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Why Changing Norms is a More Just Solution to the Failed International Regulatory Regime to Protect Whales Than a Trading Program in Whale Shares

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I. INTRODUCTION

For the present quarrel is so inflamed by the warm heads of either faction, and the pretensions *somewhere or other* so exorbitant, as not to admit the least overtures of accommodation.¹

Whales capture the public's imagination like no other wild animal.² They have played a central role in "the social construction of modern ecological thought."³ Indeed, the survival of whales has been a symbol of the environmental movement since the latter quarter of the twentieth century, when the "slogan 'save the whales' was a call to arms to save the planet from humanity's fol-

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1. ANNE FADIMAN, AT LARGE AND AT SMALL 90 (2007) (quoting Jonathan Swift, *The Battle of the Books*, in *THE WORKS OF JONATHAN SWIFT* 100 (W.P. Nimmo et al. eds., 1902) (1990)).

2. See Alison Rieser, *Whales, Whaling, and the Warming Oceans*, 36 B.C. ENVTL. AFF. L. REV. 401, 401 (2009) ("The great whales have long been a symbol of humanity's relationship to the oceans."); see also Peter J. Stoett, *Of Whales and People: Normative Theory, Symbolism, and the IWC*, 8 J. INT'L. WILDLIFE L. & POL'Y 151, 154 (2005) ("It is no exaggeration to say that even nations with no coasts or history of the whaling conflict or repeated exposure to *Free Willy* and other Hollywoodisms consider the whale the standard-bearer for nature in the epic of its assault by man."). This love for whales has its roots in "the Western social construction of childhood." *Id.* at 159.

3. See Stoett, *supra* note 2, at 153 ("[T]he whaling story often is perceived as one of the central pillars in the social construction of modern ecological thought."); *id.* at 173 ("It is tempting to conclude that the whaling story has led us inexorably down the path toward what [some] have termed ecocentrism."). For a definition of ecocentrism that also resonates with the "whale story, see *id.* at 172, n.40 (using Matthew Paterson's definition of ecocentrism in *Green Politics*, in SCOTT BURCHILL ET AL., *THEORIES OF INTERNATIONAL RELATIONS* 277, 281 (2001), and writing that the term "recognizes the 'full range of human interests in the nonhuman world[;] it recognizes the interests of the nonhuman community . . . the interests of future generations . . . [and] adopts a holistic rather than atomistic perspective—that is, it values populations, species, ecosystems and the ecosphere as a whole as well as individual organisms'").

ly.”⁴ Stories about whale conservation implicate cultural clashes, interspecies morality, and global politics.⁵ They offer lessons in how not to manage a natural resource,⁶ and simultaneously show how both governmental and individual activism can overcome this mismanagement and give whales a chance at survival.⁷ These stories also show that the current international approach for the conservation of whales administered by the International Whaling Commission (IWC) has failed to prevent substantial declines in whale stocks to a point where the survival of some species is uncertain. Major whaling countries like Norway, Russia, Japan, and Iceland have either opted out of this regulatory regime or taken advantage of various loopholes in the International Convention on the Regulation of Whaling (ICRW) allowing the unregulated take of whales for scientific research or subsistence purposes.

A recent commentary in *Nature* proposed a market-based alter-

4. Rieser, *supra* note 2, at 401; see also Gerry J. Nagtzaam, *The International Whaling Commission and the Elusive Great White Whale of Preservationism*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 375, 376 (2009) (“The fight by Environmental Non-Governmental Organizations (‘ENGOS’) to preserve whales is considered to be the first modern, global environmental campaign, and in many ways the whale is still regarded as the symbol of the ENGO trans-national movement.”); Stoett, *supra* note 2, at 156 (“Ethical positions are built on the edifice of symbols; the latter construe meaning from the former, and vice-versa. Symbols move people from one intellectual space to another; they give bearing and guidance; they shift in composition and appearance with time and experience. They are both agential and structural, influential in their contextual presence. They define ethical parameters, whether they are viewed in written or photographic or sculptured form, and whether they concretize religion, political sovereignty, or social movements. They make sense of and explain ethics, because they serve as accessible referents. The whale has evolved in this socially constructed manner to represent different things to different people, and this is politically fascinating as the normative context of the IWC evolves as well.”).

5. See Stoett, *supra* note 2, at 155 (“[T]he whaling story is one of the more prolific episodes, complete with its conflict of cultural orientation, the central role of symbolism played by the whale itself, and the many associated questions pertaining to the morality of interspecies conduct, aboriginal exemptions, the conservationist/preservationist conflict, the humane killing debate, and other factors. The tale is not immune to power politics, either: Indeed, the symbolism of the postcommercial whale is amplified by rigid and sustained, if problematic, American commitment.”).

6. See Adrienne M. Ruffle, Note, *Resurrecting the International Whaling Commission: Suggestions to Strengthen the Conservation Effort*, 27 BROOK. J. INT'L L. 639, 644 (2002) (“[The] historic overexploitation of whales” is one of “the most infamous examples of human mismanagement of the earth’s natural resources.”); see also Stoett, *supra* note 2, at 161 (“The whaling story was a case of extreme predation.”); *id.* (“[I]t is difficult to escape the conclusion that, as a signifying event, the whaling story evokes little less than a destructive period of temporary insanity in human nature relations.”).

7. See Stoett, *supra* note 2, at 153 (“[The whaling story] is certainly is one of the main lesson blueprints common for how not to manage a resource, but at the same time for how mismanagement can be overcome with vigorous activism and the support of key states.”).

native to the current ineffective international regulatory program.⁸ Under the authors' proposal, the IWC would administer "a carefully controlled global market" in whale shares.⁹ Member nations would receive allowances to hunt whales at "sustainable harvest levels" and could trade shares authorizing the killing or preservation of whales.¹⁰ The number of available shares would depend on the global status of various whale populations as determined by the IWC.¹¹ Some shares could be held back for future auction, with the proceeds going to conservation efforts (not necessarily whale related). Countries could use the shares to allow whales to be killed, hold them indefinitely for future use, or retire them permanently. Conservationists and whalers in member nations would have an opportunity to bid on these shares, unless their countries retired them permanently.¹² Strikingly, this proposal is the first time anyone has suggested safeguarding an otherwise protected species by killing some of its members.¹³

In the current climate of regulatory failure, the authors' market-based approach has obvious appeal.¹⁴ But something about the proposal, which allows whales to be killed, is troubling, even if its purpose is to save more whales.¹⁵ This Article suggests that what is

8. Christopher Costelli, Steven Gaines & Leah R. Gerber, *Conservation Science: A Market Approach to Saving Whales*, 481 NATURE 139 (2012), available at <http://www.nature.com/nature/journal/v481/n7380/full/481139a.html>; see also Juliet Eilperin, *Researchers Propose Putting a Price on Whales*, WASH. POST (Jan. 11. 2012), http://www.washingtonpost.com/national/health-science/researchers-propose-putting-a-price-on-whales/2012/01/10/gIQAHS8qP_story.html (describing the proposal).

9. Costelli et al., *supra* note 8, at 3.

10. *Id.* at 4; see also Eilperin, *supra* note 8, at 1. According to the proposal's authors, allowing the quotas to be traded "would not necessarily lead to whale deaths or national caps on takes." Costelli et al., *supra* note 8, at 4.

11. Costelli et al., *supra* note 8, at 4. The economists' proposal is quite similar to International Fishery Quotas. For an article describing the positive and negative features of such programs, see Kirsten Engel & Dean Lueck, *Introduction: Property Rights and the Environment*, 50 ARIZ. L. REV. 373, 377 (2008) (identifying some of the costs of imposing a property rights regime on natural resources and noting they are not without complexities, such as those "inherent in matching a property rights regime to a particular natural resource").

12. Costelli et al., *supra* note 8, at 2.

13. *But see* Endangered Species Act, 16 U.S.C. §1539(a) (2012) (allowing the take of an endangered species under certain limited circumstances pursuant to incidental take permits).

14. See Eilperin, *supra* note 8, at 2-3 (quoting Robert N. Stavins, Director, Harvard Environmental Economics Program, John F. Kennedy School of Government, as saying, "If the world could devise a way to monitor and enforce these whaling quotas, it could help keep whale hunting in check.").

15. See Stoett, *supra* note 2, at 164 ("In favoring popular mammals such as whales for

troubling is that the proposal is immoral—that it is morally wrong to kill whales under any circumstances, even to save a greater number. I instead advocate a different tool to stop whale hunting: using international environmental groups to promote an emergent international whale preservation norm in whaling nations by encouraging them to change their self-image as whale-eating cultures. Whales are useful subjects for examining the role of ethics in guiding decisions about species conservation, as the debates over their fate are prototypical of normative debates surrounding conservation of other species, and often “intractable problems” like those surrounding whales can only be solved through ethical discourse.”¹⁶

To explore this idea, Part II of this Article discusses the current status of whales and surveys the threats to their survival from hunting. Part III then briefly chronicles the international effort to regulate whale hunting, focusing on the creation of the IWC and the 1982 ban on commercial whale hunting. Part IV describes the structural and non-structural problems that have contributed to the ineffectiveness of the IWC, such as exemptions that have allowed unregulated whale killing to continue and debilitating internal conflicts between whaling and non-whaling member nations.

Part V examines the question of whether whales have an inherent right to life, potential sources of that right, and the consequences of recognizing its existence. When confronted with such an entitlement, the *Nature* authors’ proposal is found wanting.¹⁷

protection beyond the mere fact of their rarity, we make certain assumptions operational: that whales are intelligent, magnificent, capable of teaching us much in terms of marine biology and perhaps even sociobiology, and—not least important—capable of attracting tourists.”); see also Michael J. Sandel, What Money Can’t Buy: The Moral Limits of Markets, Address at Brasenose College, Oxford (May 11 & 12, 1998), in THE TANNER LECTURES ON HUMAN VALUES 104 (“Once we characterize the good at stake, it is always a further question whether, or in what respect, market valuation and exchange diminishes or corrupts the character of that good.”). But see Stoett, *supra* note 2, at 164 (“Whales are special. However, this does not mean that they are necessarily unhuntable.”).

16. See Alexander Gillespie, *Whaling under a Scientific Auspice: The Ethics of Scientific Research Whaling Operations*, 3 J. INT’L WILDLIFE L. & POL’Y 1, 1 (2002) (“Interest in ethical analysis of standards arises from recognition that solutions to intractable problems can only be achieved through ethical discourse.”).

17. This Article does not examine valuation and other problems inherent in the economists’ proposal except to the extent that they relate to or shed light on its moral dimensions, although the author believes these issues may be equally debilitating. For an article that examine these and other problems involved in designing property regimes to protect resources, see Katrina M. Wyman, *The Property Rights Challenge in Marine Fisheries*, 50

Finding that a market-based approach to protecting whales from extinction is ethically problematic because it allows whales to be killed, however, leaves unaddressed the problem of how to stop the slaughter of whales. Therefore, in Part VI the Article turns to a topic I have addressed previously¹⁸—the use of norms to fill gaps in law. This Part discusses norms in general and whaling norms in particular. In Part VII the Article shows how international environmental non-governmental organizations (ENGOs), using a mixture of public information campaigns, boycotts, and direct action to publicize the cruelty of whaling, might help disseminate an emergent global whale preservation norm to whaling nations by encouraging their citizens to change their self image as whale-eating cultures. Although norm change in whaling countries could be difficult, the strength of the anti-animal cruelty norm in countries like Japan, the robustness of the international whale preservation norm, and the decreasing economic importance of whaling make it possible. Part VIII concludes.

II. THE CURRENT POPULATION STATUS OF WHALES AND THE IMPACT OF HUNTING

The story of whaling is indicative of not only poor shared resource management but unbridled, frontier-style exploitation of the commons.¹⁹

Whales have been hunted by humans for hundreds of years as a

ARIZ. L. REV. 511, 537 (2008) (“[W]e almost certainly lack the resources—and probably the political will—to actually design property rights in marine fisheries that will be economically optimal in the near-term, let alone the long-term. Changes in tastes and preferences, new information, and technological developments mean that optimal harvest levels and methods will change over time.”); *id.* (“[W]e should expect that different countries, and regions within individual countries, will make different choices, due to heterogeneous preferences and environmental conditions, among other factors.”); *id.* at 543 (“[O]ptimal arrangement of property rights depends heavily on the context.”).

18. See generally Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 HARV. ENVTL. L. REV. 117 (2009) [hereinafter Babcock, *A New Environmental Norm*]; Hope M. Babcock, *Civic Republicanism Provides Theoretical Support for Making Individuals More Environmentally Responsible*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 515 (2009); Hope M. Babcock, *Global Climate Change: A Civic Republican Moment for Achieving Broader Changes in Environmental Behavior*, 26 PACE ENVTL. L. REV. 1 (2009) (hereinafter Babcock, *Global Climate Change*); 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. J. 943 (2009).

19. Stoett, *supra* note 2, at 152.

valuable source of food and fuel.²⁰ Because whales reproduce slowly, reach maturity late, travel in small pods, and are largely found on the high seas where they are available to anyone who can find and kill them,²¹ they have been especially vulnerable to hunting pressures.²² The assumption that the resources of the marine environment were limitless and that economic growth was not dependent on nature and its ability to produce basic resources fueling that growth led to a kind of unregulated “frontier economics” when it came to whale hunting.²³ Because whales are migratory, only a regime of international regulation could protect them, but none existed for much of the period in which whales were hunted almost to extinction.²⁴ In the years before international regulation, the unbridled hunting of whales led to the commercial extinction of many whale species²⁵ and left others on the verge of extinc-

20. See Ruffle, *supra* note 6, at 640 (“For centuries, whales provided valuable natural resources in the form of food and fuel to the world’s population, and the whaling industry contributed substantially to the economic wealth of countries such as Norway, England, The Netherlands, the U.S., Japan and Russia.”).

21. 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, 415 (1996) (“Whales spend the majority of their lives on the high seas, an area in which resources are openly available to all nations.”).

22. See Ruffle, *supra* note 6, at 666 (“[This is] especially true in the instant case, given the migration patterns of whales throughout the world’s oceans, low rates of reproduction, late onset of sexual maturity and small populations.”); see also Nagtzaam, *supra* note 4, at 391 (“The industry operated on a ‘boom to bust financial cycle,’ driven by the need to maximize financial returns; short-term exploitation was enhanced by the biological nature of whales, which are slow to mature compared to fish stocks.”).

23. Nagtzaam, *supra* note 4, at 391 (“[T]he idea of ‘frontier economics,’ with no oversight of whaling practices, defined the whaling industry. Whalers assumed that the marine environment consisted of virtually limitless resources and that economic growth could be decoupled from nature.”).

24. See Jaye Ellis, *Fisheries Conservation in an Anarchical System: A Comparison of Rational Choice and Constructivist Perspectives*, 3 J. INT’L L. & INT’L REL. 1, 11 (2007) (“[S]tates must cooperate to create a web of conservation and management measures, as well as procedures for implementation and enforcement of those measures, that stretches across the high seas. This international structure must be complemented and reinforced by domestic rules and procedures.”); Ronald J. Haskell, Jr., *Abandoning Whale Conservation Initiatives in Japan Whaling Association v. American Cetacean Society*, 11 HARV. ENVTL. L. REV. 551, 587 (1987) (“Whale regulation and conservation require a collective international effort due to the extra-territorial nature of whale populations and the international right of every nation to freedom of the high seas. These theoretical underpinnings are the IWC’s foundation.”).

25. 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, 256 (2004) (“Between 1.5 and 2 million whales were taken in the Southern Hemisphere during the 20th century alone, driving blue, fin, and humpback whales to commercial extinction.”); see also Nagtzaam, *supra* note 4, at 391 (“[Hunting] led to the

tion.²⁶ The advent of more lethal and efficient methods of killing whales in the early twentieth century, such as exploding harpoons and factory ships, accelerated their slaughter.²⁷

The decimation of great whale populations has been staggering: blue whales have been reduced to “1% of their pre-exploitation levels, humpback whales to less than 5%, and fin whales to approximately 15%.”²⁸ Repeated reports on the precarious survival of certain whale species by the Convention on the International Trade in Endangered Species (CITES) had no effect on the pace of the slaughter.²⁹ Even when it was known that whale stocks were rapidly declining and with them the fate of the whaling

inevitable extinction of coastal whale stocks.”); 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 Yearbook, at 37 (“Some whale populations have experienced the largest reward the UNCLOS could offer—a recovery from near extinction.”).

26. See Ruffle, *supra* note 6, at 644-45 (“[H]umpback whale stocks are now estimated at only 1% of their pre-whaling levels. Some researchers believe that four of the nine species of great whales are “severely endangered” and that two of these species have been rendered commercially extinct.”).

27. See *id.* at 645 (“[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.”); *id.* (describing factory ships as a “processing plant at sea” enabling “an entire whale” to “be hunted, captured and processed even before the ship entered port”); see also Nagtzaam, *supra* note 4, at 390 (“These new whaling technologies enshrined exploitationist practices as the global standard.”).

28. Burns, *supra* note 25, at 265-66; see also Ruffle, *supra* note 6, at 644 (“Prior to the development of the commercial whaling industry in the thirteenth century, approximately four million whales populated the world’s oceans. In 1975, that figure was only slightly larger than two million, of which about 1.2 million were sufficiently mature for capture.”); *id.* (“Before the advent of the commercial whaling industry, for example, an estimated 210,000 blue whales, the largest of the whale species, roamed the oceans. At present, scientific evidence indicates that the population of blue whales may have decreased to approximately 450 animals.”).

29. See Ruffle, *supra* note 6, at 649-50 (“In 1977, the first report of the Convention on International Trade in Endangered Species (“CITES”) was released. The report characterized certain whales already protected by the IWC as ‘endangered species.’”); *id.* at 650 (“1981, CITES had identified more species of whales as being in danger of extinction than the IWC had even recognized as a ‘protected species.’”); see also Donald K. Anton, *Antarctic Whaling: Australia’s Attempt to Protect Whales in the Southern Ocean*, 36 B.C. ENVTL. AFF. L. REV. 319, 322 (2009) (“Humpback whales are listed as Annex I species (most threatened) under the Convention on International Trade in Endangered Species. Fin whales are listed as endangered on the World Conservation Union (IUCN).”); Lessoff, *supra* note 21, at 417 (“More whales were killed in the first forty years of the twentieth century than in the previous four hundred years.”).

industry,³⁰ the pressure to continue hunting whales remained.³¹ While hunting whales is not the only threat to their survival,³² it is the activity that galvanized efforts to protect them and drew the attention of the *Nature* authors.

III. INCREASING INTERNATIONAL CONCERN ABOUT THE SURVIVAL OF WHALES

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.³³

A. *Early Efforts to Protect Whales from Commercial Hunting*

The unrelenting decline of whales led to international conservation efforts to preserve whale stocks as early as 1918.³⁴ Several of these early international attempts, including one proposal by the whaling industry to protect the price of whale oil, failed when ma-

30. See Stoett, *supra* note 2, at 154 ("Whaling was doomed as a commercial activity because of a rate of diminishing return.").

31. See Nagtzaam, *supra* note 4, at 390 (noting that even after declining whale stocks became apparent, "whaling continued at ever increasing rates, threatening the species as a whole. Robert Ellickson points out that prior to this point, there might well have been a short-term economic incentive for states to continue excessive hunting to prevent other whaling nations from exploiting this resource").

32. See, e.g. Richard Cadell, *By-Catch Mitigation and Protection of Cetaceans: Recent Developments in EC Law*, 8 J. INT'L. WILDLIFE L. & POL'Y 241, 241 (2005); see also Burns, *supra* note 25, at 262-66. On the effects of entanglements, habitat degradation, and climate change, see Rieser, *supra* note 2, at 405. On the threat posed by climate change, see *id.* at 407; Susan C. Alker, *The Marine Mammal Protection Act: Refocusing the Approach to Conservation*, 44 UCLA L. REV. 568 (1996-1997); Stoett, *supra* note 2, at 163. On the effect of pollutants on whales see Burns, *supra* note 25, at 267. On the threats posed by whale watching, see Burns, *supra* note 25, at 265. The whale watching industry is a rapidly growing tourist industry; see Burns, *supra* note 25, at 264-65; Detsky, *supra* note 25, at 42 ("Whale watching is arguably more profitable than whaling. The Icelandic whale-watch industry estimates 'the direct value of whale watching in Iceland at \$8 million a year, while whaling yielded only \$3-4 million a year in 1986-1989.' Plus, 'more than one third of tourists to Iceland went whale watching last summer.'").

33. Nagtzaam, *supra* note 4, at 397 (quoting U.S. Secretary of State Dean Acheson).

34. See Ruffle, *supra* note 6, at 645 ("[M]any countries . . . soon recognized that the economic success of their whaling efforts depended largely on worldwide availability of whale stocks. Limited attempts to regulate whaling were instituted as early as 1918."). The decline even came to the attention of the League of Nations because of the potential collapse of the whaling industry. See Nagtzaam, *supra* note 4, at 392 ("The imminent collapse of the whaling industry became an issue of global concern with even the League of Nations becoming involved.").

jor whaling nations refused to sign them.³⁵ Ironically, Norway and Iceland, two of the most aggressive modern whaling countries, were among the first to pass domestic laws limiting whale hunting.³⁶ However, the exploitation of whales continued through the 1930s essentially unabated³⁷ because it was in “the economic interest of whalers to continue harvesting what was perceived by many to be a ‘free’ resource, to be taken as quickly as technology allowed.”³⁸

By 1948, the number of whales killed annually had soared to 43,378 Blue Whale Units (BWUs).³⁹ A BWU is the equivalent of 1 blue whale, 2 fin whales, 2 ½ humpback whales, or 6 sei whales—a ratio based on the relative oil yield of the individual species. The measurement is used by the IWC.⁴⁰ This alarmed conservationists and those in the whaling industry who recognized that the extinction of great whales would mean the end of their livelihoods. This created “a powerful convergence of interests.”⁴¹ There was also a growing sense that whales should be viewed not as the property of individual countries but as “a global resource.”⁴²

35. See Nagtzaam, *supra* note 4, at 393-95 (discussing the 1931 and 1937 international Conventions to regulate whaling and the reasons for their failure). Whaling companies created an International Association through which they controlled the production of whale oil. 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.”). It also failed when major whaling companies refused to join. See *id.* (explaining that the refusal of British and Norwegian companies to join the cartel, along with the refusal of others to change their behavior, “led to the Association collapsing, like many voluntary arrangements”).

36. 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.”).

37. *Id.* at 395 (“The problem remained that, despite these added paper protections, the exploitation of whales in the 1930s continued virtually unchecked.”); see *id.* at 396 (“By the 1937-38 season the number of whales killed internationally by whalers had risen to 54,664.”).

38. *Id.* at 396.

39. *Id.* at 397.

40. SEVERAL STOCKS, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, <http://www.fao.org/docrep/96215E/96215e07.htm> (last visited Oct. 25, 2012).

41. See Nagtzaam, *supra* note 4, at 397 (“The concomitant decrease in whale stocks alarmed environmentalists and those who saw this example of over-fishing as leading to not only the extinction of whales, but also to the extinction of the whaling industry. This formed a powerful convergence of interests.”).

42. See *id.* at 397 (noting a “burgeoning understanding that whales should no longer be seen as the property of individual states, but as a global resource.”).

B. *The International Whaling Convention and Other Protective Efforts*

In 1946, fifteen nations signed the International Convention for the Regulation of Whaling (ICRW) to stop the overfishing of whales.⁴³ The following year, under the terms of the Convention, the International Whaling Commission (IWC) was established to assist whaling nations in maintaining whale markets.⁴⁴ The IWC now has eighty-nine members, and meets annually. The Convention is the principal legal document governing the whaling practices of member states.⁴⁵ The Convention's jurisdictional reach is very broad, extending from the high seas into a country's territorial and even inland waters.⁴⁶

The first three decades of the IWC's history were dominated by members with strong whaling industries who blocked all efforts to establish sustainable whale hunt quotas.⁴⁷ Until the late 1960s, the IWC functioned like a "whaling cartel,"⁴⁸ a "whaler's club,"⁴⁹ ena-

43. See Detsky, *supra* note 25, at 36 ("In 1946, nations signing the International Convention for the Regulation of Whaling agreed to control the catch operations of the whale fishery because of 'over-fishing of one area after another and of one species of whale after another to such a degree that it is essential to protect all species of whales from further over-fishing.'"); Anthony L.I. Moffa, *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, 205 (2012) ("The ICRW was drafted in 1946 with fifteen state parties and has subsequently been amended."). Prior to the Convention, other international organizations, such as the Whaling Committee, created the "disastrous" precedent of allowing whaling nations to regulate themselves. Nagtzaam, *supra* note 4, at 392.

44. International Convention for the Regulation of Whaling, with Schedule of Whaling Regulations, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72; see also Haskell, *supra* note 24, at 555 ("In 1946, Congress promoted the creation of a multinational body to assist whaling nations in maintaining a stable market for whale goods. The International Committee on the Regulation of Whaling ('ICRW') was convened and acknowledged by the United States under the Whaling Convention Act of 1949."); *id.* at 553-54 ("Congress initiated the adoption of the present international regulatory structure and, from time to time, enhanced compliance with the international regulations through supplemental domestic legislation which provided the enforcement power lacking in the international regulations. The goal of both international and domestic conservation legislation is the maintenance of economically viable whale stocks.").

45. Moffa, *supra* note 43, at 205.

46. See Ruffle, *supra* note 6, at 658 ("IWC was given authority over all waters in which whaling is carried on by factory ships, land stations or whale catchers."); *id.* ("[the IWC's] authority extends inside states' 200-mile exclusive economic zone ('EEZ') and even into territorial seas and inland waterways.").

47. Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 47 (1991).

48. See Ruffle *supra* note 6, at 640-41 ("The International Convention for the Regulation of Whaling . . . was initially created as a whaling cartel in response to these devastating statistics to ensure the sustainable development of whale stocks throughout the world."); see also Stuart R. Harrop, *From Cartel to Conservation and on to Compassion: Animal Welfare and*

bling whale stocks to be consistently “over-exploited” and leading to the commercial extinction of several species of great whales.⁵⁰ The unbridled hunting of whales during this period led to the classification of six out of eleven species of great whales as endangered and a decline in Antarctic baleen species by over 96% from their pre-exploitation levels.⁵¹ By the 1960s, a combination of a drop in great whale stocks, which reduced the economic incentives for whaling,⁵² and the “beginning of the global anti-whaling movement,”⁵³ enabled the IWC to adopt a new management protocol that reduced whale quotas.⁵⁴ In 1972, the United Nations Conference on the Human Environment (“The Stockholm Conference”) recommended a ten-year moratorium on whaling to al-

the International Whaling Commission, 6 J. INT’L. WILDLIFE L. & POL’Y 79, 88 (2003) (“The IWC operate[s] like an industrial cartel carving up trade empires within a regime free of competition and anti-trust regulation.”).

49. Nagtzaam, *supra* note 4, at 402.

50. Ruffle, *supra* note 6, at 648. The quotas on killing whales had the perverse effect of initiating a technological race to build the most efficient ways of killing whales, leading critics to refer to this period as the “Whaling Olympics.” Nagtzaam, *supra* note 4, at 401; *see also* Haskell, *supra* note 24, at 553-54 (“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.”).

51. *See* Burns, *supra* note 25, 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.”); *id.* (“The legacy of these excesses has been tragic. Some Antarctic baleen species have declined by over 96% from pre-exploitation levels, with 6 of 11 great whale species currently classified as endangered or vulnerable even 30 or more years after exploitation has ceased.”). The Soviet Union was the most egregious violator: their whaling fleets between 1948 and 1973 “killed a vast number of the world’s ‘ostensibly protected whale populations’” and then under-reported to the IWC the number of whales killed. *See id.* at 260 (“[T]he USSR officially reported killing only 2,710 humpback whales to the IWC rather than the 48,477 its industry actually killed”); *id.* (“[T]he USSR’s false reporting was so drastic and pervasive that some experts believe it accounts for the persistent inaccuracy of the IWC Scientific Committee’s forecasts of whale populations, on which the catch limits were based.”).

52. *See* Nagtzaam, *supra* note 4, at 401 (“An unintended consequence of the new, deadlier ships, however, was a significant increase in the cost of outfitting a whaling fleet. By 1960, some nations had ceased whaling on economic grounds, due to the prohibitive capital costs against returns.”).

