently inhumane for more than half the minke whales taken.”).

norm¹⁹⁹—a reality that might provide an opening wedge for eventual norm change. The homogeneity of whaling countries like Japan, Norway, and Iceland might also make adoption of an anti-whaling norm by those countries easier, as well as the decrease in importance of the whaling industries.²⁰⁰

However, if pro-whaling countries feel that the anti-whaling countries are pressuring them to adopt a new whaling norm, then a countervailing norm like the *autonomy* norm²⁰¹ may prevent its adoption. Alternatively, if Japan or Norway believes they are being treated unfairly—for example, if nonconforming behavior by anti-whaling countries (like eating meat) is not sanctioned, or traditional hunting by the Inuit is acceptable, but hunting by Japanese coastal villages is not—then the *reciprocity* norm may diminish any desire a whaling nation has to adopt the whale preservation norm.²⁰² Putting pressure on a pro-whaling nation to conform to a whale preservation norm may also be viewed as showing disrespect for divergent cultures and could undermine the IWC’s credibility if it were the source of the pressure.²⁰³ Since maintenance of any norm requires informal enforcement before it is internalized, it is unlikely that will occur if whaling countries feel they have been forced to comply with the new norm.

Still, it may be possible to change the preferences of whaling nations by changing the preferences of their citizens.²⁰⁴ Thus, if a preference is held only by a few and not deeply felt, then its strength is limited and a different preference might be possible. Should such a change start to happen in a whaling country, it could create a cascade of changed behavior in that country—a phenomenon that has already happened internationally, as more and more people have abandoned the old whale hunting norm and adopted

¹⁹⁹ See Gillespie, *supra* note 53, at 18 (“[Legislation in Japan] suggest[s] laws are necessary ‘to engender a feeling of love for animals among the people, thereby contributing to the development of respect for life and sentiments of amity and peace.’”).

²⁰⁰ See Hirata, *supra* note 46, at 140 (“Whaling is a minor industry in Japan today, with only the slightest impact on the Japanese economy: The coastal whaling industry is dwindling, and the scientific whaling programs are not-for-profit, as the money generated from the sale of whale meat under the programs is used to cover the cost of the research.”).

²⁰¹ See Michael P. Vandenbergh, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Compliance*, 22 STAN. ENVTL. L. J. 55, 99–101 (2003) (noting that, according to the autonomy norm, individuals should be free from government intervention, unless circumstances indicate that they have done, or will do, a blameworthy activity). “[I]f people adhere to . . . the ‘autonomy norm,’ they may be less likely to increase their compliance in response to threatened formal legal sanctions.” Babcock, *supra* note 182, at 152. Such sanctions may instead embolden their resolve to continue their activities, especially if they view them as important.

²⁰² Babcock, *supra* note 182, at 152 (discussing the autonomy and reciprocity norms).

²⁰³ See Osherenko, *supra* note 47, at 235 (“The costs and negative consequences of the moratorium fall unjustly on those who are marginalized.”).

²⁰⁴ Cf. Wilber, *supra* note 121, at 440 (“McGurn goes on to argue: ‘To change laws in any meaningful sense we must first do what Wilberforce and Wesley did in Britain over slavery: change minds.’ And change hearts I might add.” (quoting McGurn, *supra* note 185)); see also Doremus, *supra* note 69, at 307 (“Preferences and values are known to be malleable. They can be shaped deliberately, through advertising or similar techniques.”).

the new whale preservation norm.²⁰⁵ Making the public aware of the issues involved in whaling, such as its cruelty, might change individual preferences and help a whale preservation norm emerge in whaling countries. So Japan's aversion to animal cruelty and domestic adoption of the anti-animal cruelty norm might help spread the anti-whaling norm in that country, even though that norm is weak within the IWC and elsewhere.