53. Ruffle, *supra* note 6, at 648.

54. *See* Burns, *supra* note 25, at 258 (“In the 1960s, the IWC began to turn the corner. The diminution of the stocks of great whale species substantially reduced the economic incentive for whaling. This facilitated the adoption of the IWC’s New Management Procedure, a management regime that ultimately reduced quotas to less than 20 percent of catches during the first historical phase of the IWC.”).

low whale stocks to recover,⁵⁵ and Maurice Strong, the Secretary General of the United Nations, made an appeal at the IWC's annual meeting to protect whales.⁵⁶ That same year the United States listed eight species of whales as endangered and introduced a resolution at the IWC banning the killing of whales for ten years, which passed overwhelmingly.⁵⁷ However, objections by the IWC's scientific committee led to its eventual demise.⁵⁸ In 1975, the IWC adopted a "selective moratorium," calling for the management of whales under a maximum sustainable yield concept with reduced quotas for whales, but a lack of reliable scientific data on the status of whales hampered the program's effectiveness.⁵⁹

Between 1979 and 1983 membership on the IWC grew to forty-one countries, many of whom were opposed to whale hunting or

55. Ruffle, *supra* note 6, at 649.

56. See Nagtzaam, *supra* note 4, at 408 ("At the 1972 IWC meeting in London, Maurice Strong, the U.N. Secretary-General put to members the case that as the just-completed U.N. Conference on Human Environment had resolved that there should be a ten-year moratorium on all commercial whaling, the IWC should address the issue.").

57. See *id.* at 404 ("[T]he United States due to domestic pressure decided to put eight types of whales on the domestic Endangered Species List and that, as a country, it would no longer issue licenses for its whalers to hunt. This defection by the United States from the whalers' faction would prove a critical factor in the normative battles ahead . . ."). The United States introduced a resolution at the IWC calling for a ten-year moratorium on the killing of whales, which passed overwhelmingly indicating a new global consensus on protecting whales at least for the short term to allow stocks to rebound. See *id.* at 405 ("The passing of the motion by such an overwhelming margin indicates that saving the whales was now perceived by much of the world as an issue of critical importance."); *id.* at 408 ("Such a moratorium on whaling was initially perceived as a conservationist measure that would allow stocks to recover over time.").

58. See *id.* at 408 ("The Scientific Committee argued successfully that a blanket ban should not be imposed since whaling was better regulated at the individual species level, and a moratorium would lead to a reduced research program on whales and possibly the unregulated taking of whales. The IWC voted the motion down . . .").

59. See *id.* at 409-10 (calling a 1972 New Management Procedure to manage whale stocks by using "Maximum Sustainable Yield" "ineffective in preventing the exploitation of whales due to poor biological data on whale species and their decline"). On the topic of the problems of the IWC's Science Committee, see *id.* at 403 (referring to a committee of three independent scientists, and later four, who acted as ineffective norm "entrepreneurs" in support of quotas "to protect scientifically determined, fragile whale stocks," "temporary moratoriums," and efforts "to reduce the overall catch" because "[t]hey were small in number . . . and their advice was merely advisory"); *id.* at 403-04 ("[C]etologists also lacked the theoretical models and a consensus amongst themselves as to the correct policy prescriptions, without which they could not plausibly convince whaling states to abandon exploitationist practices."); *id.* at 404 ("[The cetologists] were unable to link their arguments with higher values that would persuade whaling states to adopt conservationist practices."); *id.* at 410 ("Despite being allowed to attend as observers by the IWC in 1977, cetologists were unable to speak with a unified voice, fracturing over questions of 'uncertainty' when applied to whale stocks.").

had serious doubts about it.⁶⁰ Two United Nations organizations and the International Union for the Conservation of Nature also began participating in IWC proceedings.⁶¹ By 1981, the whale protection outlook reflected in the Stockholm Conference⁶² as well as in CITES' regulation⁶³ and in the United Nations Convention of the Law of the Sea⁶⁴ had become dominant on the IWC.⁶⁵

60. Burns, *supra* note 25, at 258; *see also* Keiko Hirata, *Why Japan Supports Whaling*, 8 J. INT'L WILDLIFE L. & POL'Y 129, 131 (2005) ("[A]n increasing number of nonwhaling and antiwhaling states have joined the IWC since the 1970s."); *id.* (noting that "antiwhaling states have become dominant within the IWC"); Ruffle, *supra* note 6, at 648 ("[A] number of non-whaling and anti-whaling states joined the Convention and eventually gained a majority over a dwindling number of pro-whaling nations."); Ruffle also notes the change in the United States from a major whaling country to one strongly opposed to whaling. *See id.*, *supra* note 6, at 648-49 (The United States, which had been a major whaling country "became [a] strong anti-whaling component[] of the Commission.").

61. *See* Nagtzaam, *supra* note 4, at 408-09 (referring to the addition in 1974 of delegates from the Food and Agriculture Organization of the United Nations, the United Nations Environment Programme, and the International Union for the Conservation of Nature who formally participated in IWC meetings and "paved the way for alternative non-state arguments to be presented.").

62. *See* D'Amato & Chopra, *supra* note 47, 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 . . .'").

63. *See id.* at 41 ("In 1977 the secretariat of the Convention on the International Trade in Endangered Species (CITES) transmitted the report of its first meeting, highlighting the characterization of certain whales as endangered species, to the IWC."). D'Amato and Chopra note particularly the importance of the CITES ban on killing whales because parties to the Convention generally adhere to it. *Id.* at 47 ("CITES prohibitions on the covert or overt trade in whales and whale derivatives have been effective.").

64. *Id.* at 36 ("The United Nations Conference on the Law of the Sea Requests States to prescribe, by all means available to them, those methods for the capture and killing of marine life, especially of whales and seals, which will spare them suffering to the greatest extent possible. This resolution reflects changing perceptions about whales outside the IWC and recognition of the principle of more humane treatment of whales and other marine life."); *see also* Detsky, *supra* note 25, at 36 ("Since 1994, whale conservation has been put under the jurisdiction of the United Nations Convention on the Law of the Sea ('UNCLOS')."); Ruffle, *supra* note 6, at 650 ("[The] United Nations Convention on the Law of the Sea ('UNCLOS'), completed in 1982, provided inter alia that '[s]tates shall cooperate with a view to the conservation of marine mammals and in the case of [whales] shall in particular work through the appropriate international organizations for the conservation, management and study.'").

65. *See* Ruffle, *supra* note 6 at 650 ("By 1981, it became clear that the protectionist sentiment articulated in the Stockholm Conference, the CITES regulations and UNCLOS had gained dominance within the IWC."); *see also* D'Amato & Chopra, *supra* note 47, at 40 ("By 1977, the protectionist sentiment appears to have emerged as dominant over that favoring conservation and its precursor, regulation.").

C. *The 1982 Moratorium Against Commercial Hunting of Great Whales and Other Efforts to Protect Whales*

In 1982, the addition of member states opposed to whaling combined with the dire condition of great whales (the Blue, Bowhead, Fin, Bryde's, Right, Humpback, Sei, Gray, Sperm, and Minke whales) enabled the IWC to issue a moratorium on their commercial hunting.⁶⁶ To gain the eventual agreement of Japan and Norway, the IWC gave the countries three years to come into compliance and exempted aboriginal hunting.⁶⁷ In 1986, the IWC expanded the moratorium to cover the commercial catch of all types of whales in all whaling areas.⁶⁸ The policy shift toward whale preservation on the IWC and other parties⁶⁹ reflected both a grow-

66. Burns, *supra* note 25, at 258; *see also* Haskell, *supra* note 24, at 562 (“[The] 1981 IWC Schedule contained a zero quota for the Western Division stock of Northern Pacific sperm whales for the 1982 season. In 1982, the IWC enacted a five-year moratorium on all commercial whaling to begin in the 1985-86 season and last until 1990.”); Ruffle, *supra* note 6, at 648 (“[T]he second period, from the 1981 moratorium until the present, represents the transformation of the IWC from an agency solely concerned with the regulation of whale stocks for sustained development and future harvest to an agency with an environmental conscience.”). Prior to 1982, the IWC took some preliminary steps to ban the killing of certain species of whales. *See* D’Amato & Chopra, *supra* note 47, at 41-42 (“[T]he 1977 meeting [of the IWC] instituted an outright ban on aboriginal whaling of the Arctic bowhead whale, which was acknowledged to be the most endangered whale species. However . . . it was lifted at the request of the United States where various indigenous groups had instituted legal action in the courts alleging denial of their constitutional rights. Since the United States had been the principal proponent of the moratorium, its request for permission to allow aboriginal whaling weakened its general stance.”); *id.* at 42 (“[I]n 1979, when the membership of the IWC had expanded to twenty-three, Australia and the United States proposed a worldwide ban on commercial whaling.”).

67. *See* Nagtzaam, *supra* note 4, at 416-17 (“[In 1982,] [w]haling states were granted a three-year grace period to phase out their hunts to lessen the economic impact of the moratorium in order to comply with the IWC preamble. However, the ban exempted aboriginal subsistence whaling—particularly the endangered bowhead species, hunted by the Inuit in the Arctic regions.”).

68. *See* Moffa, *supra* note 43, at 205 (“[In] 1986, the ICRW . . . included in the Schedule a ban on commercial whaling of any type, setting and maintaining annual catch limits of zero in all regions for all types of whales.”); *see also* D’Amato & Chopra, *supra* note 47, at 48 (“Virtually all commercial whaling activity has now ceased. However this ban only applies to great whales (the ten largest species).”).

69. *See* D’Amato & Chopra, *supra* note 47, at 42 (“The new policy, the commissioner said, represents a ‘change in emphasis from one of the conservative utilization of whale stocks to promoting a policy of banning whaling and protecting whale populations.’”). The European Economic Community supported the moratorium by enacting its own ban on the importation of whale parts. *See id.* at 46 (“The European Economic Community at about the same time may have helped to enforce the moratorium. A regulation entitled Common Rules for Imports of Whales or Other Cetacean Products established an EEC ban as of January 1, 1982.”); *id.* (saying that since the IWC does not include nonstate parties, the ban “resulted from the ECC’s obligations to CITES” not to any discussions within the

ing public revulsion toward whaling and the availability of substitute products.⁷⁰ By 1990, all commercial whaling of great whales had ceased.⁷¹ Although intended to be a temporary ban while whale populations rebounded, the moratorium has remained in effect.⁷² However, the continuing violation of the ban by several whaling countries, including Canada, led the IWC to call upon Canada to stop its commercial whaling.⁷³ The IWC also established two whaling sanctuaries.⁷⁴

However, charges of membership packing by both sides in the debate over killing whales⁷⁵ and the refusal of major whaling na-

IWC).

70. *See id.* at 42 (citing “a growing community conviction of the immorality of whaling, the imminent availability of substitutes for whale products, the inhumane way that whales are killed, and the risks to the maintenance and even survival of some species”); *id.* at 39 (“[T]he 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.’”).

71. Nagtzaam, *supra* note 4, at 421.

72. *See Burns*, *supra* note 25, at 266 (“The IWC in recent years has become increasingly conscious of its duty of care toward such severely depleted species and populations.”).

73. *See id.* at 266 (“[T]he IWC called upon Canada to cease hunting of endangered bowhead whales in the eastern Canadian Arctic, calling for efforts to reduce the threats to western North Atlantic right whales, including entanglement in fishing gears and collisions with vessels, and expressing its concern about activities that threatened western North Pacific gray whales, such as oil seismic exploration in their feeding grounds.”).

74. *See Burns*, *supra* note 25, at 269 (“The IWC has established two sanctuaries to date, in the Indian and Southern Oceans, but rejected proposals over the past few years for sanctuaries in the South Atlantic and the South Pacific.”); *see also* Gillespie, *supra* note 16, at 41 (“The Indian Ocean was declared a sanctuary in 1979. In 1992, France proposed a Southern Ocean Whale Sanctuary and the IWC voted in favour of the sanctuary in 1994.”); Moffa, *supra* note 43, at 205 (“The IWC established in 1994 a whale sanctuary in the Southern Ocean. . . . Japan objected to the sanctuary’s creation with respect only to Antarctic minke whale stocks.”); Nagtzaam, *supra* note 4, at 443 (“The creation of the Southern Hemisphere Sanctuary represents a highwater mark in the attempt to preserve whales through the mechanism of sanctuaries.”). *But see* Emily Alpert, *International Group Harpoons Whale Haven Proposal*, GREENWIRE (July 3, 2012), <http://www.eenews.net/Greenwire/print/2012/07/03/13> (describing the IWC’s defeat of a recent proposal sponsored by several South American countries to establish a whale sanctuary in the South Atlantic Ocean with Japan, China, Norway, Russia, and Norway voting against the proposal).

75. *See Nagtzaam*, *supra* note 4, at 413 (“While it is impossible to be certain which actors put in place a plan to ‘stack’ the IWC, an examination of the membership list of that period reveals that this is in fact what happened, with countries like Switzerland and the Seychelles joining the IWC.”). Japan has also added anti-whaling member nations who have blocked the creation of new whale sanctuaries and are working on the IWC to lifting the moratorium on commercial hunting. *See Burns*, *supra* note 25, at 275 (saying Japan’s effort “assures continued gridlock at the IWC”); *see also* Ruffle, *supra* note 6, at 647 (“(1) participation in the IWC is not limited only to states involved in commercial whaling; and

tions like Norway to join⁷⁶ have marred the IWC's reputation, while the threat of withdrawal by countries like Japan⁷⁷ and actual withdrawal by Canada⁷⁸ and Iceland⁷⁹ have prevented the IWC

(2) the whaling controversy is a direct consequence of the influx into the IWC of conservation-minded nations during the 1970's.").

76. See Detsky, *supra* note 25, at 38 ("Norway never joined the IWC because of its desire to continue commercial whaling, and permits a national take of 674 whales annually."); see also Gail Osherenko, *Environmental Justice and the International Whaling Commission: Moby-Dick Revisited*, 8 J. INT'L WILDLIFE L. & POL'Y 221, 226-27 (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 International Whaling Commission (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."). *But see 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."); *id.* at 17 (noting that "Norwegians justify whaling, especially minke whaling, by just such an argument as made by Leopold to justify this hunting as a biological and cultural birthright 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. See *id.* at 2-3 ("[M]odem commercial whalers did not concentrate their efforts on minke 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.").

77. See Nagtzaam, *supra* note 4, at 402 ("[During the] period from 1948 to 1960 states continued to argue mainly over quota allocations, backed by grandstanding threats of withdrawal from the IWC."). See also Hirata, *supra* note 60, at 138 ("Minoru Morimoto, Japan's chief delegate to the IWC, announced during the 2003 IWC meeting that Japan might withhold IWC membership dues. Japan is the largest contributor to the IWC, accounting for 8.6 percent of the Commission's operational funds."); *id.* ("Japan might boycott IWC committees, or withdraw from the IWC and form a separate prowhaling commission, claiming that the IWC has been hijacked by the antiwhaling members."); *id.* at 149 ("If the IWC adopts more resolutions to restrict whaling, Japan may leave the organization."); Osherenko, *supra* note 76, at 238-39 ("Given the current make-up of and U.S. dominance in the IWC, it is likely that whaling nations will withdraw from membership and use their own regional agreements to regulate continued use and consumption of whales while the IWC becomes a club of antiwhaling nations which, without legal jurisdiction over nonmember nations, will exert its influence through increasingly coercive economic sanctions.").

78. Nagtzaam, *supra* note 4, at 417.

79. See Rieser, *supra* note 2, at 417 n.80 ("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

from taking more aggressive efforts to protect whales.⁸⁰ The Convention's exemptions for lethal scientific research on whales and aboriginal hunting, which whaling countries like Japan and Norway have continued to exploit,⁸¹ have weakened whatever moral suasion the Convention initially had. Japan's use of the Convention's "opt out" clause and research exemption has made the moratorium virtually ineffective against it.⁸² For these and other reasons, some believe that the IWC's whale preservation agenda is hanging on only "by a slim thread."⁸³ The next Part of the Article takes a closer look at these problems.

IV. PROBLEMS WITH THE INTERNATIONAL CONVENTION ON THE REGULATION OF WHALING AND WITH ITS IMPLEMENTATION HAVE PREVENTED THE IWC FROM PROTECTING WHALES

As a regime that failed to achieve its basic objective of ensuring

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.").

80. See *id.* at 417 ("The reluctance of some anti-whaling states to sanction Japan for its scientific whaling program is likely due at least in part to the fear that Japan will withdraw from the IWC and abrogate the treaty, creating its own management body to set quotas for whaling."); see also Erik Jaap Molenaar, Comment, *Marine Mammals: The Role of Ethics and Ecosystem Considerations*, 6 J. INT'L WILDLIFE & POL'Y 31, 43 (2003) ("The conservation cause is likely to suffer if States withdraw from, or operate outside, international regulatory bodies, or establish competing bodies.").

81. See Detsky, *supra* note 25, at 36-37 (describing the three exceptions to the moratorium); *id.* at 41-42 (noting that "[s]hortly after its readmission to the IWC, Iceland announced its intent to resume scientific whaling. The Icelandic government, in an official statement, took the following position: Iceland cannot accept the attempts of some countries to impose their own cultural attitudes toward whales upon others.").

82. Ruffle, *supra* note 6, 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 Rieser, *supra* note 2, at 417 ("As Japan has grown increasingly frustrated by the IWC's failure to adopt the Revised Management Procedure and lift the commercial whaling moratorium, it has expanded the scope of its research whaling program in both the number and species of whales permitted to be killed.").

83. See Nagtzaam, *supra* note 4, 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."); *id.* at 427 ("At the 2006 IWC meeting, . . . the 'St. Kitts and Nevis Declaration' [was introduced] which demanded a return to a literal interpretation of the ICRW and its conservationist principles, as well as a rejection of the ban."). St. Kitts and the Grenedines argued that resumption of whaling was a moral issue and questioned what about whales made them "so special that they should not be killed." *Id.* at 431. The resolution passed by one vote, representing the first time anti-whaling countries had lost in fourteen years. *Id.* at 427-28. See also Molenaar, *supra* note 80, at 42 ("The 55th Annual Meeting of the IWC once again gave rise to speculations about a competitor of the IWC.").

a sustainable fishery, the IWC can serve as a cautionary tale for other governance regimes, providing testament to the need for setting catch limits that are truly precautionary; for not disregarding scientific advice; for requiring verifiable and timely reporting of all catch and other data, supported by an effective compliance and infractions program; and for a mechanism for resolving disagreements over treaty interpretation that does not rely on an objection or opt-out clause.⁸⁴

There is little question that the International Convention on the Regulation of Whaling serves an important function by reflecting the “points of international consensus on the regulation of whaling.”⁸⁵ Indeed, some attribute the Convention’s creation to the dawning of a new era, in which nations recognized an international responsibility to protect environmental resources.⁸⁶ While the IWC is recognized as the only international organization with any competence on the subject of whales,⁸⁷ fundamental flaws in the Convention and problems with its implementation have made the regulatory regime largely ineffective.⁸⁸

A. *Structural Problems with the Convention*

There are three structural problems with the Convention: an opt-out provision that enables nations who dissent from an IWC resolution to ignore it; exemptions for scientific research and aboriginal hunting; and inadequate enforcement authority. Each of these problems is discussed below.

84. Rieser, *supra* note 2, at 423 n.112.

85. Moffa, *supra* note 43, at 204-05; *see also* Stoett, *supra* note 2, at 172 (“[F]rustrations of the IWC aside, it serves to keep a vital human-nature relationship somewhere on the international agenda.”).

86. *See* Ruffle, *supra* note 6, at 641 (“The ICRW, along with several others like it, signified the start of an era in which states would become cognizant of the existence of environmental commitments beyond their own territories.”).

87. *See* Molenaar, *supra* note 80, at 44 (“[T]he IWC is still perceived as the main, if not only, global international organization with competence over large whales.”); *see also* Osherenko, *supra* note 76, at 224 (“[The ICRW] has become, however, the primary international agreement for protection of 13 species of ‘great whales.’”); Ruffle, *supra* note 6, at 641 (The IWC has been the “sole international body with the authority to regulate commercial whaling operations around the world.”).

88. *See* Ruffle, *supra* note 6, at 641 (“The ICRW has served as an important instrument calling the world’s attention to the historic overexploitation of whales. Yet, its credibility has been marred by a series of failures in protecting the animals from further exploitation.”).

1. *The opt-out provision.*

One of the Convention's structural flaws is an opt-out provision allowing individual member nations to ignore the IWC's regulations by filing a "timely objection."⁸⁹ The opt-out provision makes it "virtually impossible" for the IWC to regulate the activities of members who elect to use it,⁹⁰ and by filing an objection dissenting members can delay and often defeat implementation of the disputed regulation if enough countries object.⁹¹ Whaling countries, whose use of the provision increased after the 1986 ban on commercial whaling came into effect,⁹² have used the provision to block the imposition of hunting quotas by the IWC and efforts to impose humane killing practices.⁹³

89. *See id.* at 642 ("A member nation in opposition to any amendment instituted by the IWC need only file a timely objection to be considered exempt from that regulation."); *see also* Haskell, *supra* note 24, at 557 (noting the lack of "criteria or guidelines limiting a nation's right to opt out of a newly passed schedule amendment"); Nagtzaam, *supra* note 4, at 399-400 ("[The IWC rules] also allow 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 on evading IWC directives.").

90. Ruffle, *supra* note 6, at 642; *see also* Lessoff, *supra* note 21, at 421 (citing as an example of the ability of the opt out provision to impose its regulations on truculent nations, the attempt in 1983 to set a five-year moratorium on all commercial whaling beginning two years later "in an effort to facilitate the regeneration of the depleted whale stocks and to allow the scientific community adequate time to accurately assess the whale populations") The objection of Japan, the Soviet Union, and Norway, and the filing of timely objections mean that "the IWC was powerless to enforce its moratorium against these nations." *Id.*

91. *See* Ruffle, *supra* note 6, 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."); *see also* Haskell, *supra* note 24, at 557 n.44, citing James E. Scharff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Agreement*, 6 Ecology L.Q. 323, 364 (1978) (describing the collapse of the IWC's effort to protect the Antarctic stock of blue whales after Japan's objection was followed by other nations).

92. *See* Ruffle, *supra* note 6, at 642 ("[A]s the focus of the Commission's agenda shifted from sustainable development of the natural resource represented by whales to complete conservation of dwindling whale stocks in the late 1970's, pro-whaling nations began to explore ways to subvert compliance with IWC regulations and capitalize on the profitability of whale meat and byproducts in their own markets.").

93. *See id.* at 654 ("[M]embers have used the objection procedure to avoid otherwise applicable quotas, to reject the classification of stocks where it would reduce whaling activities and to ignore IWC imposed standards on humane killing."). The opt-out provision deprives the IWC from using sanctions as a means of dissuading other countries from emulating bad behavior by signaling that engaging in non-conforming behavior has costs. *See* Ellis, *supra* note 24, at 17 ("Sanctions can be used to deprive actors of the benefits of defection or to signal to actors that certain costs will be associated with particular courses of action.").

While the opt-out provision reflects the international legal principle that sovereign states can only be bound by what they have explicitly consented to,⁹⁴ in practice, it epitomizes the IWC's lack of enforcement powers.⁹⁵ "By giving whaling countries *carte blanche* to ignore IWC regulations rather than face potentially unpleasant ramifications,"⁹⁶ the opt-out provision leaves the IWC with little authority to impose its regulations on countries who continue to whale commercially and prevents the IWC from protecting whales.⁹⁷

2. *Exemptions for scientific research and subsistence hunting.*

a. *The scientific research exemption.*

Article VIII of the Convention allows member states to issue permits to kill whales in the interest of scientific research.⁹⁸ Alt-

94. Ruffle, *supra* note 6, at 654; *see also* Ellis, *supra* note 24, at 6 ("In the absence of a central legislator with the authority to impose rules, states must consent to be bound."); Molenaar, *supra* note 80, at 35 ("One of the main cornerstones on which international law is built is the sovereign equality of States and the concomitant principle that States cannot be bound against their will. Conversely, decisions taken at the national level are, in principle, binding on all nationals of that State. On the other hand, individuals are usually not directly involved in the domestic decision-making process, but only indirectly by voting during periodic elections. At the international level, States only rarely delegate such decision-making power to an international body. And if they do, they usually have the possibility to terminate this delegation, for instance by discontinuing membership in the international body. More or less the same applies to particular rules laid down in treaties. For instance, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Convention) and the International Convention for the Regulation of Whaling expressly allow for the Parties to enter reservations to specific rules."). However, this freedom of states to bind themselves while increasing the chances the nation will agree to the norm, simultaneously may lead to norm violations. *See* Ruffle, *supra* note 6, at 665 ("[A]llowing states to bind themselves to international agreements that preserve their national sovereignty tends to increase the likelihood that a state will agree to the norm, it will also increase the possibility of seriously undermining the norm's enforcement.").

95. *See* Haskell, *supra* note 24, at 557 ("The provision recognizes the IWC's lack of enforcement power and assumes lawful exemption in international politics is preferred to unlawful and nonpunishable flaunting by dissenting member nations.").

96. Ruffle, *supra* note 6, at 654.

97. *See* Haskell, *supra* note 24, at 557 ("[T]he IWC, as it responds to the whale's plight with conservation regulations, is increasingly stifled by the lawful invocation of the "opt-out" provision, leaving the IWC powerless to effect its goals."); *see also* Molenaar, *supra* note 80, at 42 ("Measures such as these entitle States to withdraw from, or continue to engage in, the exploitation of marine mammals outside international regulatory bodies.").

98. Gillespie, *supra* note 16, at 34; *see also* Lessoff, *supra* note 21, at 422-23 ("The legality of harvesting whales under the guise of 'scientific research' is not affected by the International Whaling Convention. Accordingly, one of the largest issues regarding the IWC is the harvesting of whales for so called research purposes."); Nagtzaam, *supra* note 4, at

though the IWC reviews each permit for its scientific soundness, the ultimate decision to issue a permit is the prerogative of individual countries.⁹⁹ As early as 1985, the IWC introduced a resolution limiting scientific research to non-lethal hunting of whales where feasible¹⁰⁰ and subsequently turned down lethal research permit applications from Korea, Japan, Norway, and Iceland on scientific unsoundness grounds.¹⁰¹ Norway eventually withdrew its application,¹⁰² leaving Japan as the principal whaling nation still engaging

429 (“Under the ICRW, states are allowed to issue their own scientific permits to hunt whales and the IWC has few powers to prevent such permits for activities it might regard as scientifically dubious—a loophole whaling states have ruthlessly exploited.”); *id.* (“Japan, Iceland, Russia, and Norway have continued to award themselves scientific permits in the face of global condemnation of the twisting of the term ‘scientific.’”).

99. See Ruffle, *supra* note 6, at 656 (“All permits must be submitted to the IWC’s Scientific Committee for review to determine whether the study is methodologically sound, but the country retains the ultimate responsibility for issuance.”); see also Moffa, *supra* note 43, at 206 (“[A]ny Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research . . . exempt from the operation of this Convention.” (quoting International Convention for the Regulation of Whaling art. 8, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 361)).

100. See Nagtzaam, *supra* note 4, at 430 (“[In 1985, a] new resolution was adopted by consensus, whereby IWC members agreed to carry out research, wherever feasible, through non-lethal methods and with the goal of rational management of whale stocks.”); see also Gillespie, *supra* note 16, at 36 (referring to the IWC and arguing that “with the development of modern scientific techniques it is not necessary to kill whales to obtain the information that is needed for initial implementation of the Revised Management Procedure for a particular stock”).

101. See Nagtzaam, *supra* note 4, at 430 (“Following the 1986 decision to review permits, Iceland, the Republic of Korea, and Japan all submitted proposals to be allowed to catch whales under a scientific permit. All three requests were turned down by the IWC, citing, in the case of Korea that it would not contribute information that answers significant management questions, while arguing that Iceland’s request did not meet the 1986 criteria.”); *id.* (noting that Norway and Iceland’s special permit applications were “rejected by the IWC”); see also Gillespie, *supra* note 16, at 37 (“The IWC passed several resolutions asking the Norwegian government to reconsider its special permit program.”); *id.* at 38 (“The Icelandic Programme (1986-1989) . . . did not specify how the data would be used for management or conservation. Accordingly, the IWC issued a series of resolutions recommending ‘that the Government of Iceland revoke and refrain from issuing special permits to its nationals . . . until the uncertainties identified [by] the Scientific Committee . . . have been resolved.’”); Hirata, *supra* note 60, at 137-38 (“At the 2003 IWC annual meeting, Japan’s request for a coastal catch of 150 minke whales—triple its previous request—was rebuffed, together with other requests such as setting up a new hunting ground for 150 Bryde’s whales in the northwestern Pacific.”); *id.* at 138 (“[T]he IWC approved a nonbinding resolution to ban Japan from conducting its scientific whaling program in the Antarctic Ocean . . .”). Norway, Iceland, and Japan’s insistence on continuing to hunt whales under the pretext of scientific research has made them “rogue states in the eyes of much of the world.” Nagtzaam, *supra* note 4, at 422.

102. See Nagtzaam, *supra* note 4, at 431 (“Norway decided not to ask for a scientific permit leaving Japan isolated as the only state still claiming that whaling is a scientific activ-

in killing whales under this exemption.¹⁰³ In 1995, the IWC passed a resolution introduced by the United Kingdom on behalf of eight other non-whaling nations limiting scientific research whaling to non-lethal methods.¹⁰⁴ The IWC passed successive resolutions expressing regret that Japan was continuing to carry on lethal research and later “deep concern” that scientific research permits were enabling Japan to kill whales for commercial purposes despite the ban on commercial whaling.¹⁰⁵ However, under the terms

ity.”); *see also* Gillespie, *supra* note 16, at 37 (“Norwegian research has focused on collecting data for use in developing mathematical models of the Barents Sea ecosystem . . . to improve management of fisheries.”). *But see id.* (“Despite such strongly expressed concerns on the part of the IWC, Norway made only minor changes in its programme. Its lack of response resulted in a continual series of similar resolutions.”); Osherenko, *supra* note 76, at 236 (“Iceland, also an island nation with a high degree of dependency on the fishing industry, announced its intent to resume scientific whaling in 2003.”).

103. *See* Gillespie, *supra* note 16, at 38 (“The failure to satisfy the criteria of the IWC resolutions on Special Permits and Scientific Research also led to criticism of the research programs in Korea and the former Soviet Union. Both nations have subsequently suspended these programs.”); *id.* (“[T]he only country actively conducting and expanding scientific whaling operations is Japan.”); *see also* Lessoff, *supra* note 21, at 423 (“While both Japan and Iceland continue to exploit this loophole in the name of ‘scientific research,’ it is Japan which is drawing the most international attention.”); Nagtzaam, *supra* note 4, at 432 (“Despite being virtually alone within the IWC, Japan continues to take whales for ‘scientific purposes’ over the objections of other IWC members.”).

104. *See* Nagtzaam, *supra* note 4, at 431 (“In 1995 the United Kingdom—acting on behalf of Australia, Brazil, France, Netherlands, New Zealand, Oman, South Africa and the United States—introduced a resolution that research should be conducted primarily by non-lethal methods, and lethal methods should only be used in ‘exceptional’ circumstances, in order to address vitally important scientific questions.”). The resolution passed. *Id.*; *see also* Gillespie, *supra* note 16, at 43 (referring to “the Commission’s preference for the use of non-lethal techniques in scientific research,” and relating, “[The IWC’s special permit resolution] stipulates that the killing of cetaceans should be permitted only in *exceptional circumstances where the questions address critically important issues* that cannot be answered by the analysis of existing data or use of non-lethal research techniques” (emphasis in original)); *id.* at 36 (“In the mid-1990s, the issue of scientific whaling became more contentious as Japan continued to conduct lethal whaling operations within the recently established Southern Ocean Whale sanctuary. Accordingly, in 1996 the IWC Commission resolved that ‘Contracting governments should undertake . . . the conduct of a program of research in the Southern Ocean Sanctuary using non-lethal methods and . . . refrain from issuing special permits for research involving the killing of cetaceans in such sanctuaries.’”).

105. Nagtzaam, *supra* note 4, at 431; *see also* Detsky, *supra* note 25, at 37 (“Japan, as the largest voice for resumption of the commercial take of whales, consistently has held the position that it is allowed to take whales for scientific purposes, and then sell the commercially viable products of the take.”); Gillespie, *supra* note 16, at 40 (“Because the criteria for justifying lethal research had not been fully met, the IWC passed another resolution inviting the Japanese government to reconsider the proposed take of Minke whales.”); Hirata, *supra* note 60, at 133 (“The IWC then formally recommended that Japan withdraw its scientific research proposal. In response, Japan revised its proposal and announced that it would start research in the Antarctic in the 1987-1988 season by taking a

of the Convention, the IWC was powerless to do anything about Japan's behavior.¹⁰⁶ Japan's continued whaling in the Southern Ocean under a scientific research permit after 1986¹⁰⁷ prompted Australia in 2010 to institute proceedings against the country in the International Court of Justice.¹⁰⁸

Japan is the largest user of the scientific research exemption, having killed over 3,500 whales under the exemption since the ban against commercial whaling came into effect in 1986;¹⁰⁹ its take of

reduced number of minke whales."); *id.* at 134 ("Despite the IWC's criticism of the Japanese action, Japan carried out and even expanded the JARPA program.").

106. *See* Rieser, *supra* note 2, at 416-17 ("[T]he United States and other IWC member states have consistently opposed the scientific whaling programs but have had little recourse under the terms of the ICRW.").

107. Moffa, *supra* note 43, at 205; *see also* Detsky, *supra* note 25, at 36-37 ("Japan has taken thousands of whales, under the scientific research exception, from the Southern Ocean Whale Sanctuary."); Gillespie, *supra* note 16, at 41 ("The Japanese vociferously opposed the designation of the Southern Ocean as a sanctuary since it is the primary site for their whaling operations."); *id.* ("[Japan] has voted with its feet by continuing to conduct scientific whaling operations in the region, even in the face of numerous resolutions by the IWC parties calling upon it to respect the sanctuary."); Hirata, *supra* note 60, at 133 ("This sanctuary targeted Japan, which had been trying to resume commercial whaling in the southern ocean area."); Nagtzaam, *supra* note 4, at 442 ("Japan . . . lodged an objection [to the Australian sanctuary] and thus can still legally hunt minke whales in the region as well as continue to try to eliminate the sanctuary exception.").

108. *See* Moffa, *supra* note 43, at 207 ("The Australian government—joined by twenty-nine other nations and the European Commission—filed in 2010 an Application Instituting Proceedings in the International Court of Justice (ICJ)."); *see also* Anton, *supra* note 29, at 332 ("The dispute has harsh overtones of nationalism and a desire to 'win' against Japan in some sort of international 'competition.' The same media posture seems to prevail in Japan, too.").

109. *See* Gillespie, *supra* note 16, at 34 ("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* Burns, *supra* note 25, 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 60, at 134 ("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 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* note 16, at 34 ("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 25, at 272 ("Iceland, which very recently re-adhered to the ICRW, proposed a scientific research

whales under this provision has grown exponentially since then. Japan defends its action, saying the United States' threats of economic sanctions pressured it into supporting the moratorium, which it only did on the assurance the ban would end once whale stocks reached a high enough level for commercial whaling to restart.¹¹⁰ It has repeatedly petitioned the IWC to lift the ban and establish catch quotas for various species of minke whales—a principal target of its scientific research.¹¹¹

Proponents of scientific whaling maintain that lethal research is necessary to determine the impact of whales on fish populations.¹¹² However, most cetacean scientists believe non-lethal

program that would authorize the killing of 100 minke, 100 fin, and 50 sei whales each year for two years.”). South Korea in July 2012 submitted an application for a lethal scientific research permit. Ron Popeski, *Commission Ups Whaling Quota for Aboriginals*, GREENWIRE, (July 5, 2012), <http://www.eenews.net/Greenwire/2012/07/05/10>.

110. See Hirata, *supra* note 60, at 132 (“The United States, the architect of the moratorium, pressured Japan and other whaling states to accept the moratorium by threatening them with economic sanctions.”); see also Osherenko, *supra* note 76, at 227 (“Few Westerners understand the depth of distrust of the United States and the level of resistance on the part of the Japanese and other pro-whaling nations to acquiesce to U.S. demands today.”). When it joined the IWC in 1951, Japan contends the organization was dedicated to restoring whale populations to enable the restart of commercial whaling. See Hirata, *supra*, at 131 (“When Japan joined the IWC in 1951, the country’s whaling policy was consistent with those of the majority of IWC members. Most member nations were whaling states concerned about the serious depletion of certain whale stocks. These prowhaling members were interested in preserving whale resources for commercialization of whale products, but did not support a permanent ban on whaling.”). Japan did not anticipate the shift to preserving whales for their own sake. See *id.* at 131 (“[T]he focus of the organization has shifted from the sustainable use of whales (i.e., the orderly development of the whaling industry) to the conservation of whales (i.e., stopping the killing of whales that may otherwise extinct), and further to the *protection of the welfare of whales* (i.e., ending the suffering of whales’ ‘irrespective of their conservation status and irrespective of the benefit of such actions to humans.’”) (emphasis in original)).

111. Hirata, *supra* note 60, at 136. For a list of reasons Japan has for continuing to use research permits to kill whales, see *id.* at 145 (listing as reasons: “whaling is a traditional Japanese activity, [therefore] Japan has the cultural right to conduct whaling operations”; there is no “scientific basis” for the moratorium; “some species of whales are abundant and are actually destroying the marine ecosystem by depleting fish stocks, and thus [] it is necessary to reduce their numbers”; “Japan has the legal right to conduct whaling for purposes of scientific research and to process and use whales after research, without regulation by the IWC”; “the 1982 moratorium was 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”). Hirata thinks it unlikely that the support of Japan’s bureaucracies for this practice will change. See *id.* at 146 (“[T]he end of whaling could mean a decline in these agencies’ political power. Given intense interministerial rivalries in Japan, it is not likely that these bureaucratic actors would voluntarily concede one of their areas of jurisdiction.”).

112. See Ruffle, *supra* note 6, at 652 (commenting that “Japanese officials argue that research is necessary to determine the impact of whales on fish populations in Japanese

methods are equally effective for learning information about whales.¹¹³ In fact, little has been produced in the way of scientific support for Japan's research program.¹¹⁴ Even Japan has admitted that its program has been less successful than it had hoped in finding answers to questions about whale stocks.¹¹⁵ However, Japan also justifies its use of the exemption as the only way to keep artisanal whaling practices found in its coastal villages alive,¹¹⁶ a rationale to which it does not appear there is a ready answer.

waters and . . . will reveal valuable information concerning the viability of world food supplies"); *see also* Gillespie, *supra* note 16, at 39 ("Proponents of the research programme contend that it will contribute to the development of 'highly sophisticated management' regimes."). *But see id.* at 34 ("[T]he first question is whether scientific research involving the use of animals is necessary. If the answer is yes, then the second question must be whether this process can be refined, the number of animals reduced, or the overall process replaced."); Lessoff, *supra* note 21, at 423 ("Critics have pointed out that a single whale, by its sheer size, would "overwhelm any modern scientific research laboratory, providing enough material to keep a team of scientists busy for months.").

113. *See* Molenaar, *supra* note 80, at 401 ("The objective scientific need for the (extent of the) Japanese scientific whaling programme and the proposed Icelandic scientific whaling programme appears questionable. Similarly suspect is Japan's alleged strategy of 'vote-buying' by which predominantly Caribbean States may be receiving financial aid in exchange for aligning their votes with Japan at IWC meetings."); *see also* Gillespie, *supra* note 16, at 40 ("While many scientists acknowledge that information on stock identity was important, most believe it could be obtained through non-lethal research."); *id.* at 44 ("The assessment of stock abundance in biological populations can also be assisted by non-lethal methods in the form of photo-identification, transect surveys, and vocalization.").

114. *See* Moffa, *supra* note 43, at 206 ("Japan has produced very few, if any, peer-reviewed studies explaining the program's scientific findings."); *see also* Ruffle, *supra* note 6, at 656 ("As early as 1987, Japan announced that it would take large male sperm whales from the Atlantic under the scientific research exception in order to determine the whales' primary prey. The activity generated a great deal of controversy since the scientific community had known for over a century that the primary prey of the sperm whale is the squid.").

115. Gillespie, *supra* note 16, at 48 ("The JARPA review, to some degree, acknowledges these points, recognizing that although 'much progress has been made . . . there was still uncertainty whether information that fully represents a biological stock could be obtained. . . . [A]t the halfway point in the JARPA program there are few definitive answers. . . . Such a result is all the more disappointing when one realizes that nearly 3,000 whales have already been taken under the pretext of answering such questions.").

116. *See* Osherenko, *supra* note 76, at 236 ("Scientific whaling persists for the dual purpose of keeping whaling practices alive as well as protecting important fishing industries in Japan and Iceland. Current research by Japan aims to understand multispecies interaction of cetaceans and fish and to ensure that growing whale populations do not deplete important fish stocks."); *id.* at 227 ("Loss of access to minke whales 'that for decades had provided greater than three-quarters of the quantity and value of their annual catch' constituted not only a substantial economic hardship but also a loss of subsistence and identity, because 'minke whales also featured prominently in residents' social, ceremonial, symbolic, and religious life.'"); *see also* Callicott, *supra* note 76, at 3 ("[M]inke whales are locally available and killing them is a historic local tradition.").

Japan's opposition to the moratorium on commercial whaling continues unabated¹¹⁷ as does its practice of taking whales for scientific purposes.¹¹⁸ Some see Japan's insistence on continuing to hunt whales under a scientific research permit as little more than a thinly veiled attempt to continue commercial whaling despite the 1986 ban.¹¹⁹ Others see the country's intransigence in the face of global condemnation as part of a diplomatic effort to "roll back" the ban and prevent its expansion to other whales—playing a long-term "diplomatic game to achieve their objectives."¹²⁰ Although it is unlikely that the continuation of scientific whaling will have an impact on whale stocks,¹²¹ it remains ethically problematic,¹²² and the scientific research exemption remains the most con-

117. See, e.g., Detsky, *supra* note 25, at 37 ("In March 2002, Japan announced that at the annual meeting of the IWC, which it would host, their government would push for resuming commercial whaling and ending the moratorium."); Rieser, *supra* note 2, at 418 ("The government of Japan views the whaling moratorium as a bad precedent that, if emulated by other regional fisheries organizations or governance bodies, would threaten Japan's access to marine resources around the world."); *id.* ("To hold the line on what it views as overly restrictive ocean governance norms that compete for legitimacy with the sustainable use principle, the government of Japan is committed to restoring its commercial whaling industry.").

118. See Detsky, *supra* note 25, at 37 ("In March 2002, . . . [t]he Japanese government announced plans to increase its take of scientific research whales substantially, and also resumed importing whale meat from Norway."). Alison Rieser sees a direct connection between the continuation of the moratorium and the size of the scientific research whale harvest. Rieser, *supra* note 2, at 423 ("The longer the moratorium stays in place, the bigger and more audacious the scientific whaling program becomes, despite the weaknesses in its ecosystem-based rationale.").

119. See Ruffle, *supra* note 6, at 640 ("Currently, Japan is the most vocal proponent in favor of commercial whaling and the world's single largest consumer of whale meat. Conservationist groups and anti-whaling nations are convinced that Japanese research whaling is a thinly disguised covert operation intended to boost supplies of whale meat in a marketplace where it fetches more than ten times the price of pork or beef."); see also Hirata, *supra* note 60, at 135 ("Critics argue that Japan's scientific whaling programs represent commercial whaling in disguise, as the whales captured in the program are killed and their meat is sold in the open market."). Japan has gone so far as to create a government-connected Institute for Cetacean Research to oversee this practice, which actually markets whale meat and other byproducts to national suppliers. Ruffle, *supra* note 6, at 651-52. But selling meat from whales killed pursuant to a scientific research permit is consistent with the Convention. See Moffa, *supra* note 43, at 206 ("Article VIII further allows the whales taken under this exception to be processed and sold on the commercial market pursuant to the instructions of the country granting the research permit.").

120. See Nagtzaam, *supra* note 4, at 422 ("Japan has emerged as the leader of a veto coalition determined to roll back the moratorium, to prevent the ban from widening, and to replace it with conservationist whaling practices.").

121. See Burns, *supra* note 25, at 273 ("[C]urrent levels of scientific whaling are highly unlikely to threaten the viability of Southern Ocean minke stocks.").

122. See *id.* ("[W]hile those of us who count ourselves in the preservationist camp

troversial of the programs the IWC administers.¹²³ The IWC's inability to end the program, despite strong opposition to it,¹²⁴ is emblematic of its inability to protect whales.

b. *Subsistence hunting.*

There is also an exemption in the Convention for aboriginal whale hunting.¹²⁵ However, aboriginal hunting creates a moral conundrum¹²⁶—what Gail Osherenko calls a “cognitive disso-

may bemoan the ethics of scientific research whaling on animal welfare grounds, it is probably untenable to argue that these operations threaten the viability of whale stocks at this point and thus undermine the IWC's conservation objectives.”); *see also* Gillespie, *supra* note 16, at 40 (“[T]o this point the debate in the IWC surrounding scientific whaling operations has focused on the necessity for scientific research and alternatives to such research. By contrast, ethical considerations in this context, focused on reduction and refinement . . . have been largely ignored.”).

123. *See* Ruffle, *supra* note 6, at 655 (“[P]erhaps the most controversial of the ICRW provisions is the scientific research exception.”); *see also* Moffa, *supra* note 43, at 206 (“A majority of the IWC nations have made clear through repeated resolutions that the permits granted by Japan in the JARPA I and II programs were beyond the scope of the Article VIII scientific research exception, or, at least, constituted a bad faith use of the exception.”).

124. *See* Gillespie, *supra* note 16, at 42 (“If one construes the question of necessity as being in the province of the parties, then given the fact that they [IWC members] have consistently voted against Japan's research program, and have expressly called upon it to not conduct such operations within the sanctuaries, scientific whaling is not necessary to effectuate the objectives of the ICRW.”); *see also* Burns, *supra* note 25, at 272 (“[T]he IWC has continually passed resolutions over the past 15 years calling for the cessation of research whaling operations, on the grounds that such research is not essential for rational management of stocks, does not address critical research needs, and that nonlethal techniques can provide commensurate data.”). Ruffle comments that at the 2000 annual meeting of the IWC Japan submitted “an extensive proposal” for the annual sampling of 100 minke whales, 50 Bryde's whales, and 10 sperm whales, which “raised a considerable disagreement within the IWC” and led to the ultimate adoption of a “resolution strongly urging Japan to reconsider issuing the permit.” Ruffle, *supra* note 6, at 657. Nevertheless, according to Ruffle, in October 2000, five whaling ships returned to port with forty-three Bryde's whales, five sperm whales, and forty minke whales. *Id.* at 657.

125. Convention for the Regulation of Whaling, art. 3, Sept. 24, 1931, 49 Stat. 3079, 155 L.N.T.S. 349; *see also* Nagtzaam, *supra* note 4, at 436 (“It is clear that the IWC always meant aboriginal whaling to be a legitimate exemption to the overall commercial ban, provided that such activities did not threaten the survival of whale species.”). To the dismay of whale preservationists, the IWC recently extended the aboriginal whaling quotas for the United States, Russia, and St. Vincent and the Grenadines, allowing the take of baleen whales through 2018 and the killing of 336 bowhead whales in the Bering, Chukchi, and Beaufort seas, 744 gray whales from the North Pacific, and 24 humpback whales by the two Caribbean countries. The NGOs objected to the combination of quotas for three species instead of considering each country's quota individually. *Id.*

126. *See* Stoett, *supra* note 2, at 166 (“So we have the added ethical dilemma, assuming it is a trustworthy representation, of whether a biological extinction is worth risking if and when a cultural extinction becomes a possibility.”).

nance” between awe and respect for whales and a desire to promote and protect cultural diversity.¹²⁷ On the one hand, there is the moral obligation to protect the traditional practices of aboriginal peoples;¹²⁸ on the other, the moral imperative to protect species like the endangered bowhead whale from extinction.¹²⁹ Litigation by the Makah Tribe forced the United States, normally a staunch opponent of whaling, to retract its objections to aboriginal hunting.¹³⁰ The IWC withdrew a subsequent request by the United

127. Osherenko, *supra* note 76, at 222.

128. See D’Amato & Chopra, *supra* note 47, at 58 (“The exploitative commercial whaling practices of the developed nations victimized the Inuit people. Having endangered the species, the commercial nations are attempting through the IWC to curtail the Inuit’s historic right to subsistence whaling.”); *id.* at 59 (“[I]t is not the lives of the Inuit that are at stake but, rather, their traditional life style.” (emphasis omitted)); see also Stoett, *supra* note 2, at 167 (“The aboriginal question raises broader issues, as yet largely unexplored, about the meaning of contemporary sovereignty, in terms of both community-level governance and the relationship between communities and the states in which they find themselves, through processes of colonization and intracolonization.”).

129. See D’Amato & Chopra, *supra* note 47, at 57 (“The problem is poignant because the whales they hunt are the bowhead, an endangered species.”); *id.* at 59. (“Unfortunate though it may be that commercial whaling placed the Inuit’s source of food in danger of extinction, the fact remains that no further killing of bowheads—whether by commercial fishing vessels or by the less technological methods of the indigenous peoples—can be justified.”); see also Molenaar, *supra* note 80, at 48 (“Likewise, aboriginal whaling was also not responsible for the near-extinction of many species of marine mammals, but for some species it may lead to that now.”); Stoett, *supra* note 2, at 166 (“When whales are threatened with extinction, one might plausibly argue even indigenous communities must refrain from hunting them.”).

130. See Nagtzaam, *supra* note 4, at 434 (“[T]he United States, which has opposed commercial whaling, has sought to sanction such whaling since it has a large indigenous population which has hunted whales for centuries.”); *id.* at 438 (“The United States has still authorized the Makah to take whales domestically. Doing so undercut their moral legitimacy, however, and allowed states such as Japan, Iceland, and Norway to argue for increased whaling through the device of aboriginal whaling.”); see also D’Amato & Chopra, *supra* note 47, at 56 (“The United States, which has taken the lead in criticizing Japan’s policy, has been gravely inconsistent. By stressing a ban on commercial whaling, the United States has managed to exempt Alaskan aboriginal subsistence whaling.”); Lessoff, *supra* note 21, at 423-24 (“The United States did not file an objection to the IWC [subsistence] quota, although it had a right to do so. It realized such an objection would result in the taking of a small number of bowheads, and even the smallest of takings would weaken the IWC’s and the United States’ role in the IWC’s efforts to save the whales. Thus, the United States realized that even a small taking of these whales would diminish the effectiveness of the IWC’s goal of whale conservation and have a devastating impact on the Commission as a whole.”). Peter Stoett distinguishes the United States’ handling of aboriginal hunting from Canada’s, finding favor with the latter. See Stoett, *supra* note 2, at 167 (“Canada’s withdrawal from the IWC, in retrospect, was a sensible, situational abrogation: It avoided confrontations between the Inuit community and a shifting global normative environment.”)

States on behalf of the Makah to catch five gray whales¹³¹ because of considerable opposition to it.¹³² Nagtzaam conjectures that the opposition was “payback” by whaling countries who argued that subsistence whaling was the equivalent of whaling by small Japanese coastal towns and should only be allowed if these towns could also whale.¹³³ Aboriginal whale hunting has also muted the usually vociferous anti-whaling ENGOs because of their unwillingness to offend groups whom they have supported under other circumstances.¹³⁴ The exception for subsistence hunting shows no sign of

131. See Nagtzaam, *supra* note 4, at 437 (“At the forty-eighth IWC annual meeting the United States put forward a request from the Makah tribe to be allowed to catch five gray whales. The United States stipulated that it had an agreement with the Makah tribe that there would be no commercial whaling and that the request conformed to the criteria for an aboriginal subsistence quota.”).

132. See *id.* (“France and the Netherlands opposed the motion, with France asking how it could be a cultural event if modern technologies were to be used and whether the Makah arrangement met the definition of subsistence if the tribe had managed for seventy years without hunting whales. The Netherlands was concerned whether this request met the current definition of aboriginal subsistence whaling and questioned the Makah tradition, citing that their whaling had been of a commercial nature. Further discussion exposed that there was clear division on this issue with Japan, the Republic of Korea and the Russian Federation supporting the proposal, but many other members (Australia, Spain, Chile, New Zealand, China and Mexico) opposing the motion. Before it could be put to a vote the item was adjourned in favor of informal discussions.”).

133. See *id.* at 438 (“The vote appears to have been an example of payback by whaling states with Japan leading a coalition of states arguing that aboriginal whaling was the ‘moral’ equivalent of Japanese small-type coastal whaling, and if that was not allowed then aboriginal whaling should also be banned.”); see also Hirata, *supra* note 60, at 136 (“Tokyo has demanded at the IWC that, under the rules of the 1982 moratorium, Japan’s four coastal communities be given rights similar to the ‘aboriginal subsistence whaling’ rights that indigenous communities in the Arctic are accorded.”); *id.* (“Japan sees hypocrisy in the fact that while, on the one hand, the hunting of small-type minke whales in Japanese waters (under the STCW scheme) is prohibited, on the other hand, Alaskan Eskimos are authorized by the IWC to harvest endangered bowhead whales.”); Osherenko, *supra* note 76, at 226-27 (“The moratorium imposes an unjust and discriminatory burden on local whaling communities in Japan, Norway, and Iceland and has made whalers and whaling communities pariahs in the eyes of many. The burden has been particularly severe for small-scale Japanese whalers.”); *id.* at 228 (“[S]ubstantial elements of commercial activity exist in aboriginal whaling, while artisanal whaling holds cultural, religious, and social importance for Japanese coastal communities that is equivalent to aboriginal communities.”); Stoett, *supra* note 2, at 162 (“When the subsistence question is raised, easy ethical divides fall prey to more complicated human rights issues, and the IWC walks a dangerous ground here, open to accusations of exceptionalism. Are the cultural needs of coastal whalers ignored in the process of sanctifying the aboriginal hunt?”).

134. See Nagtzaam, *supra* note 4, at 435 (“ENGOs have also been strangely quiet on this issue, not wishing to offend aboriginal organizations whose rights they have traditionally supported in other forums. Their silence on the issue, however, undercuts their moral persuasiveness in the eyes of their opponents and to some extent, to the rest of the world. The vexed issue of aboriginal subsistence whaling is one that preservationist groups must come to terms with by declaring which set of rights is more important, aboriginal group

disappearing soon.¹³⁵

Those who wish the killing of whales to stop deplore the exemption for aboriginal whaling¹³⁶ and do not sympathize with claims for continuation of traditional rights.¹³⁷ They contend that while aboriginal peoples might once have had a legitimate, albeit “weak” claim to hunt bowhead whales, the exploitive practices of commercial whalers resulting in their near extinction¹³⁸ have deprived aboriginal peoples of those rights.¹³⁹ According to Nagtzaam, whaling countries use this exemption to further their own whaling goals,¹⁴⁰ flying under it like a flag of convenience, their cultural atavism merely a front for other nationalistic goals

rights or the intrinsic right of whales to exist.”); *id.* at 438-439 (“Their [ENGOS] silence [on the issue of aboriginal whale hunting] runs the danger of undercutting their authority as norm teachers, leaving them open to accusations of hypocrisy by pro whaling forces. Rather than being drawn into a moral and public battle they may not be able to win, most ENGOS have avoided the issue.”).

135. Nagtzaam, *supra* note 4, at 444-45 (“The vexed anomaly of aboriginal whaling continues, and given the ENGOS’ reluctance to tackle the issue, there is no sign of the practice being limited or annulled.”). The same appears to be true for Japan’s use of the research exemption. *See id.* at 445 (“While Japan is the only state still continuing ‘scientific research on whales, such Japanese research seems set to continue for the foreseeable future.”); *see also* Harrop, *supra* note 48, at 84 (“International law has found ways to compromise by provision of narrow and specific exemptions for indigenous groups, but in other respects this approach remains controversial and the clash still persists.”).

136. *See* D’Amato & Chopra, *supra* note 47, at 59 (agreeing that “overlooked voices deserve the greatest consideration,” but arguing that the “Inuit’s claims [themselves] are at the expense of an overlooked voice—the anguished cry-of the sentient inhabitants of the deep”).

137. *See id.* (referring to the great whales’ interest “in the survival of their species or—even short of survival—[in] their “right to live. The whales find their own sustenance in the oceans; by what right do the Inuit expropriate the bodies of the whales to serve as their food?”); *id.* at 57 (“For the cultural use of the baleen in folk theater may well help to perpetuate and solidify a pervasive attitude among the population that the whale is *meant* to be killed for the artistic and gustatory benefit of humans. This attitude itself can thus contribute to the perpetuation of, or increase in, the hunting and killing of whales.” (emphasis in original)).

138. *Id.* at 60 (“[A] weak claim could be advanced that whaling by the Inuit might have been tolerated for some additional years were it not for the invasion of arctic waters by the commercial whalers.”).

139. *See id.* (“Article 1(2) can therefore be read as saying that the exploitative practices of the commercial whalers (coupled with the inevitable present need to protect the great whales from extinction) deprived the Inuit of their means of subsistence.”).

140. *See* Nagtzaam, *supra* note 4, at 434 (discussing “the attempt by pro-whaling states (particularly those with indigenous populations to continue to push for the expansion of the ambit of such activities.”); *id.* (“Japan and Norway have attempted to use this issue as a wedge to reopen the broader issue of commercial whaling, arguing that some of their tradition cultural activities should fall under this category.”).

having nothing to do with either whales or traditional cultures.¹⁴¹ Yet others, like Osherenko, see the exemption as raising classic environmental justice issues¹⁴² because it disadvantages the environmental concerns of minority groups in favor of those in the majority,¹⁴³ and opposition to it a form of cultural imperialism.¹⁴⁴ Osherenko contends that anti-whaling nations are trying to impose Western "culinary preferences" on less powerful groups,¹⁴⁵ in what she calls a form of "food hegemony."¹⁴⁶ To Russel Barsh, the dis-

141. See Ruffle, *supra* note 6, at 654-55 ("Japan has often adopted an expansive foreign policy to obtain much-needed natural resources in spite of international efforts to protect these limited resources. The right to extract natural resources from the global commons is critical to Japan's survival as a nation. As a result, Japan refuses to concede on the whaling issue for fear it might adversely affect the country's tradition of exploration and exploitation of the seas.").