Limiting subsidies and exemptions for environmentally harmful activities can reduce "entrenchment" around a particular set of values and behavior.²⁰⁶ For example, changes to incentive structures, like rewarding restaurants that do not offer whale meat or penalizing those that do, might change individual preferences,²⁰⁷ such as a taste for whale meat. Similarly, eliminating any subsidy of the whaling industry²⁰⁸ might discourage the continuation of whaling. However, it is unlikely that the Japanese government will do either of these things, as it is generally unresponsive to anti-whaling constituencies.²⁰⁹ This also means that domestic nongovernmental organizations will not function as norm leaders to drive norm change in their countries, while the continuing problems at the IWC make it unlikely that it will serve as a force for norm change in whaling nations.

Thus, it will fall to international environmental nongovernmental organizations (ENGOS) to secure norm change in whaling countries. These

²⁰⁵ See Babcock, *supra* note 182, at 145 (discussing how a "norm cascade" changes majority preferences, eliminating any need for external pressure to adopt the norm).

²⁰⁶ Doremus, *supra* note 69, at 376.

²⁰⁷ An interesting empirical study was done by Julian Rode, Robin M. Hogarth, and Marc Le Menestrel, in which they looked at the willingness of consumers to pay more for ethically differentiated products and found that they were, especially when they lack information about the amount of the additional costs incurred by ethical producers. See generally JULIAN RODE, ROBIN M. HOGARTH, & MARC LE MENESTREL, ETHICAL DIFFERENTIATION AND MARKET BEHAVIOR: AN EXPERIMENTAL APPROACH (2006), available at <http://www.econ.upf.edu/docs/papers/downloads/779.pdf>. But see Hope M. Babcock, *Responsible Environmental Behavior, Energy Conservation, and Compact Fluorescent Bulbs: You Can Lead a Horse to Water But Can You Make It Drink?*, 37 HOFSTRA L. REV. 943, 968–74 (2009) (discussing the regressive impact on lower income individuals that can result when consumers are offered certain economic incentives). For further discussion on the topic of using incentives and other motivational techniques to change behavior, see also Doremus, *supra* note 69, at 307 ("[B]y communicating, directly or indirectly, society's endorsement of particular values, law reinforces those values among members of the present generation. It also subtly encourages their adoption by succeeding generations."), and see generally Babcock, *supra* (discussing the use of incentives to encourage consumers to switch to compact fluorescent light bulbs).

²⁰⁸ See Anthony L.I. Moffa, Comment, *Two Competing Models of Activism, One Goal: A Case Study of Anti-Whaling Campaigns in the Southern Ocean*, 37 YALE J. INT'L L. 201, 209 (2012) ("[The] Japanese government . . . very heavily subsidizes the whaling operations under JARPA II [the Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic].").

²⁰⁹ See Hirata, *supra* note 46, at 148 ("Japan's refusal to adopt the antiwhaling norm is explained in terms of its domestic cultural and political structures. Because the norm does not fit well into the domestic value system, antiwhaling advocates have not been able to create a social movement that is strong enough to force the ministry's hand. Also, the political structure keeps these antiwhaling advocates marginalized, thus making it extremely difficult for them to influence bureaucratic views or policy.").

groups have been extremely effective in mobilizing world opinion against whaling,²¹⁰ and have played a major role in moving the IWC to a preservationist position.²¹¹ International ENGOs organized the first international efforts to stop whale hunting,²¹² and caused the abrupt end to the 2011 Japanese whaling season.²¹³ Their attendance at IWC meetings, where they often outnumber members,²¹⁴ has enabled them to make public statements opposing whaling and has put members on notice that they are watching how the IWC performs. Their immunity from domestic political pressure makes them more effective at enforcing international norms and putting pressure on noncompliant states and industries through tactics like consumer boycotts and intervention in whale hunts.²¹⁵

International ENGOs have increased the pressure on whaling nations to give up whaling by specifically publicizing the cruelty of whale hunts.²¹⁶ Through information and direct action campaigns, they have been chipping away at the utility calculus that favors whaling in those countries. They have cornered the international emotional market by using words like whale “slaughter” as opposed to “harvest,” dramatically shaping the global