142. See Osherenko, *supra* note 76, at 235 ("The costs and negative consequences of the moratorium fall unjustly on those who are marginalized."); see also Stoett, *supra* note 2, at 161 ("The environmentalists who eschew the utilitarian perspective of nature often fall short of grasping the difficulty and cultural resonance of the subsistence lifestyle.").

143. See generally Robert D. Bullard, *Overcoming Racism in Environmental Decisionmaking*, ENVIRONMENT, May 1994, at 11 (cited in Osherenko, *supra* note 76, at 221 n.4 ("The environmental justice movement calls attention to the inequities in the application and enforcement of environmental laws that place a heavy burden on the poor and people of color while benefiting the educated and wealthy disproportionately.")).

144. See Osherenko, *supra* note 76, at 222 (discussing "the cultural imperialism present in the whaling controversy"); see also D'Amato & Chopra, *supra* note 47, at 59 ("[T]he attempt [by environmentalists] to include whales in the 'common heritage of mankind' under international law is 'a kind of intellectual imperialism.'"); Stoett, *supra* note 2, at 173 ("Indeed, whales, and their borderless, submerged worlds, would make excellent candidates for the ushers/midwives of such a paradigm shift [toward ecocentrism]. Yet this is at best premature, and at worst places excessive pressure on the symbolic aspect of whales while ignoring the problems inherent in global governance efforts. The universal application of ethical positions, when it derives from coerced imposition, is little short of cultural imperialism. Even the adoption of the still contestable and unclear precautionary principle must not be done as a steadfast rule, but left as an 'open-ended process, involving evaluative judgments.' Again, situational ethics apply, and this makes the abolishment of whaling a difficult policy when endangerment is not a clear possibility.").

145. See Osherenko, *supra* note 76, at 224 ("The antiwhaling advocates have captured the central decision-making apparatus of the IWC and used it to impose Western cultural (including culinary) preferences on less powerful communities."); *id.* at 225 ("Australia, New Zealand, the United States, and Europe abhor the taking of whale meat for consumption."). But see Harrop, *supra* note 48, at 85 ("[With regard] to the protectionists who want the eaters of whale meat to change their ways and bow to the new taboos; and . . . the swell of humane-society attitudes that want us all to walk around clad in nylon and polyester, do no harm to nature, and cause no death to any animal. . . . [I]t is my contention that these movements are indicative of a growing alienation from the realities of nature and that they are for a number of reasons unsustainable in the long run." (quoting FINN LYNCE & MARIANNE STENBAEK, *ARCTIC WARS, ANIMAL RIGHTS, ENDANGERED PEOPLES*, xi (1992))).

146. See Osherenko, *supra* note 76, at 225 ("[T]he refusal of the IWC to allow artisanal whaling and tighter IWC restrictions on indigenous whaling to global trends in food hegemony."); *id.* (quoting the anthropologist Russel Barsh and calling opposition to sub-

course over killing and eating whales, while “couched in moral and legal terms,” is really about relative power where “the rich nations eat from the tables of poor nations, all the while depriving poor nations of their own locally controlled sources of nutritionally and ecologically appropriate food.”¹⁴⁷ However, the facts that some aboriginal groups like the Inuit kill endangered whales and countries like Greenland are serving meat in restaurants from endangered Bowhead whales caught by their aboriginal peoples¹⁴⁸ at least open to question the moral legitimacy of the exemption for subsistence whaling.

3. *Lack of enforcement powers.*

Under the Convention, the IWC has little enforcement power over member nations¹⁴⁹ because it is allowed only to make “recommendations” to the offending state.¹⁵⁰ It has no authority over

sistence hunting “a continuation of a strategy of cultural hegemony that powerful states have pursued since the Roman Empire”); *id.* at 236 (“What does environmental justice mean in the context of the IWC debates? Does it mean that the nations that once brought whales near to extinction in order to light their lamps should now deny all peoples the right to hunt whales sustainably? As discussed above, environmental justice is called into question when the food preferences of those who eat pork, chicken, and beef from factory farms operating in the most marginally humane way prevail over those who eat whale.”); *see also* Hirata, *supra* note 60, at 143 (referring to “[c]ultural relativism” and quoting to the effect that “the acceptance of other cultures’ dietary practices and the promotion of cultural diversity is as important as saving endangered species and the promotion of biological diversity” (quoting JAPANESE MINISTRY OF AGRICULTURE, FORESTRY, AND FISHERIES, SHARE OUR PHILOSOPHY WITH YOU: JAPAN WILL HOST THE 54TH INTERNATIONAL WHALING COMMISSION ANNUAL MEETING IN 2002 (2002), <http://www.jfa.maff.go.jp/whale/assertion.htm>)).

147. Osherenko, *supra* note 76, at 225.

148. *See Greenland Restaurants Serve Whale Meat to Tourists*, GREENWIRE, (June 26, 2012), <http://www.eenews.net/Greenwire/print/2012/06/26/13>. Stoett questions the moral legitimacy of the IWC’s distinguishing between commercial and subsistence whaling. *See* Stoett, *supra* note 2, at 165 (“The accepted ethical position for American policy-makers is that whaling for commerce is bad, but whaling for subsistence and cultural purposes is justified. This leads to many necessary questions. Does the IWC have the necessary legitimacy to determine the distinction between commercial and subsistence whaling?”).

149. *See* Stoett, *supra* note 2, at 165 (“Although one might argue the IWC . . . set important norms and standards, it has little regulatory muscle itself.”); *see also* Ruffle, *supra* note 6, at 641-42 (“[The IWC’s] role can only be described as symbolic, given the apparent inability of the IWC independently to enforce its regulations or to sanction member nations engaging in activities that undermine the Commission’s goals.”).

150. *See* Ruffle, *supra* note 6, 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.’”); *see also* Moffa, *supra* note 43, at 207 (“Formal international law enforcement mechanisms, such as resolutions, have been ineffectual in ending Japan’s illegal whaling in

non-member states,¹⁵¹ and member nations can only enforce IWC regulations within their territorial jurisdiction.¹⁵²

The IWC has no independent authority to impose penalties on those who violate its regulations¹⁵³ or to monitor whaling activities,¹⁵⁴ with the result that many violations of IWC regulations are undetected or underreported.¹⁵⁵ This contributes to the indeterminacy of whale stock estimates that form the basis for hunting quotas.¹⁵⁶ Even a controversial requirement that whaling ships must carry at least two inspectors on board¹⁵⁷ has not improved the accuracy of reporting because inspectors are appointed by their

the Southern Ocean. Lacking the necessary invocation and application functions of international lawmaking, the ICRW and domestic law prescriptions have had no lasting effect on community behavior. Japan has been authorizing whaling through the JARPA programs continuously since 1986.”); *id.* at 209 (“A simple call to action will generally lead to under-enforcement where international law violations have environmental casualties—such as the whales of the Southern Ocean—rather than human victims.”).

151. See Nagtzaam, *supra* note 4, at 400 (“The Commission was powerless to regulate the activities of non-member countries since the Convention was not applicable to non-members.”). Making enforcement more difficult is that whales are generally in the high seas, areas too vast to effectively patrol and enforce. See Ellis, *supra* note 24, at 6 (“Freedom of the high seas is one of the most venerable principles of international law, and the strength of this principle is reinforced by the vastness and inhospitability of ocean spaces and the practical difficulties of exercising authority on the high seas.”).

152. See Nagtzaam, *supra* note 4, at 400 (“Enforcement of IWC regulations was left to individual member-states”); Ruffle, *supra* note 6, at 653 (“All authority to punish infractions is vested within the country having jurisdiction over the violations.”). This is in line with general international law principles. See *id.* at 665 (“[C]ustomary international law stipulated that a sovereign state has jurisdiction to prescribe and enforce laws only within its territorial boundaries.”). Lessoff suggests that the United States, New Zealand, and Australia impose heavier sanctions on countries that violate IWC regulations “in hopes of curtailing the illegal takings of whales.” Lessoff, *supra* note 21, at 444.

153. See Lessoff, *supra* note 21, 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.”).

154. Ruffle, *supra* note 6, at 642.

155. See *id.* at 658 (“Many violations are unnoticed or under-reported and essentially unpunished on an international level.”); *id.* (“[Because] the IWC lacks any authority to punish pro-whaling nations for violating the reporting regulations, these nations, acting in their own interests, are prone to under-report these statistics to the Commission.”).

156. Lessoff, *supra* note 21, at 441 (“Accurate assessments would provide the necessary support for the imposition of quotas.”).

157. See Ruffle, *supra* note 6, at 668 (“Under the current scheme, whaling nations are required to maintain at least two inspectors on each ship ‘for the purpose of maintaining twenty-four hour inspection’ and adequate inspection at each land station.”). This provision is controversial. See Stoett, *supra* note 2, at 165 (“[One question is] whether the whaling nations should have to pay the costs of such an intrusive observer scheme or whether the entire IWC membership should be forced to contribute.”).

own governments and have a tendency to overlook violations.¹⁵⁸ IWC attempts to establish a register of whaling ships to eliminate the practice of vessels “flying flags of convenience” and for whale meat stockpiles¹⁵⁹ as well as DNA testing of whale products have been resisted.¹⁶⁰ The United States, which had had the capacity under the Pelly Amendments¹⁶¹ to impose trade sanctions on countries that continued to violate IWC quotas, lost that authority in *Japan Whaling Association v. American Cetacean Society*.¹⁶² The United States had used the Pelly Amendments to persuade both Norway and Japan to lift their objections to the moratorium¹⁶³ and generally to convince “reluctant states to adhere to the moratorium or risk losing lucrative export markets.”¹⁶⁴ However, the decision in *Japan Whaling Association* effectively stopped the United

158. See Ruffe, *supra* note 6, at 668 (“[These measures have] proven ineffective since a strong tendency exists for inspectors appointed and financed by their own governments to overlook infractions.”).

159. Burns, *supra* note 25, at 271.

160. See *id.* at 261 (“While the parties adopted the RMP in 1994, adoption of the RMS has been thwarted by continued conflicts between the parties over elements of the inspection and observation scheme, including funding and the level of coverage.”). A Revised Management Procedure (RMP) is “a management framework intended to ensure the sustainability of commercial whaling should the moratorium ultimately be lifted,” and is “one of the cornerstones” of the IWC’s 1982 Comprehensive Assessment which included new methodologies to “assess the status and trends of whale populations” among other things. *Id.* at 260.

161. 22 U.S.C. § 1978 (2012) (Amendments to the 1967 Fishermen’s Protective Act, 22 U.S.C. §§ 1971-1980).

162. *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 241 (1986) (holding that the Secretary of Commerce had sufficient discretion under the Packwood Amendment and the Pelly Amendment to decide not to certify a country for violation of the Amendment and instead opt for entering into an executive agreement which furthers the laws goals).

163. See D’Amato & Chopra, *supra* note 47, at 46 (noting that “[t]he United States at this time notified both Norway and Japan that it was initiating certification under the Pelly Amendment,” which required “an embargo on the certified nations’ fishing rights in its 200-mile economic zone and ban the importation of fishing products from those nations,” from which the “Soviet Union was immune”). See also Nagtzaam, *supra* note 4, at 421 (“United States then informed Norway and Japan that under the Pelly Amendment it would seek to impose an embargo, banning the importation of their fish products to force them to comply with the IWC decision, which was subsequently found to be illegal under the GATT.”). The United States had previously used that authority in 1978 to pressure Chile, Peru, south Korea, and Taiwan to stop whaling. See *id.* at 411 (“Under the U.S. Pelly Act provisions, the United States certified Chile, Peru, and South Korea in 1978 for continued whaling.”); *id.* at 412 (“Under this pressure from a significant trading partner all agreed to be bound by IWC decisions in future. The United States also certified Taiwan. . . . Taiwan decided to ban all foreign whaling from its waters and then imposed on itself a ban on whaling in 1981.”).

164. See Nagtzaam, *supra* note 4, at 418.

States from using economic pressure to compel compliance with IWC regulations.¹⁶⁵

The opt-out provision additionally makes it difficult for the IWC to enforce its regulations against potentially non-compliant members who can avoid any regulatory requirement by “opting out” of its effect¹⁶⁶ or negotiating weaker requirements under the threat of opting out.¹⁶⁷ “Since pro-whaling states are aware that the Commission cannot compel them to perform their treaty obligations, they are quick to violate regulations,”¹⁶⁸ and have done so with regularity.¹⁶⁹ The IWC’s inability to enforce its restrictions has undermined its credibility and invites nations who still whale to engage in illegal behavior because there are no consequences.¹⁷⁰

165. See Lessoff, *supra* note 21, at 419 (“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.”). On the United States’ use of the Pelly Amendments to curtail Japan’s use of the scientific research exemption and whaling in protected areas, see generally U.S. Dep’t of State, *Clinton Letter to Congress on Japan’s Whaling Practices* (Jan. 02, 2001), in 3 J. INT’L. WILDLIFE L. & POL’Y 311, 313 (2008). 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. *Id.* at 311. See also Hirata, *supra* note 60, 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.”).

166. See Lessoff, *supra* note 21, at 418 (“The IWC lacks the power necessary to properly enforce its regulations. Within the IWC’s structure is an “opt-out” provision which enables any member nation that believes the set quotas and regulations are improper to elect not to abide by the IWC’s rules.”).

167. See *id.* at 421 (“Violators of IWC regulations and quotas have little to fear. Throughout the IWC’s forty-seven year history it has consistently received unfavorable reviews, primarily because of its inability to fully enforce its own rules. As a result, nations may, by threatening to object to the IWC’s restrictive amendments, coerce the IWC into adopting a weaker position by leading the Commission to believe that some conservation is better than no conservation at all.”).

168. Ruffle, *supra* note 6, at 659.

169. See Nagtzaam, *supra* note 4, at 442 (“Phillips argues that the key factor in building support for the sanctuary was the discovery in November 1993 that the Soviet whaling fleet had been consistently underreporting its catch figures. These revelations, made just prior to the Norfolk Island meeting in February 1994, showed that whalers had been ignoring IWC directives. This undercut the argument that whalers could be trusted to regulate their activities. This revelation was so morally shocking to the other states that it proved to be a critical factor in the successful vote to create a whale sanctuary in the region in May 1994.”); see also Lessoff, *supra* note 21, at 443 (“In 1994, tests conducted on whale tissue samples taken from whales harvested by the Japanese revealed that the Japanese were harvesting protected whales such as the Pacific Humpback and the North Atlantic Fin whale, in violation of IWC quotas.”).

170. See Ellis, *supra* note 24, at 11 (“It is difficult to convince actors to exercise restraint when they see others refusing to do so and paying no cost as a result of this refusal.”); see also Callicott, *supra* note 76, at 21 (“[I]f, standing upon a venerable tradition of

B. *Non-structural Problems that Hamper the Effectiveness of the IWC*

A paralyzing internal conflict between pro- and anti-whaling member states and inadequate science on whales has also prevented the IWC from protecting them. These problems have plagued the IWC since its inception and appear no closer to resolution today. Combined with the structural flaws discussed above, they contribute to what Rieser calls “a governance gap” at the IWC.¹⁷¹

1. *Internal conflict over the convention’s purpose and the IWC’s mission—conservation or permanent preservation.*

An internal conflict in the Convention’s Preamble, which refers to the signatories’ desire to “establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks,” has significantly contributed to the IWC’s dysfunction.¹⁷² This conflict reflects a

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.”); *id.* (Norway continuing to hunt whales commercially “contributes to the general breakdown of international law and order.”).

171. See Rieser, *supra* note 2, at 417 n.77 (“Other features of the ICRW that contribute to the current stalemate include the requirement of a three-quarters majority for Schedule amendments, the opting-out provision, the absence of a dispute settlement procedure, the absence of an independent scientific advisory body (members of the Scientific Committee represent member states rather than independent scientific institutions), the open membership, and the absence of a mechanism for amending the Convention. Together these provisions result in a ‘governance gap.’”); see also Lessoff, *supra* note 21, at 423 (“[T]he various loopholes within the IWC render the Commission’s regulations and imposition of quotas meaningless. Without enforcement provisions, the IWC has little control.”).

172. D’Amato & Chopra, *supra* note 47, at 34; see also Haskell, *supra* note 24, at 555 (“[The convention’s] dual aims are: (1) assisting in the orderly development of the whaling industry; and (2) protecting all species of whales from further overfishing. This dual mandate creates an internal tension in the ICRW.”); Lessoff, *supra* note 21, at 420-21 (“[T]he IWC has a conflicting dual role of both regulating the whaling industry and preserving the whales regardless of economic demands. Consequently, these conflicting roles can often be seen as the cause for much of the ineffectiveness of the Commission itself, resulting in a body whose decisions are based on sound scientific principles, but which fulfill neither objective effectively.”); Nagtzaam, *supra* note 4, at 398 (“[The] delegates’ aim was to manage exploitation of the great whales. The Preamble’s language, however, incorporated the more conservationist goals of inter-generational equity and the safeguarding of endangered species.”).

tension between conserving whales for "industrial sustenance" and conserving them "for their own sake."¹⁷³

The IWC's self-avowed purpose is to provide for "the optimum utilization of whale resources" through their conservation.¹⁷⁴ "The interest of the whales as a species intrinsically deserving to survive or to swim uninhibited in the world's oceans was not the initial motivation behind the establishment of the Convention, nor were the aesthetics of whaling an important factor (as they are today)."¹⁷⁵ While the Convention gave the IWC power to protect whales by limiting the whaling season and the waters in which whales could be caught, as well as the size of whales that could be caught and the types of gear that could be used,¹⁷⁶ these decisions were all to be made to further the interests of the whaling industry and consumers of whale products.¹⁷⁷ However, in response to the addition of anti-whaling member nations, the decline in the global market for whale products, and a growing international revulsion

173. Ruffle, *supra* note 6, at 647 ("Most of the current issues . . . derive from the ambiguous philosophies on which the ICRW was based, set out in its preamble—the conflict between conservation of whales purely for purposes of industrial sustenance and conservation of whales for their own sake as uniquely huge marine mammals with valuable and attractive characteristics about which and from which man has still much to learn to his own benefit.").

174. *Id.* at 646; *see also* Harrop, *supra* note 48, at 88 ("The International Whaling Commission, created by the International Convention for the Regulation of Whaling (ICRW), was originally designed to serve as a mechanism for the international whaling nations to control, and to share equitably, its rapidly disappearing whale stocks.").

175. Harrop, *supra* note 48, at 88.

176. *See* Ruffle, *supra* note 6, at 646 ("[T]he IWC was empowered to amend the Convention's Schedule of Regulations, ('Schedule') 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."); *see also* Haskell, *supra* note 24, at 556 ("[The IWC] is empowered to set annual harvest quotas and seasons, regulate whaling practices, conduct research, and monitor compliance of member nations with IWC regulations."). Rules implementing these functions are set forth in a schedule that can only be changed by a supermajority vote. *See* Nagtzaam, *supra* note 4, at 399 ("[The IWC's rules require] a three-quarter majority of present members to vote to approve changes to the Schedule, which contains the operative rules governing the global whaling regime.").

177. *See* Ruffle, *supra* note 6, at 647 ("The Convention requires that any amendments to the Schedule be 'based on scientific findings,' taking into consideration the 'interests of consumers of whale products and the whaling industry.'"). Harrop argues that these provisions gave "a high level of interest and attention to welfare issues." Harrop, *supra* note 48, at 88. *But see* Haskell, *supra* note 24, at 556 ("Three criteria must be satisfied in order to alter prior regulation: necessity, scientific basis, and a fair consideration of the new amendment's effect on consumers of whale products and the whaling industry. These criteria reinforce the tension between whaling interests and conservation forces. The whaling nations successfully resist schedule changes unless clear scientific evidence exists.").

toward whaling, the attitude of the IWC gradually shifted from conserving whales to protect the whaling industry to preserving whales for their own sake.¹⁷⁸

The inherent tension between the “orderly” development of the whaling industry and the protection of whales for their own sake has fomented acrimonious debate among the member nations.¹⁷⁹ The conflict has prevented the IWC from achieving either goal.¹⁸⁰ Strong differences of opinion on the underlying moral rectitude of each side’s position make it hard to resolve the conflict.¹⁸¹

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 return to sustainable levels so that whales can be hunted again.¹⁸² The continued divi-

178. See Nagtzaam, *supra* note 4, at 417 (“With the passing of the commercial whaling moratorium in 1982, to become operational in 1986, preservationism became ascendant, if not totally dominant, over both conservationism and exploitation.”); *id.* at 414 (“The reasons cited by the Australian delegation for this new direction were the probable high intelligence of whales; an understanding that such actions were immoral and that methods of taking whales were inhumane; whaling products were economically substitutable; and the survival of some whale species was in doubt, thus requiring a ‘change in emphasis from one of the conservative utilization of whale stocks to promoting a policy of banning whaling and protecting whale populations.’”).

179. See Ruffle, *supra* note 6, at 641 (“The dichotomy between the few states who still hunt whales and those opposed to whaling has created intense conflict within the Convention.”); see also Detsky, *supra* note 25, at 39 (“The fifty-sixth meeting of the IWC started amid this heated controversy, and ended in disarray and contention, spawning two emergency “special session” meetings late in the year.”); *id.* at 36 (“In 2003, over fifty years after the International Convention for the Regulation of Whaling was signed, traditional whaling nations (Norway, Japan, and Iceland)—as well as many indigenous peoples—still debate the world community over whether and to what extent they can continue whaling.”).

180. See Nagtzaam, *supra* note 4, 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. The inherent tension between these dichotomous aims would lead to much acrimony between member-states, as they could not be reconciled.”); *id.* (“[T]he conservation of whale stocks was understood until recently to mean the facilitation of an orderly resource allocation scheme, having nothing to do with maintaining sufficient stock for future generations.”).

181. See Molenaar, *supra* note 80, at 39 (“Ethical clashes and lack of respect for opposing views are very prominent within the IWC.”). Rieser suggests that removing the commercial whaling issue from the IWC’s agenda might eliminate the conflict and free it to address the more pressing environmental threats to the survival of whales, like loss of habitat and essential food supply. See Rieser, *supra* note 2, at 402-03 (“An accommodation that removes the commercial whaling issue from the IWC’s agenda will free that body to address the numerous environmental challenges that cetaceans face today, from climate change and marine pollution to collisions with vessels and fishing gear.”).

182. See Nagtzaam, *supra* note 4, at 415 (“On the one side there were the states and ENGOs that espoused a preservationist creed and wanted ‘to ban all whaling, irrespective

sion of the IWC into pro- and anti-whaling camps has led to its paralysis and may lead to its dissolution.¹⁸³

2. *Data problems.*

The IWC has not been able to fill the gaps in scientific information about whales.¹⁸⁴ Whaling members historically exploited

of whether a particular species is stable or endangered.' Opposing them was the whaling industry which, at best, favored a conservationist perspective, but in reality had been exploiting whales for decades. Such diametrically opposed positions meant whalers and preservationists were unable to reach any accord, leading to an escalation in what became known colorfully as 'the whale wars.'"); *see also* Osherenko, *supra* note 76, 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."); Rieser, *supra* note 2, at 402 ("The conservation movement behind the moratorium was never able to resolve a basic question: should whaling be banned permanently or, if and when whale populations recover, should they again be hunted for 'sustainable use?"). The opposition of some member nations to resuming whale hunting once sustainable population have been reached has undermined the credibility of the IWC in the eyes of nations favoring resumption of whaling. *See* Molenaar, *supra* note 80, at 40 ("Certain States have even publicly announced that they would never agree on a resumption. In view of the IWC's dual objectives, this has undermined its credibility and legitimacy.").

183. *See* Rieser, *supra* note 2, at 402 ("The deliberations of the International Whaling Commission (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."); *see also* Ruffle, *supra* note 6, at 652 ("The IWC has repeatedly failed to create a successful protocol for the regulation of commercial whaling."). *But see* Anton, *supra* note 29, at 320 ("If either side were to achieve the totality of its ambitions in the [IWC], it is likely that it would spell the end of the ICRW as the accepted global mechanism for international cooperation and coordination on whaling. Indeed, at the 2007 IWC meeting, the Japanese delegation announced that it was considering withdrawal from the treaty and the Commission altogether after years of condemnation and acrimony."). Anton believes that the anti-whaling activities of individual nations like Australia may reflect all that can be achieved in the way of protecting whales. *See id.* at 319 ("It is important to reflect on the individual activities of a state like Australia because the long-running stalemate under the International Convention for the Regulation of Whaling (ICRW) between the anti-whaling forces and pro-whaling forces is, in my view, probably as good as it gets for the foreseeable future.").

184. *See* Burns, *supra* note 25, at 274 ("In most regions of the world there is a dearth of information on the critical life parameters of cetaceans, including their distribution, migration, biology, feeding and reproduction strategies, behavior, and even taxonomy."); *see also* Lessoff, *supra* note 21, at 421-22 ("Although 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 sup-

scientific differences of opinion over whale stocks and the trend line for their survival to justify continuing to whale.¹⁸⁵ The absence of good science on the status of whales means that the IWC cannot accurately assess the threats whales face and prioritize how its scarce resources should be marshaled on their behalf.¹⁸⁶ This data gap also makes it difficult for the IWC to support proposed quota and size restriction regulations¹⁸⁷ and makes those regulations vulnerable to being weakened and violated.

What data there are on whales and their marine ecosystem are questionable, "fragmentary, and at best, highly speculative," depriving the IWC of "any real understanding of living whales."¹⁸⁸ Some attribute the sad state of data on whales to "individual biases and methodological flaws."¹⁸⁹ Others say it is due to the general axiom that "scientific uncertainty is deeply embedded in international environmental law."¹⁹⁰ Regardless of the cause, whaling nations have been able to take advantage of the dependence of IWC regulations on solid data about whales by withholding critical information from the IWC or underreporting their catch statistics.¹⁹¹

port for the imposition of such restrictions.").

185. See Lessoff, *supra* note 21, at 422 ("Whaling nations exploited the differences of opinion which existed in the scientific community to justify continued whaling practices."). Ironically, whaling countries like Japan and Norway would benefit from better data, as accurate assessments of whale stocks could result in the lifting of the 1982 moratorium and lead to its replacement with new management practices for whale harvesting. *Id.* at 442.

186. See Burns, *supra* note 25, at 274 ("The IWC lacks the resources to conduct the requisite research to accurately assess these threats and hence establish priorities for expending scarce resources on behalf of cetaceans.").

187. See Lessoff, *supra* note 21, at 439 ("More accurate scientific measures are necessary not only to accurately assess the current status of the whales, but to gain compliance of those whaling nations who doubt the necessity of IWC measures."); *id.* (quoting one critic, a former scientist with the Council for Environmental Quality, as saying, "The continuation of commercial whaling can also be threatened by management measures that are too restrictive. The most extreme example is a moratorium on all whaling. This is a completely unselective measure. Given the differing status of the various [whale] stocks, and the fact that virtually all those species or stocks that are seriously depleted are already receiving complete protection, there seems to be no scientific justification for a global moratorium. A justification for a complete cessation of whaling can be put forward on aesthetic or moral grounds, but these seem outside the terms of reference of the Commission.").

188. See *id.* 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.").

189. Ruffle, *supra* note 6, at 667.

190. *Id.* at 666.

191. See *id.* at 667 ("Whaling nations have often capitalized on this dependence by refusing to supply the IWC with crucial data or by severely under-reporting catch statistics

Ironically, Japan has used the IWC's need for data to establish quotas to justify its lethal scientific research on whales.¹⁹²

The Convention's opt-out provision and scientific research and aboriginal hunting exemptions, as well as internal divisions and lack of enforcement authority have prevented the IWC from protecting whales and have created a climate of moral indeterminacy. Schisms in the scientific community over the future of whales and lack of accurate independent data on them have left the IWC unable to defend the basis for its action against challenges by whaling members. In a system dependent on self-policing and self-reporting, it is no surprise that whales continue to disappear.

The *Nature* authors are right in one respect: The international regulatory regime to protect whales is broken—perhaps beyond repair. So why not create a market in tradable whale shares, which might lead to fewer whales being killed and might gain the support of both whaling and whale preservation members on the IWC ending the deadlock? Because if whales have an entitlement to life, as the next Part of the Article shows, then it is morally wrong to deprive them of it, and the proposal should not be accepted.

V. WHALES AND THEIR ENTITLEMENT TO LIFE

Humane exploitation is an oxymoron.¹⁹³

The prior sections of the Article have shown that the IWC is too dysfunctional and the Convention too flawed to protect whales. One manifestation of this dysfunction is the conflict between member states over the fate of whales—sustainable hunting or permanent preservation. The ethical content of the debate has

over the years.”).

192. See Rieser, *supra* note 2, at 416 (arguing that Japan has been “using the chief rationale for the moratorium as justification: uncertainty surrounding estimates of whale population levels makes it difficult to regulate their hunting effectively. Japan asserted that its research would improve the understanding of certain cetacean species’ population dynamics so that sustainable catch limits could be defined.”). The dubious nature of Japan’s claim is apparent from the hundreds of whales the country kills each year. See Nagtzaam, *supra* note 4, at 429 n.454 (“For example, in the 1987/88 season Japan undertook a research program with the nebulous aim of better understanding the population dynamics of minke whales in Antarctica which apparently means killing three hundred whales a year.”).

193. Ellen Goodman, *Animal Ethics and the Law*, 79 TEMP. L. REV. 1291, 1311 (2006) (reviewing ANIMAL ETHICS AND THE LAW A REVIEW OF ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbau, eds. 2004)).

made it particularly controversial and difficult to resolve.¹⁹⁴ Member states like the United States and Australia find it morally unacceptable to kill whales,¹⁹⁵ while other countries like Japan and Norway have concluded that it is acceptable.¹⁹⁶ If the United States and Australia are correct that humans have a moral duty toward whales because whales have an entitlement to life that cannot be abridged, then that entitlement cannot morally be traded by others as the economists propose.¹⁹⁷ This Part of the Article, using criteria identified by animal rights scholars for distinguishing between animals that can morally be destroyed and those that cannot,¹⁹⁸ explores why whales might trigger an ethical obligation

194. See Molenaar, *supra* note 80, at 35 (“The debate on the special status of marine mammals is so controversial due to its high ethical content.”).

195. See, e.g., D’Amato & Chopra, *supra* note 47, at 22 (“Australia, a nation that in years past had engaged heavily in whaling, declared in 1979 that ‘the harpooning of these animals is offensive to many people who regard killing these special and intelligent animals as inconsistent with the ideals of mankind, and without any valid economic purpose in mitigation.’”); see also Molenaar, *supra* note 80, at 34 (referring to many people in Western societies and saying, “To them, the presence of eye contact with the whale may make the kill feel akin to murder”); Nagtzaam, *supra* note 4, at 419 (“[S]ome states—such as Australia, the United States and the Netherlands—had come to accept that whales had an intrinsic right to live. This altered their identity within the global society. For these states and for most of the ENGOs, whaling was a barbaric practice and the taking of even one whale was anathema.”).

196. See Anton, *supra* note 29, at 337 (quoting Justice Allsop as saying, “The whales being killed . . . are seen by some as not merely a natural resource that is important to conserve, but as living creatures of intelligence and of great importance not only for the animal world, but for humankind and that to slaughter them . . . is deeply wrong. These views are not shared by all. . . . They are views which, at an international level, are mediated through the Whaling Commission and its procedures, by reference to the Whaling Convention and the views of nation States. They are views which contain a number of normative and judgmental premises . . . which do not arise in any simple application of domestic law, but which do, or may, arise in a wider international context.” (internal quotation marks omitted)).

197. See Sandel, *supra* note 15, at 122 (referring to “the dimensions of life that lie beyond consent, in the moral and civic goods that markets do not honor and money cannot buy”).

198. See Patrick Lee & Robert P. George, *The Nature and Basis of Human Dignity*, 21 *RATIO JURIS* 173, 175 (2008) (“[A] line must be drawn, a line between those entities it is morally permissible to use, consume, and destroy, and those it is not permissible to use, consume, and destroy.”); *id.* at 176 (“Various criteria for where the line should be drawn have been proposed: sentience, consciousness, self-awareness, rationality, or being a moral agent.”). For a list of possible reasons referring to animals in general, see, for example, 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, 67 (2009) (“Various arguments have been provided for drawing non-humans such as animals and artificial agents into the sphere of moral consideration: animals have been attributed rights or equal consideration of interests; plants and the ecosystem have been attributed intrinsic value.”); *id.* at 68 (“[J]ustifications given for these attributions

toward them and what that obligation might entail, including protecting their right to life.¹⁹⁹ Although there are differences of opinion as to where this line should be,²⁰⁰ a strong case is made here that depriving whales of their right to life falls on the morally impermissible side of the line.²⁰¹

Accordingly, this Part examines some of the theoretical and pragmatic arguments supporting the idea that whales have a right to life, which, if correct, triggers commensurate human ethical obligations toward them. The Article does not distinguish among the various arguments based on their relative persuasive power, but rather encourages the reader to realize that any one of them provides sufficient support for the argument, and that when they are accumulated, a contrary thesis is untenable. Set forth below is a review of each of these arguments.

A. *Theoretical Arguments Why Whales Have a Right to Life*

This review of various right to life theories shifts from those

include the inherent value or capacity to suffer, being alive or being part of a spiritual-ecological whole or a high degree of system interactivity, autonomy, and adaptability." (internal citations omitted)).

199. D'Amato and Chopra argue that this intrinsic right to life has always existed, even though humans have only recently begun to recognize it. *See* D'Amato & Chopra, *supra* note 47, at 60 ("[I]f whales now have an entitlement to life, they always had it; the only difference is that human recognition of that right has come relatively late in the game."). They also argue that the *de facto* permanence of the moratorium has created an entitlement to life for whales. *See id.* at 49 ("Preservation is transmuted into entitlement when the moratorium becomes permanent, at which point it is no longer definitionally a 'moratorium' but, rather, may be termed an entitlement to life."). *But see id.* at 48 ("[T]he moratorium does not entitle whales to the right to life, because a moratorium implies temporal limitations (even if extendable) upon whaling activities.").

200. *See* Coeckelbergh, *supra* note 198, at 81 ("Is eating animals for food morally wrong? This is a hard ethical question."). *But see* Lee & George, *supra* note 198, at 175 ("It seems that it is morally permissible to *use* some living things, to consume them, experiment on them for our own benefit (without their consent, or perhaps when they are unable to give or withhold consent), but that it is not morally permissible to treat other beings in this way.").

201. According to D'Amato and Chopra, extending rights to whales should not seem odd because it "resonates" with comparable expansions of rights to minorities and women. *See* D'Amato & Chopra, *supra* note 47, at 27 ("[T]he extension of rights to whales resonates deeply with the historical-legal extensions of equal rights to women and to minority groups."); *id.* at 51 (relying on Christopher Stone and saying, "History has seen a widening of the circle of rights holders" even including "inanimate, intangible entities: trusts, corporations, joint ventures, partnerships and municipalities"); *id.* at 23 ("[Granting animals rights] involves a broadening of humanistic consciousness comparable to the Copernican revolution that changed the Ptolemaic earth-centered conception of the universe to the modern realization that ours is but a minor planet revolving around a minor star in only one of billions of galaxies.").

who advocate a general right to life for all animals and those that advocate the same right but only for whales because of their special capabilities. Francione argues that animals have rights that emanate from their being “autonomous subjects.”²⁰² These rights are not dependent on an animal’s mental capabilities, capacity to suffer or conceptualize,²⁰³ or sentience.²⁰⁴ Rather, full moral worth flows from the fact that animals have the capacity to have preferences and to act on those preferences²⁰⁵—what Francione calls a “core consciousness” that translates into an interest in survival and not being killed.²⁰⁶ Hoch, among others, says an animal’s interest in survival creates a human moral duty toward animals;²⁰⁷ anything that impedes the fulfillment of that survival interest is against the whale’s interests²⁰⁸ and, therefore, morally suspect. Even some util-

202. See Goodman, *supra* note 193, at 1300 (“The basic tenet of animal rights is that animals who can be considered autonomous subjects have rights, and humans have associated duties.”).

203. See D’Amato & Chopra, *supra* note 47, at 49 (“[T]he entitlement philosophy recognizes this right as belonging to, or even coming from, the whales themselves.”). *But see* Goodman, *supra* note 193, at 1307 (asserting that “animals have rights,” which “will depend on the natural and social contexts in which the animal lives”).

204. See Goodman, *supra* note 193, at 1301 (“Francione makes a right to life dependent on animal consciousness, not mere sentience.”).

205. See *id.* (arguing that “practical autonomy” is “predicated not on the ability to reason, but on a being’s possession of preferences, the ability to act to satisfy them, and the sense that it is she who wants and seeks satisfaction”).

206. See *id.* (referring to Francione and stating, “Any animal that has a sense of self, he says, has an interest in continued existence in addition to an interest in happiness”); *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.”); *id.* at 1307 (“[A]nimals have dignitary interests.”); see also D’Amato & Chopra, *supra* note 47, at 27 (“[W]e argue only for extending the single most fundamental of all human rights—the right to life—to whales.”).

207. See David Hoch, *Environmental Ethics and Nonhuman Interests: A Challenge to Anthropocentric License*, 23 GONZ. L. REV. 331, 346 (1987-1988) (“If animals have interests, we have moral obligations toward them.”); see also Gillespie, *supra* note 16, at 13-14 (“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. For Regan, most animals, like humans, have equal inherent value, and, since inherent value cannot be ranked, they are entitled to equal, inviolable, moral treatment vis-à-vis other possessors of inherent value.”). *But see* Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 394 (2003) (“If we are speaking of perfumes, the claim for imposing suffering on animals is ludicrously weak. But if scientists are able to develop treatments for AIDS and cancer, or even treatment for serious psychological ailments, the claim is much stronger.”).

208. See Lee & George, *supra* note 198, at 179 (“One can then say that what promotes the organism’s survival and flourishing is *in its interest* and what diminishes its chances of

itarians grant animals a right to happiness and equal moral worth to humans.²⁰⁹ However, freedom of choice or autonomy from human control based on these interests, as Sunstein urges,²¹⁰ does not necessarily mean that animals “have full basic and inherent dignity (moral worth) or rights.”²¹¹

survival or flourishing is *against its interests.*”); *id.* at 178 (“We can think of the good of an individual nonhuman organism as consisting in the full development of its biological powers. Its good is realised to the extent that it is strong and healthy.”); *see also* Gillespie, *supra* note 16, 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.”); Goodman, *supra* note 193, at 1306 (“[H]umans do not sufficiently respect animal interests. For rights theorists, the failure comes down to the treatment of animals as resources for human ends. For utilitarians, it is the failure to give equal consideration to animal welfare in the pursuit of the good. For humanists, it is the failure to fully consider how cruelty to animals harms humans.”).

209. *Cf.* Goodman, *supra* note 193, at 1293 (“Kantian philosophical [tradition] . . . 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. This approach is well developed, but hardly dominant. Rights-based arguments compete with distinctly utilitarian traditions, which recognize in animals no inviolable rights, but strong interests in happiness that deserve greater weight than they have been given.”); *id.* at 1300 n. 55 (referencing Tom Regan for the proposition that “some animals are similar to humans due to their capacities to ‘see and hear, believe and desire, remember and anticipate, and plan and intend,’ [and] as a result, these animals have right to have humans treat them respectfully” (quoting TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* 42-43 (1983))).

210. *See* Sunstein, *supra* note 207, at 397 (“Is there an analogy between slavery and current treatment of animals? Should animals have a right to choose as they wish, or at least more of a right to free choice?”); *id.* at 398 (“Certainly animals, both domesticated and wild, should be able to make many choices on their own. Equally certainly, it is legitimate to interfere with the autonomy of animals if the interference can be justified in the interest of animals themselves, or of vulnerable third parties.”). *But see* Lee & George, *supra* note 198, at 185 (“Human beings also have the basic natural capacity or potentiality to deliberate among options and make free choices, choices that are not determined by the events that preceded them, but are determined by the person making the choice in the very act of choosing.”). Sunstein notes that some carry the notion of animal autonomy and a concomitant right to self-determination to the point of granting personhood to animals. *Id.* at 399; *see also* 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, 253 (2007-2008) (criticizing “legal recognition of the extent to which animals should be considered ‘persons’ entitled to inclusion in the moral community such that humans cannot commit acts on animals that humans cannot commit on equally situated humans,” and stating, “Those criticisms include pragmatic and philosophical reasons to reject pursuit of a concept of ‘legal personhood’ that requires endless, fruitless proofs that animals bear such substantial similarity to humans.”).

211. *See* Lee & George, *supra* note 198, 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* Gillespie, *supra* note 16, at 13 (“In living creatures, the ascription of inherent value, which imbues equal protection and moral worth, is generally restricted to humans.”); Goodman, *supra* note 193, at 1307 (“[T]he conflict between the

But humans recognize moral worth in animals and feel a sense of moral responsibility toward them. One manifestation of that responsibility is the affection and empathy people feel for animals,²¹² perhaps because of analogous neurological features and feelings²¹³ as well as shared social and psychological needs.²¹⁴ This

flourishing of animal capabilities and human interests.”).

212. See Lee & George, *supra* note 198, at 180 (“[O]ne might argue for animal rights starting from our natural empathy or affection for them.”); see also Goodman, *supra* note 193, at 1302 (“We should respect animal life, Diamond concludes, because of what it means to be a fellow creature. An appeal to pity rather than to rationality is what is called for.”); *id.* at 1297 (“The core of the utilitarian argument—that animals should not be made to suffer unjustified pain—is immensely appealing in part because it draws on the empathy for animals so natural for most people.”); Harrop, *supra* note 48, at 80 (“Much of the work of the classic conservation lobbying may have been successful, not through its reliance on an array of tedious, esoteric facts portraying scientific certainty, but from its appeal to compassion as well as to aesthetics.”). However, Lee and George consider this a mistaken premise for animal rights as it is based on a “hedonistic value theory.” See Lee & George, *supra* note 198, at 180-81 (“[H]edonism is mistaken. It cannot provide support for the view that sentience (or the capacity for suffering and enjoyment) is the criterion of full moral worth.”).

213. See 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 . . . 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.* at 183 (“The legal progression described above is thoroughly supported by our society’s vast personal experience, and considerable scientific knowledge, of the interests of nonhuman animals who—though perhaps not possessing minds identical to those of competent adult humans—certainly possess a similar nervous system, experience similar physical sensations such as hunger and pain, and have mental and emotional lives.”).

214. See Newell, *supra* note 213, at 184 (“Biologists and ethnologists likewise have established that mammals have their own needs and desires, including those of a social and psychological nature, as well as physical.”); see also Lessoff, *supra* note 21, 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 whales 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 evi-

affection has moved public opinion from viewing animals as “mere property”²¹⁵ to “recognizing that they are sentient and emotive beings,” deserving protection.²¹⁶ Newell sees strong public opinion in favor of protecting the lives of animals “in accord with the upward development of an instinct in mankind for the preservation of life of all kinds, including the life of lesser species.”²¹⁷

A sense of a moral duty toward animals may flow from their mental capabilities.²¹⁸ Scientists have commented on the size of

dence 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.”).

215. David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1022, 1023 (2009-2010) (“[G]iven the reality that many humans attach an emotional, personal value to their pets, the present position of the law that says that damages to property are primarily measured by the fair market value of the property, constitutes a large disconnect between public expectations and the rules of property.”).

216. See Newell, *supra* note 213, at 162 (“The 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 Judge Andell)); see also Bryant, *supra* note 210, at 255 (“[N]o one has successfully refuted Professor Francione’s argument that the property status of animals accounts for that extreme gap between widespread, commonsense recognition of animals as sentient beings and the grossly inadequate legal means of protecting animals from even the most extreme types of human-inflicted suffering. When animals can be lawfully treated in ways that cause such great suffering for human ends, it is difficult to conceptualize them as ‘legal persons’ under any definition of that term.”); Goodman, *supra* note 193, at 1297 (“Jeremy Bentham looms large in the intellectual development of animal law theories. Bentham refuted the Cartesian notion, convenient to all and believed by few, that animals are unthinking machines without interests. Bentham took animal sentience seriously, arguing that sentience alone was enough to entitle animals to humane treatment. The important question, he argued, was not ‘Can they *reason*?’ nor, ‘Can they *talk*?’ but, ‘Can they *suffer*?’ If animals can suffer, their interests in not suffering should be taken into account in pursuit of the common good.”); *id.* at 1311 (“Animal status as property, [Francione] contends, is the primary obstacle to animal welfare.”); Sunstein, *supra* note 207, at 399 (“What, then, are the real stakes in the debate over whether animals are ‘property’? Perhaps it is thought necessary to destroy the idea of ownership in order to make, simply and all at once, a statement that the interests of animals count, and have weight independent of the interests of human beings.”); *id.* at 400 (“The idea of ‘property’ does fit very poorly with how people should think, on reflection, about other living creatures.”).

217. Newell, *supra* note 213, at 182.

218. See Bryant, *supra* note 210, at 255 (“Among those legal scholars who do attempt to elevate the standing of animals, there is primary reliance on arguments that animals have particular attributes that make them worthy of respect, consideration, and protection.”); see also Goodman, *supra* note 193, at 1306 (“All beings have the right to flourish as their capabilities allow. What she calls a ‘capabilities approach’ would respect the basic innate capability, or behavioral needs, of creatures to form social bonds, roll in the mud, seek adventure, etc.”). Steven Wise, a well-established scholar in the animal rights field, among others, argues that the superior mental ability of some animals to mentally disabled

whale brains, for example, and that their capacity to communicate and hunt cooperatively indicates a superior intelligence.²¹⁹ If Sunstein is right that what human treatment animals deserve should be related to their capacities,²²⁰ then whales that have capacities, including an intelligence that is comparable to that of humans, should be treated more like humans, and killing them is immoral because it is more akin to murder.²²¹ To Lee and George,

persons and children entitle them to rights. See Martha C. Nussbaum, *Animal Rights: The Need For a Theoretical Basis*, 114 HARV. L. REV. 1506, 1548 (2001) (reviewing STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* (2000)) (“As with mentally disabled humans, a right may be qualified in certain ways in keeping with the creature’s level of understanding.”); see also Coeckelbergh, *supra* note 198, at 78 (taking Rawls’ position that rationality is an essential criterion for contracting parties suggests that “we must treat marginal humans as morally inferior to normal humans, and, equally, we ought to grant an equivalent moral status to marginal humans and the many animals with levels of autonomy broadly the same as them.” (quoting Robert Garner, *Animals, Politics, and Justice: Rawlsian Liberalism and the Plight of Non-humans*, 12 ENVTL. POL. 3, 7 (2003)); Gillespie, *supra* note 16, at 12 (“Recent research demonstrates that human intelligence differs from that of other species less in kind than degree. Additionally, communication, moral behaviour, the use of tools and the creation of art are proven to be not exclusively human traits. Those who focus on rationality as the dividing characteristic between humans and other animals fail to recognize that many humans, such as the very young, the senile, and the mentally infirm, fail to meet this standard of ‘rationality.’”); Goodman, *supra* note 193, at 1300 (“Kant included all humans in his ethical system because he believed they possessed divinely given souls. Animal rights theorists strip Kant’s ethics of faith and ask the fateful question: on what basis can we say that a mentally incompetent human has a right to life and liberty, but a highly functioning chimpanzee has no such rights? And if a chimpanzee has such rights, should a dolphin, and if a dolphin, why not a dog?”).

219. See Ruffle, *supra* note 6, 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.”); see also D’Amato & Chopra, *supra* note 47, at 26 (“Why should whales have evolved with a capacity to communicate their ideas to homo sapiens when the latter appeared only at the very end of the 30 million years of the whale’s history? There is overwhelming evidence that whales communicate effectively with their own species (and, as previously noted, have even developed interspecies communication).”); *id.* (“Our failure to converse with whales could well be a matter more of our own limitation than of theirs.”); Stoett, *supra* note 2, at 164 (“[W]e’ve yet to arrive at an acceptable universal standard for measuring human intelligence, much less nonhuman intelligence.”). *But see* Callicott, *supra* note 76, at 23 (“How does one assess whale intelligence? More fundamentally, can one meaningfully attribute ‘intelligence’ to whales?”).

220. Sunstein, *supra* note 207, at 401.

221. See Bryant, *supra* note 210, at 256 (citing Derrida in support of the assertion that “as long as killing animals is not considered murder, animals will not be included among those to whom moral responsibilities are owed. The amorality of killing animals sustains a view of animals as sufficiently different from humans that concepts of justice are not offended when animals are exploited in ways that humans cannot be exploited.”). *But see*

it is an animal's rational nature that gives it "full moral worth."²²² It does not matter that animals cannot conceptualize, sense anything other than their existence, project into the future in their deliberations, or choose between options like humans.²²³

To other animal rights scholars the capacity of any animal to feel pain imposes upon humans a moral duty toward them.²²⁴ For Regan, this capacity to feel is a basis for granting any animal rights.²²⁵ At minimum, to these scholars this shared capacity for an animal to feel pain raises the ethical bar²²⁶ and gives it "moral

Molenaar, *supra* note 80, at 37 ("Criteria such as intelligence, complexity of behavior or consciousness are after all very subjective and data upon which to make such assessments is very difficult to obtain.").

222. See Lee & George, *supra* note 198, 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."); *id.* at 190 ("Consistency, then, demands that one respect reasonable pursuits and real fulfillment of others as well. Thus, having a rational nature, or, being a person, as traditionally defined (a distinct subject or substance with a rational nature) is the criterion for full moral worth."); *id.* ("[T]he position (that full moral worth is based on the possession of the basic natural capacity for rationality), if correct, would also lead to the denial of fundamental personal equality. However, the criterion for full moral worth is having a nature that entails the capacity (whether existing in root form or developed to the point at which it is immediately exercisable) for conceptual thought and free choice—not the development of that basic natural capacity to some degree or other." (internal citations omitted)).

223. See Goodman, *supra* note 193, at 1301 ("Regan's [test] accords rights to animals that have 'propositional attitudes, emotions, will, and an orientation to oneself and one's future.'").

224. See Gillespie, *supra* note 16, at 15 (viewing pain avoidance as "a characteristic of all sentient creatures"); *id.* at 16 (claiming the capacity to avoid pain "leads to the need to weigh like interests equally"). This concern about protecting animals from pain differentiates animal welfare advocates from conservationists who are more concerned about maintaining sustainable populations of wildlife for human use. See Harrop, *supra* note 48, at 81 ("On the one hand welfare prescribes our moral duties which must stand in the face of scientific analysis and on the other conservation is based upon economic and scientific enquiry resulting in an equation of sustainability supporting anthropocentric goals."); see also Goodman, *supra* note 193, at 1298 ("[K]illing for sport and food consumption, where unnecessary for survival, is inconsistent with an ethic of care for animals that takes their interests seriously.").

225. See Goodman, *supra* note 193, at 1301 (referring to Francione and stating, "[A]nimals qualify for basic liberty rights merely because they feel").

226. See Hoch, *supra* note 207, at 334-35 ("Bentham argued that if animals are capable of suffering then humans have more duties toward them. Bentham was a utilitarian, however, and did not argue against the imposition of all suffering on animals."); *id.* at 334 ("Even though laws regulating the use of animals have always been minimally protective of nonhumans, ethically proper conduct often demands more than the law commands."); see also Callicott, *supra* note 76, at 13 ("[R]espect for game animals requires land ethical hunters to dispatch them with care, skill, and humanity. Human beings should not cause other forms of life to suffer gratuitously."); Gillespie, *supra* note 16, at 15 ("The central

worth.”²²⁷ This same principle applies to whales that “are sentient, intelligent beings who can feel pain.”²²⁸ D’Amato and Chopra question whether the fact that whales are not human,²²⁹ especially since the “bright line distinctions between humans and other animals” may be false,²³⁰ means they deserve less in terms of human behavior toward them.²³¹

B. *Pragmatic Reasons Why Whales Have a Right to Life*

There are also pragmatic reasons why humans should grant whales moral worth. They occupy a critical place in an ecosystem where animals and humans are codependents,²³² what

point to extract from Bentham’s and Singer’s argument is that animal interests should be (prima facie) considered in the course of moral deliberations since animal interests in avoiding pain are commensurate to those of humans.”).

227. See Lee & George, *supra* note 198, at 176 (“Animal welfarists argue that the criterion of moral worth is simply the ability to experience enjoyment and suffering.”); see also Gillespie, *supra* note 16, at 16 (“Creatures that demonstrate consciousness or awareness are capable of feeling pain; therefore, they should be objects of moral concern. In so far as animals suffer commensurately with humans, they have equal claim to relief from pain.”).

228. See Lessoff, *supra* note 21, at 414 (“If whales are, as scientists believe, sentient, intelligent beings who, like man, can feel pain and suffering, is it just to destroy such animals?”); see also Harrop, *supra* note 48, at 79-80 (“[A]nimal welfare begins and is fundamentally concerned with ethical assumptions. . . . [W]ith science to an extent measuring and identifying such suffering but very much subordinated to the moral assumptions”); Sunstein, *supra* note 207, at 400 (“[I]f ants and mosquitoes have no claim to human concern—if they can be killed at our whim—it is because they suffer little or not at all.”).

229. See Gillespie, *supra* note 16, at 9-10 (listing bases for drawing a distinction between humans and non-humans as including the rationality of humans and their ability to communicate, “purported superior moral behavior,” their ability “to use tools to modify and change the environment,” and to create art and to hold “religious beliefs”).

230. See *id.* at 11 (“In contrast to this anthropocentric paradigm, modern scientists argue that the purported bright line distinctions between humans and other animals are spurious.”).

231. See D’Amato & Chopra, *supra* note 47, at 27 (“To be sure, whales are not human, but are they ‘less’ than human?”); *id.* at 26 (warning of the dangers of this comparison and stating, “[t]hroughout history, the denial that other persons—outsiders, minority groups—as well as other animals, have a consciousness equivalent to our own has been the foundational philosophy for genocide and enslavement”).

232. See Coeckelbergh, *supra* note 198, at 75 (“Humans and some kinds of animals are mutually dependent on each other for their food and living.”); see also Burns, *supra* note 25, at 268 (“Cetaceans can play an important role in the ecosystems of which they are a part.”); Stephanie Curran, *The Preservation of the Intrinsic: Ecosystem Valuation in New Zealand*, 9 N.Z. J. ENVTL L. 51, 61 (2005) (“Beyond duties and obligations, holistic worldviews see the biosphere as interconnected whereupon each part is valuable for the role it has evolved to serve.”); Goodman, *supra* note 193, at 1307 (noting the “environmental concern for animals as part of a functioning ecosystem.”); Rieser, *supra* note 2, at 401 (“[I]n the twenty-first century, whales are sentinels for the large-scale changes that global warm-

Coeckelbergh calls “cooper-ands.”²³³ This codependency and “quasi-cooperation,” according to Coeckelbergh, makes it less just to exclude whales from our “moral sphere and related conceptual frameworks”²³⁴ and makes whales “morally equal participants”²³⁵ regardless of their capacity for rational thought.²³⁶ According to Coeckelbergh, “[i]f we take seriously the fact that the human world depends on the nonhuman world, then it is not even necessary to blur the categorical line between the moral status of humans and that of nonhumans to understand nonhumans as an integral and necessary part of a wider cooperative quasisocial scheme.”²³⁷ This “position of mutual advantage and cooperation” also eliminates any need to find ontological or other similarities between humans and animals.²³⁸ Recognizing the interconnected-

ing and ocean industrialization are bringing to the seas.”). Indeed, international environmental treaties are increasingly directed at preventing ecosystem harms. *See* Ruffle, *supra* note 6, at 665 (“Recently, the emphasis of international environmental treaties has shifted to address concerns regarding the disruption of wildlife habitat and also the preservation of delicate ecosystems.”).

233. Coeckelbergh, *supra* note 198, at 78 (“[W]e need not recognize their being-such-and-such; we ‘only’ need to see them as co-operands.”).

234. *See id.* at 70-71 (“[O]nce we come to understand our world partly in terms of cooperation between various entities and life forms, we no longer have a good reason to exclude non-humans from the moral sphere and our related conceptual frameworks.”); *id.* at 83 (“[T]o the extent that they can be considered as part of a co-operative scheme between humans and non-humans, non-humans must be included in the sphere of justice.”). Coeckelbergh calls this co-operative relationship between humans and non-humans “quasi-social.” *Id.* at 67 (“We should try to grasp conceptually the quasi-social dimension of relations between non-humans and humans.”).

235. *Id.* at 69 (“I argue that we should draw non-humans into the sphere of moral consideration not only because of what they are (features) or do as such (consequences) but because of their relations with us, in particular their (quasi-co-operation) with us.”).

236. *See id.* at 73-74 (“[W]e do not need to make assumptions about the rationality or intelligence of animals (or other non-humans) in order to treat them justly; we only need rational and intelligent humans to make the judgment and decision to treat animals in that way.”).

237. *Id.* at 74-75; *see also id.* at 75 (“These entities are not drawn into the sphere of justice because they are rational, self-interested, or because they have capabilities, but because they are part of a larger co-operative scheme that is not completely within our control but that exists and on which human society depends for its operation.”).