²¹⁰ See, e.g., McCurry, *supra* note 8 (reporting that Amazon eliminated whale meat products from its Japanese website in response to thousands of email messages protesting their sale). A recent example of the successful application of pressure being brought against a whaling country is the recent reversal by South Korea to resume lethal scientific research of whales. See *S. Korea Says It May Abandon Research Whaling Plan*, ASSOCIATED PRESS, July 11, 2012, <http://bigstory.ap.org/article/skorea-says-it-may-abandon-research-whaling-plan> (last visited Feb. 15, 2013) (describing the protests from environmental groups and non-whaling countries who suspected that the plan was just a front for resuming commercial whaling).

²¹¹ See Nagtzaam, *supra* note 16, at 406 (“Any understanding of the shift in the IWC’s operating norm must account for the role played by ENGOs, who in the 1970s pushed a preservationist agenda both within the IWC and to the global society in general.”).

²¹² See Ruffle, *supra* note 17, at 669 (“NGOs are credited with initiating the first worldwide campaign to stop the slaughter of whales.”).

²¹³ See Moffa, *supra* note 208, at 202 (“[N]ews of the abrupt end of the Japanese whaling season demonstrates that environmental NGOs now have the ability to compel compliance with international commitments through unilateral action.”).

²¹⁴ See Nagtzaam, *supra* note 16, at 407 (“By the early 1980s, over fifty ENGOs were represented at the IWC in an effort to influence debates, either by persuasion, by direct action, or by putting states on notice that the constituents they represented were watching.”); see also Stuart R. Harrop, *From Cartel to Conservation and on to Compassion: Animal Welfare and the International Whaling Commission*, 6 J. INT’L. WILDLIFE L. & POL’Y 79, 85 (2003) (“[A]t many meetings of the IWC there are more than twice as many NGO’s present as state members.”).

²¹⁵ See Nagtzaam, *supra* note 16, at 418 (“[M]any non-whaling states supported a moratorium because of domestic political pressure to appease voters who, thanks to the ENGO publicity campaign, perceived whaling as a morally repugnant activity. Voting for the moratorium cost domestic governments little strategically and appeased domestic voters.”).

²¹⁶ See *id.* at 406 (“ENGOs . . . were able to tap into, articulate, and publicize the Western public’s horrific response to whaling. Their tactics were to use mostly peaceful protests and public information campaigns to highlight the brutality of whaling and its impact on whale species and persuade the global populace to end whale hunting and reframe the debate from one of exploitation or conservation to one of preserving all whales in perpetuity.”);

see also Blosser, *supra* note 7, at 427 (“[Adam] Smith believes a well skilled and informed person can best aid the interests of humanity by making good choices in her own neck of the woods. If he were alive these days, he might have a ‘Think Global—Act Local’ bumper sticker on his car.”).

perception of whaling. However, the confrontational and often violent tactics employed by groups like Sea Shepherd,²¹⁷ while attention garnering, could be counterproductive in a country like Japan where it might trigger the country's nationalism norm in support of whaling.²¹⁸ At the international level, the reluctance to prosecute these groups for violations of international law may indicate a societal calculation that the benefits of their tactics outweigh the costs, since they may help stop a practice the international community largely condemns but has been unable to curb.²¹⁹

One other thing favoring a norm change in whaling countries, like Japan is that their whaling industries are very small and shrinking.²²⁰ Therefore, the adoption of an anti-whaling norm in those countries could gain them international goodwill at little cost. This possibility underscores the importance of international NGOs' non-interventionist education campaigns²²¹ focused on the non-commercial value of whales and the horrors of whaling to move people who have been neutral on the topic to favor an anti-whaling norm.²²² Such campaigns might also moot the negative reaction of countries that might see external pressure by other countries to adopt the anti-whaling norm as an attack on their national identity.