238. *See id.* at 77 (“Instead of requiring that we see, or want to make, the ‘newcomers’ as beings-like-us . . . , we can allow for (ontological) differences.”); *id.* at 76 (“[P]arties—human and non-human—are often already in a position of mutual advantage and co-operation, in spite of or regardless of the wide disparity in capacities (‘powers’).” (emphasis omitted)). But this same theory of co-dependency may justify humans eating animals. *See id.* at 81 (“[I]f our relations with animals we use for food satisfy the criteria of mutual dependence and cooperation, they fall within the sphere of morality and justice. I believe this is indeed the case: we depend on them for food and they depend on us for their lives.”).

ness of life forms increases the importance of the survival of each part of the natural system²³⁹ and should temper the proclivity of humans toward destroying parts of it.²⁴⁰ Both humans and whales have an important role in maintaining that ecosystem, in which each part has individual value for the contribution it makes toward maintaining the whole.²⁴¹ However, whales have “become a symbol of humankind’s inability to find common ground and cooperate to protect the global environment,”²⁴² although they may yet offer humans a chance at ecological redemption.²⁴³

Whales occupy an important place in the pyramid of life celebrated in Leopold’s “land ethic.”²⁴⁴ Such an ethic, according to

239. See Curran, *supra* note 232, at 69 (“[A]n ecosystem approach ‘recognizes the relationships between life forms and places great value upon the survival of each for its contribution to the operation of its natural ecosystem.’”).

240. *Id.* at 70 (“[M]an should be firmly viewed as an aspect of the biosphere, an aspect highly influential and able to inflict damage upon other aspects yet also reliant upon the health and well-being of the biosphere and the ecosystems comprising it.”); *id.* (asserting that an ecosystem approach is a “change from previous anthropocentric approaches in which man was separated from nature with little responsibility taken for the effects of human activities on the environment”). Some, however, argue that whales are “nuisance species” that could make things worse for over-exploited fish stocks. See Molenaar, *supra* note 80, at 48 (“In areas where all fish stocks are fully or over-exploited, large populations of marine mammals *may* adversely affect the status of those fish stocks.”). However, Molenaar adds that while “a preemptive (anticipatory) catch [of whales] *may* not be a bad idea,” whales and other marine mammals should not be treated as “scapegoats” for human excesses. *Id.*

241. See Curran, *supra* note 232, at 70 (“The central goal of human survival remains but a holism is introduced that recognises that all life is interconnected and, therefore, has value for the role it has evolved to take.”); see also Molenaar, *supra* note 80, at 49 (“One could also see it as an issue of shared responsibility, although marine mammals are of course unable to accept that responsibility themselves and the consequences are much more far-reaching for them. . . . This clearly raises philosophical questions on the role of humans on earth.”).

242. Rieser, *supra* note 2, at 401; see also Ruffle, *supra* note 6, at 666 (“Whales play a crucial part in maintaining the equilibrium of the ecosystem. Thus, ‘the killing of one whale amounts to harvesting from three hundred to five hundred square kilometers of ocean area.’”).

243. See Stoett, *supra* note 2, at 172 (“The story of whaling, as a symbolic construction of redemption, is firmly (if unevenly) embedded in Western political mythology.”).

244. ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE 251-58 (1966) (describing the concept of a “biotic pyramid” as “an ethic to supplement and guide the economic relation to land” and warning that “[t]he combined evidence of history and ecology seems to support one general deduction: the less violent the man-made changes, the greater the probability of successful readjustment in the pyramid”). Callicott refers to this as a “sea ethic.” Callicott, *supra* note 76, at 3; see also *id.* at 3 n.12 (explaining that Leopold in his seminal work, proposes that “mankind adopt a relationship to wildlife that includes obligation as well as privilege and that humans should affirm the biotic right of other species to exist”).

Callico, is in addition to and not a substitute for other ethical codes.²⁴⁵ To the extent it is applied to answer the question about the morality of whaling, the ethic's broader "communitarian" premises should be consulted for guidance,²⁴⁶ including its inclusion of nonhumans.²⁴⁷ When so little is understood about whales—a keystone species in the marine ecosystem²⁴⁸—the land ethic dictates that it is a wiser course not to kill them unless there is a better justification for doing so than is offered by whaling countries.²⁴⁹ Being reluctant to interfere in the functioning of an important ecosystem like the marine environment is also based on a moral duty toward future generations, including preserving their

245. See Callicott, *supra* note 76, at 5 ("Leopold characterized the land ethic as an 'accretion,' which suggests another layer of the same substance. This implies that he understood the land ethic to be an addition to, not a substitute for, the more venerable and familiar social ethics. Thus, the land ethic was never meant to oust traditional, human-oriented morality and reign supreme. It was intended, rather, to supplement traditional, human-oriented morality.").

246. See *id.* at 5-6 ("Thus, the land ethic was not conceived to be an ad hoc addition to traditional social ethics, based upon altogether new and unfamiliar premises and principles. Rather, the land ethic is the most recently born sibling in a family of ethics—the family of ethics generated by and dependent upon various community entanglements. Hence, in applying the land ethic to the present question, the morality of whaling, one need not be restricted to the land ethic narrowly defined—one can reach more deeply into the land ethic's generic communitarian premises and principles for guidance.").

247. See *id.* at 6 ("[T]he land ethic accommodates concern for individual nonhuman beings no less surely than it coheres and peacefully coexists with the more venerable and familiar human-oriented ethics. When Leopold first crystallizes the implications of the land ethic, he mentions individual nonhuman natural entities alongside biological wholes. 'In short a land ethic changes the role of *Homo sapiens* from conqueror of the land-community to plain member and citizen of it. It implies respect for *his fellow-members*, [as well as] respect for the community as such.'").

248. See Curran, *supra* note 232, at 75 ("[T]he value of a keystone species to an ecosystem must be found to be greater than other species.").

249. See *id.* at 71 ("Leopold found that: A thing is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it does not."); see also Molenaar, *supra* note 80, at 47 ("[T]he precautionary approach should be applied so as to avoid serious consequences of scientific uncertainty."). This conclusion also makes sense, if one sees whales in an instrumentalist way. See Sunstein, *supra* note 207, at 387 ("Immanuel Kant thought of animals as 'man's instruments,' deserving protection only to help human beings in their relation to one another."); *id.* at 396 ("[A]nimals have intrinsic as well as instrumental value."). Callicott applies Leopold's "land ethic" to *sustainable* whale hunting and finds it "land ethically" sound, if it does not adversely affect endangered species or disrupt the stability of a biotic community. Callicott, *supra* note 76, at 17-18; *id.* at 8 ("[S]ignificantly interfering with poorly understood complex population equilibria courts disaster."). For these reasons, Callicott also "cautiously" approves commercial minke whale hunting, if their populations are as "robust" as maintained and "strict quotas" are maintained to prevent over-hunting. *Id.* at 10.

“fair access to resources.”²⁵⁰

Whales are members of biotic communities, and as such, humans owe duties toward them.²⁵¹ As members of the same biotic community of intelligent beings as humans,²⁵² whales should be owed comparable moral respect.²⁵³ Under modern ethical princi-

250. See Curran, *supra* note 232, at 60 (“[F]uture generations are not ‘traders’ in the market, yet many consider that they should have fair access to resources.” (quoting MINISTRY FOR THE ENVIRONMENT, ENVIRONMENT 2010 STRATEGY—A STATEMENT OF THE GOVERNMENT’S STRATEGY ON THE ENVIRONMENT, WELLINGTON (1995))); *id.* (“[A]nother view of stewardship, based upon a moral duty to provide for our descendants.”); see also Stoett, *supra* note 2, at 164 (“[O]ne could argue we are obligated to future generations to avoid driving today’s species into extinction, and the imperative of intergenerational ethics was even accepted in the Rio Declaration.”). D’Amato and Chopra find such a claim “weak.” See D’Amato & Chopra, *supra* note 47, at 23 (“A weak claim of environmental awareness is that we must concern ourselves with the integrity of the environment because of a duty to future generations.”); *id.* at 28 (“[M]orality cannot be a matter of self-interested or prudential calculation, but is rather a deontological obligation that we owe to others even at the possibility of a net cost to ourselves.”); *id.* at 23 (“[W]e owe a duty to living creatures in the environment per se, without calculating their utility to future generations of human beings.”); see also Curran, *supra* note 232, at 60 (discussing the rejection of the concept of intergenerational equity because “it rests ‘on the presumption that our descendants will still delight in what now delights only some of us and did not delight our predecessors’” (quoting JOHN PASSMORE, MAN’S RESPONSIBILITY FOR NATURE 124-25 (1974))); *id.* at 60 (“[D]uty that can provide for future generations could apply equally to other species, and even to the environment itself.”); *id.* (“[J]ust as any human may value his life any other living creature may do the same, despite the lack of instrumental value its life offers another.”).

251. See Callicott, *supra* note 76, at 11 (remarking on the incompleteness of the Land Ethic because “it says nothing about duties to ‘fellow-members’ of the biotic community”). Coeckelbergh says deep ecologists carry this thought one step further and argue that humans and animals are on the same moral level. Coeckelbergh, *supra* note 198, at 70 (“[I]t is [deep ecology] ideal is a biospheric egalitarianism’ which again puts humans and non-humans on a morally equal level. We are not just members of a biotic community’ (Leopold) but *equal* members.”).

252. See Callicott, *supra* note 76, at 23 (“*Homo sapiens* and the cetaceans are fellow-members of the global biotic community with few natural enemies. Cetaceans are warm-blooded, live-birthing, long-lived, suckling, nurturing, playful, curious, learning beings. They inhabit an environment that is, from a human point of view, completely foreign. But human beings and cetaceans may share a fellowship of a much more sympathetic sort: very different, but equally expansive mental lives.”); see also Stoett, *supra* note 2, at 161 (“We are, in some sense, little more than highly complex organisms at a particular moment in evolution. Whales are similarly creatures of their environment, and although there are endless debates over cetacean intelligence, we might safely conclude that they are the most cognitively oriented of all marine life, as humans are on land. The clash between these two species, however, does not fit with the usual pattern of land-space conflict one sees in the natural wild . . .”).

253. See Callicott, *supra* note 76, at 24 (“[O]ne may confidentially believe that humans share a select community of intelligent life on Earth with whales and dolphins. There exists a cetacean mind in the waters as well as a human mind on the land. Membership in that community—the community of minded organisms—carries with it special ethical duties and obligations.”); see also Goodman, *supra* note 193, at 1308 (“[R]ights em-

ples, this respect should at minimum imply non-interference with other members of these biotic communities,²⁵⁴ and should certainly not countenance killing²⁵⁵ or any form of animal cruelty.²⁵⁶ While hunting may be an exception to a rule against killing a member of the same biotic community, the killing of an animal during a hunt should not cause unnecessary suffering.²⁵⁷ Causing an animal to suffer debases humanity;²⁵⁸ treating animals well enlarges human welfare.²⁵⁹ Since whale hunting is a particularly cruel form of hunting,²⁶⁰ it, therefore, should not be countenanced as

anate from membership in society and an expectation of reciprocity among members.”).

254. See Callicott, *supra* note 76, at 11 (“From the point of view of modern ethical principles, respect for fellow-members of the human community implies, at the very least, noninterference.”).

255. See *id.* (“[A]n environmental ethic—to kill and eat a fellow-member of the *biotic* community is *prima facie* suspect. Would not *that*, if anything violate the land ethical duty to respect fellow-members of a biotic community?”).

256. See Coeckelbergh, *supra* note 198, at 71 (“But it does not follow that there are no requirements at all in regard to them, nor in our relations with the natural order. Certainly it is wrong to be cruel to animals and the destruction of the whole species can be a great evil. The capacity for feeling of pleasure and pain and for the forms of life of which animals are capable clearly impose duties of compassion and humanity in their case.” (quoting JOHN RAWLS, *A THEORY OF JUSTICE* 448 (1971))).

257. See Callicott, *supra* note 76, at 13-14 (“A modern or perhaps *postmodern* Western demonstration of respect for hunted fellow-members of the biotic community, as sketched by Leopold, included: learning the biology of one’s quarry; voluntarily limiting one’s means of capture; good markspersonship; not shooting when one cannot be sure of making a quick, clean kill; strict obedience to statutory regulations; and assiduously following a code of sporting conduct.”); see also *id.* at 14 (“Voluntary adherence to an ethical code elevates the self-respect of the sportsman, but it should not be forgotten that voluntary disregard of the code degenerates and depraves him.” (quoting LEOPOLD, *supra* note 244, at 178)).

258. See Goodman, *supra* note 193, at 1302 (“Empathy, not moral duty, requires this commitment. Animal suffering matters because it debases humanity and causes (or should cause) human suffering.”); *id.* at 1308 (“[T]here is a moral consensus in the Western world that animals should be treated better than they are.”).

259. *Id.* at 1303 (“[H]umans should treat animals well to enhance human welfare.”); see also Sunstein, *supra* note 207, 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.”); *id.* (“Every reasonable person believes in animal rights. Even the sharpest critics of animal rights support the anticruelty laws. I have suggested that the simple moral judgment behind these laws is that animal suffering matters.”).

260. See Callicott, *supra* note 76, 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.”); see also Stoett, *supra* note 2, at 169 (“A related ethical question . . . concerns the nature of whaling itself, which is often seen as an especially cruel form of hunting.”).

an exception to these ethical precepts.²⁶¹

A species-specific ethic has developed around whales.²⁶² People who value natural resources like whales believe it is unethical to destroy them, especially when those resources are rare.²⁶³ The fear of extinction has symbolic value and can lead to a collective sense of guilt at the thought of consuming a rare species like a whale.²⁶⁴ The whale has become a powerful symbol of nature in some countries.²⁶⁵ This view of whales is very different than the scientific view, which carries no normative content or symbolism and allows humans to consider themselves dominant over nature and, therefore, able to exploit it.²⁶⁶ It is also different from the view of the three

261. See Callicott, *supra* note 76, at 24 (“[W]hales seem to recognize human beings as fellow-intelligent-beings and assiduously refrain from harming members of the human species. Should not human beings then have a duty to reciprocate?”); *id.* at 25 (“Should *Homo sapiens* be killing fellow beings who may be the most highly evolved form of intelligent life on the planet?”); see also Stoett, *supra* note 2, at 162 (“If we can destroy such remarkable marine mammals-beasts who do not compete with us for living space, who are not predators on our domestic livestock, who are not physical threats to us in any way, and whose beauty are impressive and enriching—then nothing is safe from our destructive impulse.” (quoting F. STEWART, *THE PRESENCE OF WHALES: CONTEMPORARY WRITINGS ON THE WHALE* 15 (1995))); D’Amato & Chopra, *supra* note 47, at 21 n.1 (“Though the search for extraterrestrial intelligence may take a very long time, we could not do better than to start with a program of rehumanization by making friends with the whales and the dolphins. . . . They have behaved benignly and in many cases affectionately toward us. We have systematically slaughtered them.” (quoting CARL SAGAN, *THE COSMIC CONNECTION* 178-80 (1973))).

262. See Stoett, *supra* note 2, at 171 (“In terms of public opinion and policy, environmental ethics are situation-specific; indeed, one might suggest they are species-specific, as well.”).

263. See David A. Dana, *Existence Value and Federal Preservation Regulation*, 28 HARV. ENVIL. L. REV. 343, 366 (2004) (“Just as some people believe it is wrong for one state to permit its firms to pollute another state, some people believe that it is wrong for a state to permit its firms to destroy natural resources, at least non-reproducible or rare resources.”).

264. See Stoett, *supra* note 2, at 163-164 (“Why not eat whales? Taste preferences aside, the answer may lay in a collective sense of guilt. It is the symbolic value of the great extinctions, or threat thereof, that separates the whale from most species, leading to a rather clear construction of a species-specific hierarchy by cetologists and others.”); *id.* at 159 (“Symbolism is an integral aspect of the social construction of ethics”); *id.* at 160 (“[S]uggest that views toward nature have an axiomatic impact and that they are sustained not only by material needs but by symbolic imagery, from trees to whales to the entire globe captured by space-based photos.”).

265. See *id.* at 159 (“Even in these localized cases, the symbolic pull of the whale is apparent.”); *id.* at 151 (“Symbolism—the use of socially constructed images to convey a cause—has seldom been so important as in the case of the struggle over whaling rights and responsibilities.”).

266. See *id.* at 160 (“[T]he concept of nature in science carries no ethical value, since various organisms and animals are considered to be as morally neutral as molecules, atoms, or objects falling from space. Such a concept of nature places human beings in a po-

academics in their *Nature* commentary, which shows no collective concern for the environment's well-being.²⁶⁷

This Part of the Article shows why "whales are entitled to consideration as moral entities,"²⁶⁸ and why excluding them from a moral scheme is an unjustifiable conceit and an indefensible "value-laden belief."²⁶⁹ If that conclusion is correct, then depriving whales of their right to life under any circumstances is morally wrong,²⁷⁰ making the economists' proposal morally suspect. Granting whales a right to life could also "inform existing law"²⁷¹ or move it along a particular path.²⁷² Indeed, the law might develop more favorably for whales if courts viewed them as rights-holders.²⁷³ However, there is no international legal principle or principle of customary international law that prohibits the killing of non-endangered whales.²⁷⁴ But if there is a widely held moral-

sition of dominance over nature, and makes it acceptable morally to exploit nature for the 'benefit' of humans."); *id.* at 161 ("[I]t leads to an incomprehensible perspective on humanity separate from nature . . .").

267. See Curran, *supra* note 232, at 81 ("[V]aluation of the environment will always be low where there is little collective concern for its well-being. Under cost-benefit analysis every participant's preference is of equal weight and, therefore, without a collective environmental concern, valuation of healthy ecosystems will never be high."); see also Sandel, *supra* note 15, at 101 ("To know whether a good should be subject to market exchange . . . , we need to know what mode of valuation is fitting or appropriate to that good. This is different from knowing how much the thing is worth. It involves a qualitative, not just a quantitative judgment.").

268. D'Amato & Chopra, *supra* note 47, at 61.

269. Coeckelbergh, *supra* note 198, at 72.

270. See Callicott, *supra* note 76, at 22 ("Whale hunting is land ethically wrong, absolutely and categorically—even if the target species can sustain an annual commercial harvest and even if the whalers go about their grim work obsequiously.").

271. D'Amato & Chopra, *supra* note 47, at 61 (asserting that there is a "considerable degree of overlap" between moral and legal rights, reflecting how a norm develops "over time").

272. See *id.* at 52 ("[M]oral considerations influence the content of law over time."); *id.* ("Courts may be predisposed to giving a far more 'liberal' construction of applicable rules to a party that claims to be asserting rights than to one that claims to be a third-party beneficiary of asserted rights.").

273. *Id.* at 52 ("[D]evelopment of a jurisprudence regarding whales is more likely if whales are perceived by courts as rights holders . . .").

274. See Molenaar, *supra* note 80, at 49 ("[T]here is currently no universal rule of international law that prohibits States from killing marine mammals, either by way of preemptive catches or straightforward exploitation, provided this does not lead to their extinction. There is no treaty-based rule to that effect, nor a customary rule based on sufficiently uniform and widespread State practice."). Molenaar believes that it might be very difficult and unlikely for such a legal principle to emerge. *Id.* at 50-51 ("In certain western societies, most prominently the United States, marine mammals are regarded as having inherent value, perhaps even a right to life. Such rights have no basis under international law: there is no treaty rule to that effect and the practice of States is not uniform and wide-

based whale preservation norm, then it might fill the gap in law.²⁷⁵

VI. THE POTENTIAL ROLE OF NORMS IN WHALE PRESERVATION

Of course, the need for normative justification often reduces politics to a symbolic game of showmanship. But the need, nonetheless, persists—and this is why normative analysis retains its validity, regardless of the behavioral and postpositivist revolutions in social scientific thought.²⁷⁶

This Part of the Article focuses on norms: how they arise and are dispersed. It specifically focuses on the competing norms affecting the fate of whales and how one of these norms, the whale *preservation* norm, is on the rise in the international arena, but has not yet been adopted by whale hunting countries, which have instead embraced the whale *conservation* norm in their quest to resume whale hunting.²⁷⁷

Norms represent broadly shared understandings about what is appropriate or inappropriate behavior in a variety of situations.²⁷⁸

spread enough to create a rule of customary law that binds all States. And whereas it is in principle possible that the practice of States changes to give rise to a customary rule, this is not likely to happen due to a lack of logic and immediate benefits. There are simply no objective criteria to determine which life forms would have a right to life, and which would not.”). *But see* D’Amato & Chopra, *supra* note 47, at 22-23 (“This essay examines the history, and argues for the ‘presentation,’ 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.”).

275. *See* D’Amato & Chopra, *supra* note 47, at 61 (“One cannot fully explain ‘law’ without reference to normative values—what law is striving to achieve.”).

276. Stoett, *supra* note 2, at 157.

277. *See* Nagtzaam, *supra* note 4, at 376-77 (discussing “the exploitation of whales and the competing attempts by various normative entrepreneurs to introduce their preferred competing environmental norms of exploitation, conservation, or preservation”).

278. *See* Ellis, *supra* note 24, at 2 (“Constructivists consider legal rules and systems to be constituted by shared understandings developed through iterative processes of interaction. Legal rules are not regarded as commands backed by sanctions, but rather as crystallizations of shared understandings that affect the way in which actors perceive a problem, the range of possible solutions, and their own interests and priorities.”); *see also* Nagtzaam, *supra* note 4, at 377 (“Norms contain somewhat clearer injunctions to members about legitimate and illegitimate behaviour, still defining responsibilities and obligations in relatively general terms. . . . Rules are, however, more specific: they indicate in more detail the specific rights and obligations of members.”); *id.* (“Norms can be defined . . . as ‘shared

Norms are generally enforced through tactics like shaming to pressure people to conform to the norm's directives; once norms are internalized, they guide behavior without outside interference.²⁷⁹ Compliance with a norm legitimizes an actor, imparting credibility and status—effects of being a good citizen.²⁸⁰ Norms exist at the international level²⁸¹ and can be found in international or customary law.²⁸² Until a competing international regulatory body espousing different norms is created, the unchallenged existence of the IWC as the sole international organization charged with preserving whales means that its underlying norms “reflect those operating in the broader world.”²⁸³

While some norms, like the duty to maintain biodiversity and prevent certain life forms from dying out, have gained the status of becoming customary international law,²⁸⁴ this is not true for the

expectations about appropriate behavior held by a collectivity of actors.”); see generally Babcock, *A New Environmental Norm*, *supra* note 18, at 134-42 (discussing how norms arise, the difference between personal or individual norms and social norms as well as abstract and concrete norms, and their various uses in suggesting the right behavior).

279. See Nagtzaam, *supra* note 4, at 377 (“[Norms] can provide a basis for shaming or pressuring actors, or they can provide the basis of social learning of appropriate or moral behavior and become internalized by agents and guide actions.”); see also Babcock, *A New Environmental Norm*, *supra* note 18, at 134 (“Norms are informal obligations or social rules that are not dependent on government either for their creation or enforcement.”).

280. See Nagtzaam, *supra* note 4, at 378 (“[T]he benefits that accrue from normative compliance may not necessarily be material, but may include the need for legitimacy, credibility, status, or a concern to be perceived as a good global citizen.”); *id.* at 412 (referring to the United States’ persistent pursuit of whale preservation and saying, “It is arguable that the United States might have gained a ‘reputational advantage’ in being perceived as a good environmental citizen”).

281. See *id.* at 377 (“At the global level, norms can be found operating in international regimes of all persuasions . . .”). *But see* Stoett, *supra* note 2, at 158 (“[T]he embryonic field of global environmental politics suffers from normative paucity at this stage, which is somewhat surprising, given the emotive appeal of environmental issues (perhaps this is the sobering effect of social science).”).

282. See Nagtzaam, *supra* note 4, at 378 (“At the international level such norms are often codified within international law, which provides an important indicator of the presence and strength of a global norm.”); see also D’Amato & Chopra, *supra* note 47, at 50 (“What states *do* becomes what they legally *ought* to do, by virtue of a growing sense that what they do is right, proper and natural.”).

283. Nagtzaam, *supra* note 4, at 399.

284. See Molenaar, *supra* note 80, at 36 (“[I]n the case of certain norms the practice of States has become so uniform and widespread that these norms have acquired the status of customary law and thus are binding on all States absent timely objection during the crystallization process. For example, the prohibition on over-exploitation of marine living resources, the duty to cooperate in relation to transboundary marine living resources, the duty to conserve biodiversity and the duty to take measures to prevent species from becoming extinct are binding as customary law on all States. For States that are parties to the 1982 United Nations Convention on the Law of the Sea (LOS Convention), the 1992 Con-

anti-whaling norm. The continuing controversy over commercial whaling on the IWC and the use of exemptions allowing whales to be killed shows the lack of universal acceptance of the anti-whaling norm and why it is not yet customary international law.²⁸⁵

However, a growing international consciousness that killing whales is morally repugnant is an indication of an emergent international whale preservation norm.²⁸⁶ That consciousness is apparent from the fact that only a few countries adhere to a different norm. It manifests an international awareness of a legal obligation toward whales;²⁸⁷ perhaps even an acknowledgment of a whale's right to life with commensurate legal and moral obligations imposed on the international community.²⁸⁸ 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.²⁸⁹ But this concern has had little effect on whaling countries that stand to gain only international reputational benefits if they were to convert to a whale preservation norm.

Preventing universal acceptance of a whale preservation norm is the existence of two other competing whale norms:²⁹⁰ exploita-

vention on Biological Diversity, and the CITES Convention these norms are also binding as treaty law.”).

285. See Molenaar, *supra* note 80, at 36 (“It can therefore not be ruled out that a prohibition on the exploitation of certain or all marine mammals could ultimately acquire customary status. But the provision for aboriginal subsistence whaling under the IWC Convention and the current deadlock on commercial whaling indicates that current State practice is far from such uniformity.”).

286. See D’Amato & Chopra, *supra* note 47, at 50 (“We have seen, in the history [of] . . . the practice of states (reflected through their whaling activities) moving through six stages that are best characterized as increases in international breadth of consciousness.”); see also Stoett, *supra* note 2, at 167 (“Cultural relativism surfaces here. The antiwhaling lobby often has pushed toward the powerful idea that efforts to abolish whaling are reflective of a new, global consciousness.”).

287. See D’Amato & Chopra, *supra* note 47, at 50 (suggest[ing] “an *opinio juris*—a growing sense of international legal obligation toward whales”).

288. *Id.* (“Nearly all nations accept the obligation of preservation. And in this consensus of preservation, we suggest that there is the incipient formation of the final, decisive stage—the entitlement of whales to life.”).

289. See *id.* at 56 (“[T]he sovereign rights of states’ in objecting to certain specifications on scientific research laid down by the IWC’s Technical Committee. But ‘sovereign rights’ is a rhetorically overused and ill-fitting concept in discussions of international law. 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.”).

290. See Nagtzaam, *supra* note 4, at 380 (identifying three competing norms as “exploitation, conservation, and preservation”).

tion—a declining norm²⁹¹ that treats natural resources as fungible goods separate from the environment in which they are found—and conservation.²⁹² The conservation norm finds support in many different cultures²⁹³ because it is “a utilitarian, human-centered perspective that seeks the greatest good for the greatest number of humans”²⁹⁴ and personifies “a rhetoric” of restrained and wise use of natural resources.²⁹⁵ Pro-whaling countries support the conservation norm because its indeterminacy enables them to use the language of conservation to support their goal of resuming hunt-

291. See *id.* at 385 (“[Exploitation] will be understood . . . as referring to a situation where humanity treats resources as merely instruments to be developed and consumed without consideration for the survivability of the resource, the overall ecosystem, or the rights of future generations of humans.”). Nagtzaam finds support for the exploitation norm to be fading as indicated by the failure of nations like Japan and the Soviet Union to justify their continued killing of whales in exploitative language. See *id.* at 386 (“[T]he choice not to use the explicit language of exploitation also provides a revealing indication that support for the norm has waned.”). Instead supporters of the exploitation norm “prefer to use the language of sustainable utilization or conservation”); *id.* at 385 (“[A]rguments for the unrestrained or minimally restrained utilization of a resource are rarely couched in the language of exploitation by its proponents, who prefer to use the language of sustainable utilization or conservation.”).

292. See *id.* at 386 (“The conservationist approach is bound up with the production process and regards the nonhuman world merely in terms of its use-value terms, as a resource to be utilized. Therefore a conservationist perspective treats the biosphere as a reservoir of matter-energy to be altered by technology for human consumption.”); *id.* at 387 (quoting MARK SMITH, *ECOLOGISM: TOWARDS ECOLOGICAL CITIZENSHIP* 11 (1998) (“[T]he idea of conservationism has tended to act as a brake ‘to moderate the pressures for an *exploitative* ‘free for all’ inherent in the drives which propel actions in economic markets,’ thus ameliorating damaging practices of the past.”)).

293. *Id.* at 387 (“Using this norm [of conservation] to underpin a global environmental regime tends to invite greater consensus from stakeholders as its argument that the environment is a resource that wisely must be utilized resonates deeply with many cultures.”).

294. *Id.* (“Conservation is in many ways the least controversial environmental norm since it has at its heart a utilitarian, human-centered perspective that seeks the greatest good for the greatest number of humans.”). Even those who favor a norm of preservation use the language of conservation and sustainable whale stocks in their arguments against killing whales. See *id.* at 418 (“Preservationist proponents’ arguments were never advanced in terms of preserving whales.”). Rather, these arguments were defended within the IWC as providing a chance for whale stocks to rebound, which left the door open for whaling to continue at a later date, which is consistent with a conservationist position.”); *id.* at 446 (“Proponents of preservationism do not dare make arguments with preservationist language because they know they will not succeed so the strategically couch their claims in conservationist rhetoric instead.”); see also Harrop, *supra* note 48, at 79 (“In the most general sense, conservation concerns scientific (and increasingly) economic assumptions based on a foundation of anthropocentric concern.”).

295. See Nagtzaam, *supra* note 4, at 387 (“[The conservation norm] embodies a rhetoric of restraint.”).

ing whales once sustainable populations are reached.²⁹⁶ The preservation norm, in contrast, takes a non-instrumentalist view of whales,²⁹⁷ uninterested in any future use they might have for humanity.²⁹⁸ The whale preservation norm appears to be ascending over both the exploitation and conservation norms on the international stage, in large part due to the activities of environmental non-governmental organizations.²⁹⁹ However, the division between anti-whaling members on the IWC over whether the whale norm should be conservation or preservation³⁰⁰—what Nagtzaam refers to as a failure of “concordance or commonality”³⁰¹—has prevented the IWC’s adoption of the preservation norm³⁰² despite increas-

296. *See id.* at 423 (“If Japan and its allies can limit and define the normative contest within the IWC to one of only debating conservationist mores and practices, it knows that it has an excellent chance of eventually being allowed to whale legally again.”); *id.* at 425 (“Both sides to the debate have used conservationist rhetoric for their own ends rather than actually discussing exploitation and preservation.”).

297. *See id.* at 388 (“[P]reservationism accords an intrinsic or non-instrumental value to the world even if it conflicts with human interests.”); *id.* (“[W]hile it is possible to argue preservationist positions from an instrumental perspective, doing so does a disservice to the intentions of many global actors advocating preservation who argue that whales or other creatures deserve not to be culled because they intrinsically have a right to exist.”).

298. *See id.* at 388 (“A conservationist may only save a resource for use at a future time, while a preservationist desires to keep the resources forever untrammelled and protected”); *id.* at 387 (“If the saving of a resource is *from* utilization rather than *for* utilization, however, we are generally speaking of ‘preservation.’” (emphasis added)).

299. Nagtzaam attributes the ascendance of the whale preservation norm to the work of international ENGOs. *See id.* at 382 (“All three environmental norms examined in this Article started as domestic norms but have become global due to the increasingly transboundary character of environmental problems and the transnational activism of ENGOs. Thus norms have histories that can be ‘subject to change over time’ as a ‘result of the communicative process in which value-based expectations of behavior are socialized and as a result of which the contents of socialization can change in the long term.’”).

300. *See id.* at 386 (“[The] domestic debate [between those advocating conservation and those promoting preservationism] is now being played out on a global scale.”); *id.* at 420 (“Preservationist states and ENGOs have attempted to widen the moratorium into a comprehensive ban on all whaling by creating whale sanctuaries and encouraging whale watching enterprises, while other states like Japan campaign to put in place ostensibly conservationist programs.”).

301. *See id.* at 381 (defining the concept of concordance or commonality as “how widely accepted the rules are in diplomatic discussions and treaties (that is, the degree of inter subjective agreement)”). Nagtzaam discusses three factors that can determine a norm’s strength, “specificity, durability, and concordance.” *Id.* at 380. “The strength . . . of a norm is determined in these cases by the units within a system who share that norm’s values.” *Id.* at 381. Specificity is “how precisely a norm distinguishes appropriate from inappropriate behavior,” and durability looks at how long the norms have been in existence, their ability to withstand challenges to them, and whether their violations are punished. *Id.*

302. *See id.* at 446 (“Taking the three factors of specificity, durability and concordance into account, we can only speak of the [whale preservation] norm being of medium-to-high commonality.”). Nagtzaam, however, believes that the IWC has accepted the whale

ing support for it there.³⁰³ ENGOs have not been able to break this “asymmetric” norm “deadlock,”³⁰⁴ and enactment of the ban on commercial whaling has only hardened positions on either side of the conflict.³⁰⁵ That both sides are buoyed by national cultural norms and moral beliefs makes any change in the norm stalemate on the IWC unlikely³⁰⁶ and has neutralized the IWC as a force for norm change elsewhere in the world.

The whale preservation norm is a weak behavioral guide for those not inclined to follow it. Even though the ban against commercial whale hunting is “reasonably understood and adhered to” by most nations,³⁰⁷ the exceptions to it for lethal scientific research and aboriginal hunting³⁰⁸ mean that the preservation norm’s international internalization is not complete.³⁰⁹ The ban’s continued

conservation norm, leaving whaling nations like Japan and Norway as renegade nations. *Id.* at 432 (“Japan stands out as the exception that proves the norm, which is becoming more deeply entrenched among IWC members.”).

303. *See id.* at 444 (“It is clear that for the moment preservationist norms are ascendant and that most members of the IWC favor the total extinction of the whaling industry.”). Nagtzaam attributes norm change on the IWC to the addition of non-whaling states. *Id.* at 399 (“Allowing other states to join the IWC, whether whaling nations or not, was to prove a critical factor in norm transformation. This step would not have occurred in the absence of this new view that whales should be considered a global re-source and not just the property of whaling states. The provision allowed states to circumvent potential veto coalitions by recruiting like-minded allies, a tactic used by both pro- and anti-whaling forces.”).

304. *See id.* at 420 (“The actions of the coalition of pro-whaling states indicate that the whaling regime is in a situation of ‘asymmetric deadlock,’ with whaling states having no intention of cooperating with other states to preserve whales.”); *id.* at 443 (“At the moment there appears to be a normative deadlock with neither group able to expand their sphere of influence.”).

305. *See id.* at 419 (“[T]he moratorium did not end the normative contestation within the IWC and globally. . . . In many ways the debate became more acrimonious as positions hardened.”); *see also* Molenaar, *supra* note 80, at 39 (“Ethical clashes and lack of respect for opposing views are very prominent within the IWC.”).

306. *See* Nagtzaam, *supra* note 4, at 420 (“Neither side has approached the negotiating table with a willingness to compromise because no diminution of position is possible given the moral and cultural belief structures at stake.”).

307. *See id.* at 445 (“[T]he majority of states do, at present, accept the ban as legitimate.”).

308. *See id.* at 434 (“[H]ow strong can the preservationist norm within the IWC be if whales are still killed under the pretext of aboriginal subsistence whaling?”); *id.* (“If whaling still continues, even with only a few taken, then the preservationist norm has not been fully entrenched but is limited in its application.”); *id.* at 439 (“This tension raises the bigger question of whether support for aboriginal whaling necessarily undermines the preservationist norm as a whole.”).

309. *Id.* at 444 (“[T]he commercial moratorium is reasonably understood and adhered to. However, the exemptions allowing for scientific and aboriginal subsistence whaling complicate the operation of the ban.”).

violation by a number of countries,³¹⁰ that it is repeatedly challenged at annual IWC meetings,³¹¹ and that Japan has threatened to set up a rival organization based on sustainable use (the conservation norm) if the ban is not repealed are all indications of the whale preservation norm's weakness and questionable durability.³¹²

On the other hand, proponents of the preservation norm have achieved much on the global stage in terms of changing how the world thinks about whaling practices and whale hunting in general.³¹³ Indeed, the whale preservation norm may have gone through an international tipping point, making its reversal unlikely.³¹⁴ The United States, Australia, France, and the Netherlands have become powerful proponents for norm change on the global stage because they have internalized the whale preservation norm.³¹⁵

310. *See id.* at 381 ("Has [the norm] been internalized? Do they put conditions on acceptance and therefore diminish it? Are these rules so taken for granted that no actor even considers violating them?"). On problems enforcing the ban, see D'Amato & Chopra, *supra* note 47, at 30-34 (discussing problems the IWC has enforcing the ban).

311. *See* Nagtzaam, *supra* note 4, at 445 ("[T]he . . . durability of the norm is also complicated. While the moratorium has been in effect for over twenty years, the question of its continuation has been revisited on a yearly basis at the IWC annual meeting."). *But see id.* ("Delegate numbers are still finely balanced. . . . However, overturning the moratorium requires a three-quarters majority of members. This seems unlikely in the near future, given how faction numbers are so evenly balanced.").

312. *See id.* at 446 ("Japan seems to be losing faith in the process altogether. . . . [A]nd it threatened to quit the IWC and to set up an alternative organization based on sustainable utilization.").

313. *See id.* at 447 ("While preservationist proponents may not yet have brought about a universal shift sufficient to end the normative debate they have been remarkably successful in a relatively short period of time in changing how whales and the practice of whaling are perceived globally.").

314. *See* Babcock, *A New Environmental Norm*, *supra* note 18, at 143 (discussing how a "tipping point" occurs when a 'critical mass' of other actors 'become norm leaders and adopt new norms'); Nagtzaam, *supra* note 4, at 447 ("Friedheim argues that we can observe within the whaling regime that 'the preservation norm has gone through a "tipping point" 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.'").

315. *See* Nagtzaam, *supra* note 4, at 447 ("States such as Australia, France, the Netherlands, and the United States appear to have internalized preservationist values as part of their state identities, and as a consequence they have become powerful norm proponents."); *id.* at 415 ("It is clear that given the resources put into the global moratorium that this was no mere strategic decision by the United States and Australia, but rather symptomatic of a change in their very identity, from passive bystanders to active norm proponents.").

VII. NORM CHANGE AS A WAY TO PROTECT WHALES

The cold view . . . is that we are therefore headed for extinction in a universe of impersonal chemical, physical, and biological laws. A more productive, certainly more engaging view, is that we have the intelligence to grasp what is happening, the composure not to be intimidated by its complexity, and the courage to take steps that may bear no fruit in our lifetimes.³¹⁶

There have been many recommendations for how to improve whale protection besides the proposal that inspired this Article's response.³¹⁷ Some involve the IWC changing how it manages whales,³¹⁸ like imposing stricter quotas and using nongovernmental organizations to monitor whaling activities.³¹⁹ Others suggest the creation of an international trust to protect whales³²⁰ or the creation of whale reserves, in which hunting whales by anyone would be prohibited.³²¹ Many of these proposals are premised on

316. Haskell, Jr., *supra* note 24, at 591 (quoting B. LOPEZ, ARCTIC DREAMS 52 (1986)).

317. See Regina Asmutis-Silva, *A Multi-Faceted Approach Is Necessary to Protect Endangered Species: A Case Study of the Critically Imperiled North Atlantic Right Whale*, 36 B.C. ENVTL. AFF. L. REV. 483, 493 (2009) (advocating the use of multiple approaches in the cause of saving environmental species.); *id.* at 494 (“[A]n insistence on a single-tool approach is myopic and doomed to failure, as is damning the use of any particular tool.”).

318. See Osherenko, *supra* note 76, at 229-30 (discussing Friedheim's proposals to reform the IWC as including “adoption of a long-overdue Revised Management Scheme with enhanced implementation and compliance mechanisms, (creation of a permanent Implementation Subcommittee, a field inspection corps, a Register of Whaling Vessels, and a system of third-party audits), redefinition of aboriginal whaling so as not to exclude nationalities with a long tradition of coastal whaling but which do not meet international definitions of indigenous or aboriginal, and acceptance of a definition of reallocation of costs so that all users, consumptive and nonconsumptive, pay for the cost of the whaling regime”).

319. See Ruffle, *supra* note 6, at 666 (“[I]mproved monitoring with the assistance of non-governmental organizations (‘NGOs’) is also required.”).

320. See D’Amato & Chopra, *supra* note 47, at 39 (quoting the IWC/25th Report as saying, “[W]hales come under no man’s exclusive national jurisdiction and as such have to be an international trust in whose disposition all nations should have a voice”).

321. See Katrina M. Wyman, *The Property Rights Challenge in Marine Fisheries*, 50 ARIZ. L. REV. 511, 529 (2008) (suggesting that marine reserves would provide “insurance against management errors within fished areas”); *id.* (“The growing popularity of the idea of reserving areas of the oceans as protected spaces recalls the move in late nineteenth and early twentieth century America to preserve some of the country’s most spectacular scenery for future generations after many public lands had been privatized.”). *But see id.* at 542 (“Reserves are often difficult to establish because they entail closing off areas of the ocean to fishing and other extractive activities.”); *id.* (“Reserves also may be costly to manage. Their boundaries must be policed, and it may be necessary to undertake measures in areas

whaling and anti-whaling nations being able to reconcile their differences through compromise,³²² uniting whaling and anti-whaling nations in a single regime that assures the survival of whales.³²³ Given the “vituperative atmosphere” at the IWC,³²⁴ achieving this result will be quite a challenge.

An alternative approach is to seek norm change in whaling countries. Since norms are “constructed through shared understandings” about what constitutes good behavior,³²⁵ for a norm to change, “a new social meaning must be created” about the activity in question.³²⁶ When social understandings change, the institutions and rules that are dependent on them change as well.³²⁷ Most

bordering reserves to protect the areas inside them.”); *id.* at 540 (“Reserving certain areas of the oceans also might displace fisheries and their attendant environmental harms to other areas.”).

322. See Burns, *supra* note 25, at 276 (“[I]f the IWC is to overcome its dysfunctionality, both whaling and non-whaling nations will have to stand down from their ultimate objectives and work to craft a reasonable compromise on the issue of commercial whaling.”); see also Osherenko, *supra* note 76, at 239 (“The parties should set aside irreconcilable value differences, fully commit to set harvest quotas for artisanal whaling based on best scientific stock assessments, and join together to address the environmental threats to conservation of whale populations.”).

323. See Osherenko, *supra* note 76, at 230 (“Friedheim’s arguments rest not so much on concerns for environmental justice as on a desire to see an effective international whaling regime that entices the Japanese and other whaling nations to participate rather than behave as ‘bootleggers’ in the face of Baptists (to use Friedheim’s own metaphor).”). For an example of what such a compromise might look like, see Burns, *supra* note 25, at 276 (quoting Sydney Holt as saying, “There may be only one way out of the looming catastrophe: that is for both whaling and non-whaling countries to engage for the first time in serious negotiation. Rigorous, precautionary management rules are needed, backed by a stern regime to secure compliance with the rules. In such negotiations, a few non-whaling countries would need to drop their pretense that a permanent end to commercial whaling can be brought about by vote in the IWC.”); see also *id.* (offering the Canny Compromise as a way to bridge the divide, which proposed “the completion and adoption of the RMS, with catch quotas restricted to coastal areas and harvesting by current whaling nations; local consumption only of harvested whales; a phase-out of lethal scientific whaling operations”). *But see* Lessoff, *supra* note 21, at 444 (“[T]he IWC and the United States still make too many concessions to commercial whaling nations. It is now time, if the United States is serious about saving these animals, to exert increased political and economic leverage on nations who choose not to abide by the IWC’s quotas.”).

324. See Burns, *supra* note 25, at 276 (“While it is difficult to envision acceptance of the Canny Compromise in the vituperative atmosphere of the IWC, ultimately the body must find a way to save itself if it is going to save the whales.”).

325. See Ellis, *supra* note 24, at 14 (“If social institutions, including legal rules, are constructed through shared understandings . . . , this means that changes in shared understandings lead to changes in those institutions.”).

326. Babcock, *A New Environmental Norm*, *supra* note 18, at 143.

327. See Ellis, *supra* note 24, at 14.

times, these changes happen imperceptibly³²⁸ because they occur “against a backdrop of shared understandings and social institutions that give them meaning and anchor them in the shared reality of the various interested actors.”³²⁹ For example, the emergence of the anti-whaling norm in western countries coincided with the upsurge of a more concerned and environmentally sophisticated public in those countries.³³⁰

However, changing norms is not easy when there are no shared understandings and when it means abandoning previously acceptable behavior that has been engaged in so long that it has become its own norm, as is the case in whaling countries.³³¹ There are also countervailing general norms like the autonomy and reciprocity or fairness norms that might create barriers to the adoption of a specific whale preservation norm by a whaling country. Thus, if a pro-whaling country feels that it is being forced to adopt a norm, then the autonomy norm may prevent its adoption.³³² Similarly, if a country believes it is being treated unfairly, then the “reciprocity norm” may diminish any desire a whaling nation has to adopt the whale preservation norm.³³³ An example of how this particular countervailing norm might function in Japan’s case is the failure of the global community to sanction contrary behavior by anti-whaling countries, like eating meat or to accept traditional hunting by Inuits but not by Japanese coastal villages.³³⁴ Putting

328. *See id.* at 14 (“At times, changes to the rules are done quite deliberately: laws are adopted, definitions are developed, legal relationships are structured and modified. Most of the time, however, these changes take place almost imperceptibly.”).

329. *See id.* at 39 (“Constructivists in particular understand that the series of utterances that comprise the kinds of claims and counter-claims described above are far from isolated events; they take place against a backdrop of shared understandings and social institutions that give them meaning and anchor them in the shared reality of the various interested actors.”).

330. *See Nagtzaam, supra* note 4, at 405 (“Critically, the issue of overexploiting whales was becoming one of global concern at a time when the global public was becoming more worried and better educated on global environmental issues.”).

331. *See Babcock, A New Environmental Norm, supra* note 18, at 143 (discussing the difficulty of norm change when it requires “the abandonment of preconceived ideas”).

332. *See id.* at 152 (discussing the autonomy norm).

333. *See id.* (discussing the reciprocity norm).

334. Many Japanese consider western culinary preferences hypocritical. *See Hirata, supra* note 60, at 142 (“Westerners consider it morally wrong to kill certain mammals such as whales but consider it acceptable to kill others, such as kangaroos (in Australia) and cattle (in the United States).”); *see also Callicott, supra* note 76, at 14 (“Under land ethical principles, why would sustainable minke whale hunting, provided it is done respectfully, be any less justifiable than sustainable deer hunting, respectfully done?” (emphasis omitted)).

pressure on the pro-whaling nation to conform to a whale preservation norm could be viewed as showing lack of respect for divergent cultures, a form of “cultural imperialism.”³³⁵ This perception could undermine the credibility of the IWC, if it is perceived to be the source of the pressure.³³⁶ Since maintenance of any norm requires informal enforcement before the norm is internalized, it is unlikely that internalization will occur, if countries feel they have been forced to comply with the new norm.³³⁷

Still, it may be possible to change the preferences of whaling nations by changing the preferences of their citizens.³³⁸ Doing this might avoid the effect of the autonomy norm because people would not perceive themselves as being forced to change their behavior in response to outside pressure. To the extent that preferences are merely “mental constructs” and not due to external facts,³³⁹ they can be realigned. Thus, if a preference is held only by a few and is not deeply felt, then its strength is not overwhelming,³⁴⁰ and a different outcome might be possible.³⁴¹ Should a

335. See Hirata, *supra* note 60, at 142 (“Japanese public resents what it perceives as Western interference in its own indigenous behavior.”); *id.* (calling Western interference, “cultural imperialism”); *id.* (“[O]pposition to Japanese whaling is an expression of racism.”); see also Molenaar, *supra* note 80, at 38 (“The need for mutual respect is clearly under threat if States exert pressure on other States to ensure compliance with their views.”); *id.* (“Even though killing marine mammals is not prohibited by international law, States that *do* prohibit this within their jurisdiction may regard the killing of marine mammals by other States as disrespect for their views.”); Stoett, *supra* note 2, at 167 (“The idea that the Japanese will eventually lose their fondness for whale meat is not without some merit. . . . However, it is obvious that this argument is based on a rather condescending cultural orientation, one resented by the Japanese. . . .”).

336. See Molenaar, *supra* note 80, at 51 (“The sovereign equality of States implies that States should respect the views of other States even though they may not agree with them. Exerting pressure on States to ensure that they also treat some animals more equally than others may not always be inconsistent with international law, but reflects at any rate a lack of mutual respect. Using international regulatory bodies like the IWC and CITES for such pressure will lead to a loss of the credibility and legitimacy of such organizations.”).

337. See *id.* at 39 (“Also, States may be less than enthusiastic in ensuring compliance with rules they have been forced to accept.”).

338. See Dana, *supra* note 263, at 372 (“[P]olitical outcomes track, if imperfectly, the relative weight of competing sets of preferences held by members of the population.”).

339. *Id.* at 361.

340. See *id.* at 372 (“[T]he weight of a set of preferences held by a group is a function of breadth—how many people hold particular preferences—and depth—the intensity with which the preferences are held.”).

341. See *id.* at 374 (“[T]he emergence of a political outcome supporting preservation of a natural resource despite the transaction costs and political structures impediments strongly suggests that the preferences in support of preservation clearly outweigh the preferences in opposition to preservation.”). *But see* Curran, *supra* note 232, at 82 (“Governments face difficulties obtaining a complete view of individual preferences and are easily

change in preferences start to happen in a whaling country then this could create a cascade of changed behavior in that country as more and more people abandon the old whale hunting norm and adopt the new whale preservation norm.³⁴² Making the public aware of the issues involved in whaling—particularly its cruelty—might change individual preferences and help a whale preservation norm emerge in whaling countries.³⁴³ Ethics play a critical role in defining the content of norms and in their diffusion.³⁴⁴ So a culture's aversion to animal cruelty and adherence to an ethic of not being cruel to animals might help spread the anti-whaling norm.

Since norms guide people into behaving in ways that conform to community expectations, community expectations in pro-whaling countries about whaling will have to change first.³⁴⁵ This

influenced by sectional interests.”).

342. See Babcock, *A New Environmental Norm*, *supra* note 18, at 145 (discussing the phenomenon of a norm cascade).

343. See Alker, *supra* note 32, at 559 (“Also, this market closure was made possible in part by activities of conservation groups dating back to the 1960s. Years of publishing information had generated a cumulative effect, whereby the public was already marginally aware of some of the issues. Thus a somewhat lesser immediate effort was needed to create a strong rallying point for this single critical issue in 1990. Of course, as the reality of our culture dictates today, having video footage finally proved more effective than most of the previous efforts to help the public understand the problem.”); see also Nagtzaam, *supra* note 4, at 402 (“Frustrated delegates to the ICW, who wanted to promote a conservationist platform, could not alter the situation in a context where there was little public knowledge of whaling issues and practices.”).

344. See Stoett, *supra* note 2, at 158 (“[E]thical questions, and their interpretation and transmission through global governance structures, remain central to the evolution of both jurisdiction and veridiction.”); *id.* at 151 (“The continued value of ethical analysis in world politics, ecopolitical and otherwise, is demonstrated with reference to the ongoing debate over cetacean management at the international level.”); see also Curran, *supra* note 232, at 88 (“When a high level of environmental protection is desired [a spiritual belief in Nature’s intrinsic value and economic modeling of community preferences] . . . are inappropriate and ineffective without a collective environmental ethic.”).

345. See Babcock, *A New Environmental Norm*, *supra* note 18, at 134 (“[Norms] portray how people behave and also prescribe how they should behave to conform to community expectations.”). Rieser would abandon this behavioral change effort because the need for reform in other areas of marine species management is greater. See Rieser, *supra* note 2, at 428 (“The need for reform is much greater in other regimes; a regime for whaling that is very costly to reform is not worth the price. Greater effort at other international bodies to advance precautionary and ecosystem approaches will in the long run do more for whales in a warming ocean than a less acrimonious IWC.”); see also Stoett, *supra* note 2, at 159 (“The IWC became hamstrung by popular opinion in Europe and the United States, driving the IWC into a chamber of hardened positions. Most ecologists (in the scientific sense of that word) would agree that the focus on charismatic megavertebrates reduces the potential attention paid to broader and more important issues related to ecosystem health, especially habitat preservation.”). Rieser also believes that the diplomatic cost of reform-

can be done by changing the salience of the whale preservation norm in those countries.³⁴⁶ For a norm to have salience and exert any prescriptive pressure on the behavior of nations, its adoption must be perceived as legitimate by the adopting state, and it must also be “sufficiently robust or widely enough held”³⁴⁷ to overcome barriers to its adoption. Here, the whale-preservation norm is robust and widely held at the international level, but not yet strong enough by itself to be part of a new cultural identity in whaling nations.³⁴⁸ Therefore, a lack of belief in the rightness of the anti-whaling norm means that where a whaling nation’s costs of not whaling exceed perceived benefits—especially where the harm from killing a whale is felt far away and only very indirectly—behavioral change will be difficult to induce.³⁴⁹ It is hard to get people, let alone countries, to accept a new norm when a claim that adopting the new norm will be good for everyone cannot be sustained.³⁵⁰ Additionally, whale populations are recovering; many

ing the behavior of whaling nations is too high, if it requires compromising other norms that were hard fought to achieve. *See* Rieser, *supra* note 2, at 428 (“If diplomacy to resolve the whaling regime stalemate can only succeed by compromising norms that were earned the hard way, diplomacy in that case is really not working.”).

346. *See* Ellis, *supra* note 24, at 40 (“[T]he salience of fisheries conservation and management, and marine ecosystem protection more generally, must be significantly increased within the machinery of governments and in the public imagination.”); *id.* (“If citizens and politicians cannot be made to care about this issue, all the monitoring technology, port inspections and trade measures in the world will not make a significant difference. Law cannot bear the burden of fisheries conservation and management alone.”); *see also* Babcock, *A New Environmental Norm*, *supra* note 18, at 154 (“[P]eople may not want to change their behavior because they simply do not believe the reason for the behavior change or they question the legitimacy of the norm.”); Hirata, *supra* note 60, at 130 (“[T]wo national-level factors seem to condition the effects of international norms on domestic political processes: the domestic legitimacy (or ‘salience’) of the norm and the structural context in which domestic policy debate takes place.”).

347. Babcock, *A New Environmental Norm*, *supra* note 18, at 152.

348. *But see* Stoett, *supra* note 2, at 159 (“[G]iven the divisive nature of the whaling issue, any resultant transformation of ethical positions into universal knowledge is far away.”).

349. *See* Babcock, *A New Environmental Norm*, *supra* note 18, at 141-42 (discussing how a cost-benefit calculation of personal behavior can influence adherence to a new norm); *id.* at 141 (discussing the problem of changing behavior in situations where there are “large-number, small-payoff collective action problems”).

350. *See id.* at 144 (“[N]orms that make ‘universalistic’ claims about what is good for a lot of people . . . also have a higher likelihood of success.”). This lack of universal support may be one reason the IWC has not been able to effectively enforce its regulations. *See* Ellis, *supra* note 24, at 36 (“[T]he choice of a regime that establishes general objectives rather than specific obligations and avoids the imposition of sanctions for non-compliance is generally not made because it is believed that such a regime will prove more effective, but rather because the regime’s member states have not yet developed the kind of deep

species are moving out of the imminent endangerment zone, making their further protection less urgent.³⁵¹ Ironically, the recovery of some whale species undercuts the legitimacy of the whale preservation norm.

Diffusion of an international norm within a country depends on the country's "cultural characteristics" and the extent to which the "international norm resonates with domestic values."³⁵² In Japan, for example, the anti-whaling norm is non-congruent with the country's domestic value system.³⁵³ Even though whaling has never been a major contributor to Japan's economy,³⁵⁴ the divide between Japan's self-image as a whale-eating nation,³⁵⁵ who have hunted whales for over two thousand years,³⁵⁶ and the norm of whale preservation is very wide.³⁵⁷ Most Japanese have no particular affinity for whales or a belief in their entitlement to life.³⁵⁸

consensus about the issue-area that would permit a more rigorous regime."); *id.* ("The effectiveness of formal mechanisms is likely to depend upon the degree to which they are embedded in contextual regimes where shared perspectives have evolved—and political and legal legitimacy has been recognized and accepted" (quoting Brunneé and Toope)).

351. *See* Molenaar, *supra* note 80, at 50 ("In the not so distant future, the general public and the international community of States will have to come to terms with the fact that many species of marine mammals are no longer under a threat of extinction.").

352. Hirata, *supra* note 60, at 141.

353. *See id.* 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.").

354. *See* Rieser, *supra* note 2, at 417 ("Japan's whaling industry has never been and is unlikely to become a major contributor to the Japanese economy.").

355. *See* Lessoff, *supra* note 21, at 416 ("The whale is of great cultural importance to Japan as both an economic resource and as a necessary food source."); *see also* Hirata, *supra* note 60, at 141 ("Japanese attitudes toward whales and whaling are based on . . . the belief that the Japanese have been eating whale for thousands of years. Many Japanese believe that they have a distinct and unique whale-eating culture."); *id.* ("Japanese consider whale preparation and eating an integral part of the national cuisine and an expression of cultural identity."). *But see id.* ("[T]he eating of whale only became commonplace in Japan after World War II."); Lessoff, *supra* note 21, at 416 ("Today, many Japanese concede that the current whaling industry is maintained not for the necessity of the meat to the Japanese diet, but rather for the profit which can be made from the selling of whale meat to wealthy restaurateurs in Tokyo for preparation for their upscale clientele.").