In sum, the academics are right that the international regulatory regime to protect whales is broken. However, their reliance on a market-based trading scheme in whale shares is morally flawed, as it is premised on killing

²¹⁷ See Moffa, *supra* note 208, at 209–10 (“[The Sea Shepherds] harassed Japanese whalers by ramming their vessels, throwing bottles of foul-smelling butyric acid onto their vessels, temporarily blinding whalers with a laser device, deploying propeller fouling devices to disable vessels, and even boarding moving whaling vessels.”).

²¹⁸ See Hirata, *supra* note 46, at 149 (“Militant action against the Japanese government, through the physical blockage of whaling vessels or shaming campaigns, may backfire, strengthening the nationalist sentiments of the Japanese public and policy makers.”).

²¹⁹ See Moffa, *supra* note 208, at 211 (“The general reluctance of any nation to prosecute the Sea Shepherds for violations of international law suggests that the benefit of interventionist activism outweighs its costs in this case.”); see also *id.* at 212 (“It is quite possible that the global community, at least as evidenced by citizen and government action in Australia and the United States, recognizes that by giving real force to international law, the Sea Shepherds and other interventionist activist organizations are performing the costly, and often unfunded, *invocation* and *application* functions arising from obligations to international conventions. By allowing interventionist activism to continue, either by explicitly recognizing its legitimacy or by refraining from condemning the activists' illegal tactics, countries utilize private funding to monitor and enforce conservation laws, thus saving themselves considerable amounts of tax money and government resources.”). *But see id.* (“Nonetheless, the counterargument goes, interventionist activism suffers from the ethical fallacy that ‘two wrongs do not make a right,’ and thus its existence undercuts the international rule of law.”).

²²⁰ See Hirata, *supra* note 46, at 130 (“The Japanese whaling industry, which employs only a few hundred people and generates at best marginal profits, is too small and weak to influence government policy.”).

²²¹ See Moffa, *supra* note 208, at 203 (identifying the “two competing models as ‘protest’ and ‘interventionist’ activism”); see also *id.* (distinguishing between the law abiding, law-promoting activities like consumer boycotts of groups like Greenpeace and confrontational, illegal activities of groups like the Sea Shepherds).

²²² Purdy talks about the role of avoidance in maintaining an ethical status quo. See Purdy, *supra* note 1, at 915; see also *id.* at 917 (suggesting that “encounters with everyday violence might be invaluable now in learning to assess the things we already do but tend not to see”).

whales that have moral worth and an entitlement to life. As Sandel shows, markets cannot and should not commodify certain goods that possess moral worth.²²³ The solution may lie in persuading whaling countries to adopt a whale preservation norm—which might be possible if international ENGOS can change peoples’ preferences by carefully designing and executing campaigns using public education, boycotts, and direct action. As more people engage in the right behavior—such as not demanding whale meat—and internalize the new norm, a whale preservation norm might emerge. External factors like homogenous populations and a decrease in the economic importance of whaling in those countries, coupled with the growing prominence of the international whale preservation norm, the movement of the IWC toward a preservation norm, and the strength of the anti-animal cruelty norm in whaling countries like Japan, collectively create a “backdrop of shared understandings and social institutions”²²⁴ in which norm change might occur.²²⁵ Although changing norms is a slow process that faces many barriers, once norm change starts it is equally hard to reverse. Importantly for the purposes of this Essay, this alternative presents none of the ethical infirmities of the economists’ approach, which is premised on depriving some whales of their right to live so that others might survive.

²²³ See *supra* notes 159–60 and accompanying text.

²²⁴ Ellis, *supra* note 183, at 39.

²²⁵ See Purdy, *supra* note 1, at 924 (“To imagine this change, we have to accept that our existing moral grammar . . . is not fixed once and for all, but can expand to make perceptible and salient what was once unavailable or impossibly obscure.”).