356. Moffa, *supra* note 43, at 204.

357. *See* Hirata, *supra* note 60, at 141 ("In the case of Japan's whaling, the divide between the international norm and domestic values is substantial. Many Japanese perceive the whaling controversy largely as a cultural matter.").

358. *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."); Lessoff, *supra* note

Moreover, killing whales is consistent with the high value Japan places on protecting its traditional coastal communities³⁵⁹ and with the nationalism and sovereignty norms, the latter of which grants to an exploiting state the right to exploit domestic and global natural resources.³⁶⁰

However, killing whales is not consistent with Japan's strong support of an anti-animal cruelty norm.³⁶¹ For example, Japan requires that when an animal is used for "scientific purposes" the animal should be subjected to minimal pain,³⁶² and annually the biomedical faculties at research institutions and universities hold a memorial service for "the spirits of animals that have been sacrificed for medical research."³⁶³ While there is no international wild animal welfare norm³⁶⁴ and the majority of member nations at the IWC, despite being concerned about the cruelty of whaling,³⁶⁵ have been reluctant to stop whale hunting because of their equal desire to preserve aboriginal subsistence hunting,³⁶⁶ Japan's strong do-

21, at 415 ("Japan has repeatedly denied the right to life of all species of whales, including those most endangered by extinction, emphasizing their country's long history and important involvement in the whaling industry as well as the need for whale meat as a vital source of protein for the peoples of Japan.").

359. See Nagtzaam, *supra* note 4, at 384 ("However, it is possible to perceive exploitation as a good if it is in the service of a higher moral goal, such as the provision of a better quality of life for the citizens of a state."); see also D'Amato & Chopra, *supra* note 47, at 54 ("If we take whales' entitlement to life seriously, we cannot allow it to be defeated by any lesser countervailing entitlement. However, if a countervailing entitlement seems to be of the same or greater magnitude, a serious problem in moral and legal judgment presents itself.").

360. See Nagtzaam, *supra* note 4, at 385 ("States have historically viewed their exploitation of natural resources, both domestic and global, as a right and, in some cases, as a good."); *id.* ("Exploitation of resources such as those examined in this Article—minerals, whales or timber—has long been accepted as a corollary of state sovereignty, and part of the principle of permanent sovereignty over natural resources.").

361. See Gillespie, *supra* note 16, at 18 ("[O]thers, such as in Japan, suggest 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.'").

362. Gillespie, *supra* note 16, at 32.

363. *Id.* at 18 n.127.

364. Harrop, *supra* note 48, at 82 ("Legislation dealing predominantly with wild animal welfare issues hardly exists at the international level."); *id.* at 83 ("[M]oral assumptions concerning the welfare of wild animals differ widely around the world whereas there is some consensus about the anthropocentric concerns that are the basis for conservation policy.").

365. *Id.* at 83 ("In the IWC a preponderance of delegates support the UK's contentions [about cruelty of whaling].").

366. *Id.* at 84 ("The reason for the opposition to welfare goals in this context is not derived from a sadistic desire to see wild animals suffer but instead from a desire to protect the right of rural communities and indigenous peoples to carry out traditional, and as they

mestic anti-animal cruelty norm might be deployed to support a whale preservation norm in that country. Therefore, while a weak animal-welfare norm has not been able to defeat a robust aboriginal subsistence norm at the IWC,³⁶⁷ Japan's strong domestic anti-animal cruelty norm, given the cruelty in whale hunting,³⁶⁸ might overcome any cultural dissonance threatened by adoption of the anti-whaling norm if it is seen as consistent with the higher animal-welfare norm.³⁶⁹ While Japan's norm profile illustrates the complexity and challenge of achieving wider diffusion of an anti-whaling norm, it does not make such norm change impossible. The homogeneity of the populations of individual whaling countries like Japan, Norway, and Iceland might also make adoption of an anti-whaling norm by those countries easier.³⁷⁰

Given the low salience of the whale-preservation norm in whaling countries and that the only benefit for the country that adopts an anti-whaling norm is reputational, it is unlikely that norm conversion will happen spontaneously in those countries.³⁷¹ Thus

argue, currently necessary, subsistence hunting."). *But see* Stoett, *supra* note 2, at 170 ("[W]hen does a traditional hunt end and a modern one begin?").

367. *See* Harrop, *supra* note 48, at 84 ("The conflict provides a graphic illustration of the contradictions between traditional cultural approaches to wildlife management and contemporary animal welfare and animal rights ideals."). It remains to be seen if the threat of extinction of the bowhead whale would overcome the conflicting norm of preserving traditional whaling cultures. Stoett, *supra* note 2, at 166 ("Nonetheless, the threat of human-induced extinction would, for most observers, constitutes [sic] reasonable grounds for the application of situational ethics.").

368. *See* Harrop, *supra* note 48, at 85 ("The hunting of whales has long been contentious, not only because of the drastic reduction of population sizes by relentless whaling activities, but also because a large whale in a cruel sea is not an easy quarry for hunting and necessarily the killing of these animals will fail to conform with contemporary welfare expectations."); *see also* Stoett, *supra* note 2, at 153 ("We stared our own cruelty and selfishness in the face, were repulsed by the image, and (with notable exceptions) reinvented ourselves. Any return to even small-scale whaling with possible commercial applications would be a digression, a step back toward an ugly past.").

369. *See* Nagtzaam, *supra* note 4, at 447 ("[T]hese leading norm teachers need to focus on domestic populaces in the recalcitrant states and need to suggest to their citizens that preserving whales is not an insult to traditional customs and practices but rather is a sign of a culture's maturity.").

370. *See id.* at 380 ("Jackson argues, 'the international sphere, like most spheres of human conduct, is fraught with normative tensions, anomalies and conflicts'"); *see also* Anne E. Carlson, *Recycling Norms*, 89 CAL. L. REV. 1231, 1235 (2001) (identifying "lack of homogeneity" as a barrier to norm adoption).

371. *See* Molenaar, *supra* note 80, at 37 ("In view of this lack of logic and immediate benefits, and in the absence of a threat to extinction, a duty not to kill whales becomes a matter of principle on which States are not likely to agree soon. Even if a customary rule would emerge, some States would not be bound as they have persistently objected to its emergence. It is more likely that States will agree on an international minimum standard

while changes to incentives structures that are motivating whaling nations to hunt whales might change individual preferences,³⁷² it is unlikely that countries like Japan will use their laws expressively to change their citizens' preferences by informing them about what is good or bad behavior.³⁷³ Examples of expressive use of law by the government include penalizing or subsidizing certain actions.³⁷⁴ For example, Japan could encourage behavioral change in its citizens' taste preferences by not subsidizing its whaling industry³⁷⁵ or by rewarding restaurants that do not offer whale meat through favorable publicity and penalizing those that do.³⁷⁶ The economic unimportance of the whaling industry might make this possible, and, as more people engage in the right behavior by not demand-

for the treatment of animals in order to avoid 'unnecessary suffering.'). Paradoxically, a decision by a state to adopt the whale preservation norm undercuts the moral arguments of NGOs about the repulsiveness of whaling. See Nagtzaam, *supra* note 4, at 414 ("One view is that it was in the interests of these non-whaling states to join because it was an easy way to acquire the kudos of being a good 'green' international citizen without suffering any economic costs. However, doing so ignores the work done by ENGOs to convince both state leaders and domestic populations that whaling was morally repugnant.").

372. See Ellis, *supra* note 24, at 3 ("[Rational choice] begins with the assumption that actors' behaviour can be understood in light of their preferences; changes in behaviour can be brought about through changes to incentives structures."); see also James C. Nicholas & Julian Conrad Juergensmeyer, *Market Based Approaches to Environmental Preservation: To Environmental Mitigation Fees and Beyond*, 43 NAT. RESOURCES J. 837, 838 (2003) ("Since new techniques used to protect the environment have obvious costs, the key in establishing a program to better preserve our environmental interests is to structure economic decision making so that the 'invisible hand' guides resources toward protection of the environment through economic incentives to protect the environment."); *id.* at 848 ("[M]aking the desired end, in this case environmental protection, in somebody's economic interest, meaning that someone must profit from environmental protection.").

373. Babcock, *A New Environmental Norm*, *supra* note 18, at 148 (discussing the various ways that the government can use laws and initiatives expressively to change how people perceive a particular action and thus change norms and related behavior). *But see id.* at 149-51 (pointing out some of the problems with relying on the government to change norms or create a new norm).

374. *See id.*

375. Moffa, *supra* note 43, at 209 ("[T]he Japanese government . . . , now very heavily subsidizes the whaling operations under JARPA II.").

376. See Babcock, *A New Environmental Norm*, *supra* note 18, at 140-41 (discussing rewards and sanctions to induce norm activation); see also Ellis, *supra* note 24, at 36 ("When sanctions constitute a credible threat and are carefully crafted, they can have a significant impact on incentive structures and on the behaviour of actors."); *id.* at 18 ("[P]unishment strategies should not be aimed solely at isolated incidents of rule violation but also at creating incentives . . . for respect for the panoply of rules and measures . . ."). *But see* Babcock, *A New Environmental Norm*, *supra* note 18, at 154 (discussing problems with shaming); Ellis, *supra*, at 36 ("[R]ational choice approaches encounter difficulties in explaining how to convince relevant actors to put incentive-shifting punishment strategies in place to begin with.").

ing whale meat and internalize the desired new norm, a new anti-whaling norm might emerge.³⁷⁷ However, given the traditional non-responsiveness of the bureaucracies in whaling nations like Japan to whaling concerns, it is unlikely they will take these steps and be a force for norm change.³⁷⁸ Alternatively, domestic non-governmental organizations might function as norm leaders to drive norm change in their countries.³⁷⁹ But the ineffectiveness of domestic anti-whaling groups in whaling countries like Japan³⁸⁰ has prevented the creation and diffusion of an anti-whaling norm in those countries,³⁸¹ and the continuation of problems at the IWC makes it unlikely that the body will play any role in changing norms in whaling countries.³⁸²

377. See Babcock, *A New Environmental Norm*, *supra* note 18, at 138 (discussing how internalization of a norm happens when the individual's community reaches a consensus about "the desirability of particular behavior").

378. See Hirata, *supra* note 60, at 148 ("As the decision-making mechanism is highly centralized with over-whelming control by the Fisheries Agency and MAFF, the preferences and interests of the bureaucrats in these agencies prevail. If the antiwhaling norm is to be empowered domestically, these bureaucrats will either have to embrace the new norm or have power over this issue stripped away from them."); *id.* at 145 ("Japan's adherence to its whaling policies also can be explained in terms of the country's domestic political structure that prevents environmentalists from taking part in decision-making processes. The political structure over whaling policy is highly centralized with strong bureaucratic leadership, thus creating obstacles to the promotion and diffusion of the antiwhaling norm.").

379. See Babcock, *Global Climate Change*, *supra* note 18, at 14 (discussing the concept of a norm entrepreneur); see also Nagtzaam, *supra* note 4, at 406 ("[It was] not until Greenpeace, an organization founded on a 'biocentric philosophy' that challenged the idea that humans were the supreme beings on the face of the planet," became involved in the mid-1970s that a preservationist normative position was put forth. For environmentalists, whales became a potent symbol of the entire environmental movement's commitment to save the planet and bring about a more ecologically aware society.").

380. See generally Hirata, *supra* note 60, at 144-47 (describing the problems anti-whaling groups in Japan have and their resultant lack of effect on public opinion and public policy); *id.* at 144 (noting that because of their ineffectiveness "[m]any Japanese environmental NGOs have avoided the whaling issue altogether").

381. *Id.* at 141; see also *id.* at 148 ("Two major factors—the lack of congruence between the antiwhaling norm and domestic cultural values, and the hegemonistic control over decision making on this issue by prowhaling government agencies—have prevented antiwhaling advocates from influencing whaling policy."); *id.* at 145 ("Japan's adherence to its whaling policies also can be explained in terms of the country's domestic political structure that prevents environmentalists from taking part in decision-making processes. The political structure over whaling policy is highly centralized with strong bureaucratic leadership, thus creating obstacles to the promotion and diffusion of the antiwhaling norm."); *id.* at 146 ("Japan has virtually no legislative advocates for the antiwhaling cause and no legislative supporter of antiwhaling activism.").

382. See Stoett, *supra* note 2, at 157 ("[It] remains an article of faith that the status of the IWC might empower the antiwhaling normative shift that occurred there, enticing the

Thus, it will fall to international environmental nongovernmental organizations to secure norm change in whaling countries. These groups have been extremely effective in mobilizing world opinion against whaling.³⁸³ They played a major role in moving the IWC to more of a preservationist position.³⁸⁴ International ENGOs organized the first international effort to stop whale hunting, which abruptly ended the 2011 Japanese whaling season in the Southern Ocean.³⁸⁵ Their attendance at IWC meetings,³⁸⁶ where they often outnumber members,³⁸⁷ has enabled them to make statements opposing whaling on a global stage.³⁸⁸ Their presence also puts the members on notice that they are watching how the IWC performs.³⁸⁹ Their immunity from political pressure frees them to use tactics like consumer boycotts to put pressure on non-compliant states and industries.³⁹⁰ It also makes them effective at

prowhalers with a postconsumption relationship with cetaceans.”). Alison Rieser suggests allowing the resumption of commercial whaling to enlist Japan’s help in protecting the krill population, but doubts that such a proposal will result in anything more than “extractions” from the marine environment. Rieser, *supra* note 2, at 428; *see also* Babcock, *A New Environmental Norm*, *supra* note 18, at 147-49 (discussing the role of governmental institutions in changing norms).

383. Nagtzaam, *supra* note 4, at 388 (“ENGOs have been the prime norm entrepreneurs.”). On the topic of norm entrepreneurs generally, *see* Babcock, *Global Climate Change*, *supra* note 18, at 14.

384. Nagtzaam, *supra* note 4, 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.”).

385. Moffa, *supra* note 43, at 209 (“The Sea Shepherds’ active harassment of the Japanese whaling fleet in the Southern Ocean brought an early end to the 2011 whaling season.”); *id.* 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.”); *see also* Ruffle, note 6, at 669 (“NGOs are credited with initiating the first worldwide campaign to stop the slaughter of whales.”).

386. Ruffle, *supra* note 6, at 647 (“[T]he IWC’s Rules of Procedure allow non-parties and intergovernmental organizations to attend the meetings and to be represented by observers”); *see also* Nagtzaam, *supra* note 4, at 410-11 (“ENGOs, building on their successes in domestically altering the whaling policies of states like Australia, Argentina, Uruguay and the Netherlands, were determined to translate their policies into action in the global sphere. By 1979, ENGOs were able to attend IWC meetings officially in the dual roles as observers and in some cases as delegation members.”).

387. Harrop, *supra* note 48, at 85 (“Indeed, at many meetings of the IWC there are more than twice as many NGO’s present as state members.”).

388. *See* Nagtzaam, *supra* note 4, at 406 (“[T]he decision by the IWC in 1970 to allow ENGOs to make statements opened the door for the more forceful articulation of environmental positions to the IWC members.”).

389. *Id.* 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.”).

390. On the topic of consumer boycotts, *see* generally Alker, *supra* note 32, at 556-63

enforcing international norms.³⁹¹

Through information³⁹² and direct action campaigns³⁹³ that publicize the cruelty of whale hunts,³⁹⁴ international ENGOs like

(describing the effectiveness of the 1990 tuna boycott). Alker notes, however, that the boycott was successful because of the large market for tuna, which is not true for whale meat. *Id.* at 560-61 ("Powerful market actions such as this one work well in an industry like tuna fishing, in which there is a product being brought to market in large volume, in which very few parties control access to the market . . . and . . . the public is willing to take the consequences (consumers decide they can live without tuna, or are willing to pay higher prices to keep from harming dolphins). This was a solution driven by consumer demand. Thus, if the market approach is to work in other areas affected by the MMPA, consumers must be at the forefront of the demands for change."). Alker also notes that while the boycott reduced dolphin deaths it did not completely solve the problem and was not without costs. *Id.* at 560 ("Although the market solution was very effective in reducing dolphin deaths, it was not without costs, and it has not ended all problems in this area.").

391. Ruffle, *supra* note 6, at 669 ("NGOs may also be effectively utilized in the monitoring scheme. Unlike member states who may be concerned with retaliation, NGOs are politically independent and, as a result, more aggressive enforcers of international norms.").

392. Goodman, *supra* note 193, at 1313 ("[Sunstein and Leslie] advocate the use of voluntary and mandatory disclosure policies to mobilize a market response against animal cruelty."); *see also* Nagtzaam, *supra* note 4, 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."); *id.* ("Their aim was to put pressure on the regime states to change their expectations, behaviors, and identities."). *See generally* Babcock, *A New Environmental Norm*, *supra* note 18, at 165-70 (discussing the effectiveness of public information campaigns).

393. Ruffle, *supra* note 6, at 669 (noting "the ability to put direct public pressure on a state, organize a boycott or take direct action against violators since they are not subject to political pressure from the noncompliant state"); *see also* Alker, *supra* note 32, at 562-63 ("Therefore, because the problems in public display, recreational boating, and recreational fishing affect fewer marine mammals than in tuna fishing, and because the problems are not widely publicized, it must be recognized that it is less likely a consumer boycott would gain sufficient public support to bring about a change in these areas. However, just as environmental groups were able to rally support for dolphins killed in tuna nets, a strong effort to increase public awareness (particularly if coupled with video footage of the problems) could generate enough attention to bring about real results. These industries are all susceptible to consumer action, in that consumer boycotts could severely harm or even shut down these industries, and the threat of a boycott could be enough to force a change."); Moffa, *supra* note 43, at 207 ("[Opposition to] whaling includes typical protest tactics: consumer boycotts, public demonstrations, and awareness campaigns.").

394. Ruffle, *supra* note 6, at 671 ("[E]fforts of non-governmental organizations to publicize Japanese whaling hunts should be applauded. The pressure of public opinion may eventually devastate the already controversial whaling industry."); *see also* Alker, *supra* note 32, at 557 ("Environmentalists had been working for years to educate the public and the government about the large number of dolphin deaths occurring in the Pacific Ocean at the hands of fishermen. Their work received little exposure, however, until they were able to provide video footage that graphically depicted hundreds of dolphins dying in a

Greenpeace and Sea Shepherd have been changing the utility calculus that favors whaling.³⁹⁵ Their shrill and apocalyptic³⁹⁶ campaigns have “corner[ed] the emotional marketing of the issue” and have shaped the global perception of whaling.³⁹⁷ When it appeared that certain species of whales were not going extinct, their campaigns changed the focus of the debate from science to one about morals.³⁹⁸

fishing net. Now the problem was no longer represented as data on paper that could be ignored or explained away; instead, it was on the nightly news in living color. People were dismayed to find that the government had allowed this activity, through lack of enforcement of the MMPA and through establishment of generous quotas that made killing the dolphins legal.”); Nagtzaam, *supra* note 4, at 447 (“NGOs have shown themselves to be adept at conducting public education campaigns.”); *id.* at 407 (“NGOs conducted a campaign that focused on brutality, capturing images that promoted their view that whaling was barbarous and should be ended. They linked their arguments to higher values that highlighted the intelligence and uniqueness of whales and argued that they therefore deserved to live unhindered. Framing their approach in this way helped their arguments resonate with the global public in a way scientists, up until that point, had been unable to do.”).

395. Ruffle, *supra* note 6, at 670 (“If pro-whaling states determine that continuous international objection to their whaling activities outweighs the potential economic benefit of harvesting the animals, they may likely abandon their current practices.”); *see also* Babcock, *A New Environmental Norm*, *supra* note 18, at 144 (discussing how norm entrepreneurs use persuasion to “change how other actors ‘maximize their utilities’”); Moffa, *supra* note 43, at 209 (“The Sea Shepherds’ active harassment of the Japanese whaling fleet in the Southern Ocean brought an early end to the 2011 whaling season.”); *id.* at 209-10 (referring to Sea Shepherds and saying they “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, an even boarding moving whaling vessels.”).

396. Stoett, *supra* note 2, at 152 (“Stressing the approach of ecological ruin has become a common technique, and denying it has been a central theme of those opposing radical transformations in human-nature relations.”); *id.* (“[I]t can be argued that the voice of the alarmist is as necessary as it may be misleading, as the tendency toward denial and passivity needs to be challenged for problems to receive attention.”).

397. *Id.* at 161 (“How we choose to describe certain activities, carried out by humans and nonhumans alike, will influence our perception of those events. The success of preservationist groups is at least partly attributable to their ability to corner the emotional marketing of the issue, referring to killing instead of harvesting seals, whales, and terrestrial wildlife. Although prowhaling groups are sure to call themselves conservationists, and they focus on the sustainable utilization of natural resources, this lacks the exciting connotations of the preservationist vocabulary, especially in the nondiplomatic context of environmental activism, where reference to ‘whale slaughter’ or ‘killing’ not ‘utilization’ or ‘harvest,’ became familiar.”); *id.* (comparing the anti-whaling campaign to the anti-fur campaigns, and stating, “The implication—that whale meat is murder—is not just a propaganda tactic”).

398. Nagtzaam, *supra* note 4, 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 NGOs shifted ground to argue that it was simply unethical to kill whales.”). According to Nagtzaam this was largely due to the division of opinion in the sci-

The specific tactics international ENGOs use can have a direct effect on whether norm change will occur in targeted countries.³⁹⁹ For example, Moffa finds that Greenpeace's information campaigns and boycotts rarely change behavior because they do not have sufficient force,⁴⁰⁰ though others find them effective.⁴⁰¹ The direct and violent tactics of groups like Sea Shepherd⁴⁰² could be counter-productive in a country like Japan where it might appeal to the country's nationalism norm to support whaling.⁴⁰³ Also mili-

entific community. *Id.* at 410 ("The rift [between cetologists] was so wide that cetologists were unable to function as a coherent lobby group between 1974 and 1982, opening the door for ENGOs to become the primary normative advocates on whaling issues."). Indeed, in the case of whales the cries about impending doom turned out to be fairly accurate. Stoett, *supra* note 2, at 152 ("Whaling is an issue-area in which, it can be argued, the prophets of doom were in retrospect quite justified.").

399. Moffa, *supra* note 43, at 202 ("[T]he lawmaking function of activism and the effect it has on international behavioral norms change depending on the model employed."); *id.* ("[T]wo types of environmental campaigns have targeted the whaling industry. One approach, employed by Greenpeace, utilizes consumer boycotts and protests to encourage divestment from the industry. The other approach, taken by the Sea Shepherds, uses a fleet of ships to directly intervene in and obstruct whaling operations in the Southern Ocean.").

400. *Id.* at 209 ("[P]rotest activism, though it serves law promotion and prescription functions, ultimately lacks sufficient force to effectively change behavior.").

401. Alker, *supra* note 32, at 559 ("[The tuna boycott] example supports the proposition that a strong market-based solution can sometimes be more immediately and completely effective than years of legislation. Here, because of public outcry and threats of boycotts, the entire canning industry *voluntarily* adopted a policy that government, however well-intentioned, was unwilling to require of them. And by completely shutting down access to the U.S. markets, the tuna canneries left fishermen with no choice but to change their ways. It did not take long for the fishermen to find workable alternatives to setting on dolphins-fish in different waters, fish for species of tuna that do not travel with dolphins, or fish with hooks and poles as was done for decades before purse seining.").

402. Moffa, *supra* note 43, at 210 ("Interventionist techniques . . . involve direct, often violent, confrontations . . ."); *id.* at 210 ("[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.").

403. Hirata, *supra* note 60, at 149 ("Militant action against the Japanese government, through the physical block-age of whaling vessels or shaming campaigns, may backfire, strengthening the nationalist sentiments of the Japanese public and policy makers."); *see also* Stoett, *supra* note 2, at 161-62 ("It is predicated on the twin assumptions that whales are special and that past folly will be repeated if whalers are not strictly controlled—eradicating, in the case of commercial whalers—by antiwhaling forces. One is an assumption premised by a Western acceptance of species hierarchy; the other assumption is based on the idea that history repeats itself in the absence of regulatory intervention. Both are problematic, if popular, themes that, regrettably, force whaling states such as Japan, Norway, and Iceland to harden their positions in self-defense of not just their pride but also their morality. It is at heart an ethical challenge, regardless of the power politics accompanying it.").

tating against the use of direct action tactics is the trope that two wrongs don't make a right,⁴⁰⁴ and the risk that the use of illegal tactics might undermine the rule of law.⁴⁰⁵ But the reluctance of countries to prosecute those groups for violations of international law may indicate a calculation that the benefits of contribution of the group's tactics towards achieving the goal of stopping whale hunts outweigh their cost.⁴⁰⁶ Moffa supports the extreme tactics of these groups precisely because they have helped stop a practice that the international community largely condemns, but has been unable to curb.⁴⁰⁷ Regardless of what tactics they employ, international ENGOs' campaigns that highlight the horrors of whaling have the best chance of changing people's preferences in whaling countries and move those who have been neutral on the topic to a

404. Moffa, *supra* note 43, at 212 ("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."); *see also* Callicott, *supra* note 76, at 21 ("Lawless behavior begets lawless behavior.").

405. Moffa, *supra* note 43, at 209 ("Because many interventionist tactics themselves violate international law, their continued use threatens to compromise the international rule of law."). *But see id.* at 212 ("Cooperative international legal efforts could become increasingly rare, or at the very least much more difficult to undertake, due to a lack of trust. From this perspective, to the extent that the larger goal of international law is to establish a world order that can regulate the global commons, equivocation as to interventionist activism may be a step in the wrong direction. This counterargument, though theoretically appealing, ignores the reality of the situation in many circumstances in which international laws are significantly under-enforced, such as the case of whaling in the Southern Ocean.").

406. *Id.* 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."); *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.").

407. *Id.* at 213 ("[I]nterventionist activism should be supported and permitted to continue if for no other reason than that it is the best possible actualization of the international community's environmental commitments. Interventionist activism has helped to stop a practice in commercial whaling that the global community has long condemned but that formal legal disapprobation has done nothing to curb."); *id.* ("As the events in the Southern Ocean demonstrate, nonstate actors can and do use informal pressure to perform international lawmaking functions, often with greater success than state actors working through traditional channels."). Moffa finds the tactics of the interventionists particularly justified as the victims of the behavior they are trying to change "have no seat at the international bargaining table." *Id.*

position that favors a whale preservation norm.

One other factor favoring norm change in whaling countries, like Japan, is that their whaling industries are very small.⁴⁰⁸ Therefore, the adoption of an anti-whaling norm by the governments in those countries would yield international reputational benefits of being perceived as a good environmental citizen by most other countries at little cost.⁴⁰⁹ Change within whaling countries brought about by non-government actors might also moot the negative reaction of countries that might otherwise see the pressure to adopt the anti-whaling norm as an attack on their national identity.

In sum, carefully orchestrated campaigns by international ENGOs focused on the cruelty of whale hunts could change peoples' preferences in whaling countries. External factors like homogenous populations and a decrease in the economic importance of whaling in those countries, plus the robustness 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 a country like Japan create a "backdrop of shared understandings and social institutions,"⁴¹⁰ in which norm change might occur. Although changing norms is a slow process, once it starts it is hard to reverse.⁴¹¹ It also offers none of the ethical infirmities of the *Nature* commentators' approach.

VIII. CONCLUSION

Whole rivulets of ink have been exhausted, and the virulence of both parties enormously augmented. Now it must here be understood that ink is the great missive weapon in all battles of the

408. See Hirata, *supra* note 60, 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."); *id.* 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."); *id.* at 138 ("The business sector has only marginal influence over the decision-making process regarding whaling.").

409. Nagtzaam, *supra* note 4, at 418 ("[T]he interest many states had in being seen as a good international citizen, however, with the concomitant reputational advantage to states of being perceived as good global environmental citizens.").

410. Ellis, *supra* note 24, at 39.

411. See Babcock, *A New Environmental Norm*, *supra* note 18, at 145 (discussing how a "norm cascade" changes majority preferences, eliminating any need for external pressure to adopt the norm).

learned, which, conveyed through a sort of engine called a quill, infinite numbers of these are darted at the enemy by the valiant on each side, with equal skill and violence, as if it were an engagement of porcupines.⁴¹²

Whales are “ecopolitical mammals” who “exist in an incredibly complex ecological and, whether we like it or not, political context.”⁴¹³ This Article has recounted the failure of one political institution, the IWC, to protect whales, and the reasons for that failure. That failure motivated three academics to propose a market-based alternative authorizing the killing of some whales to save others. This Article has suggested that such a proposal is ethically dubious because whales have an entitlement to life based on their similarities to humans, their capacity to feel pain, and our ecological co-dependence with them, among other reasons. Although neither a *theoretical* right to life nor the revulsion of most nations toward whaling gives whales a *legal* right to survive,⁴¹⁴ it does support an anti-whaling norm, albeit one that is not yet universal.

International ENGOs, using a mixture of public education, boycotts, and direct action tactics focusing on the cruelty of whaling, offer one approach to induce whaling nations to adopt a whale preservation norm as whaling becomes less important in those countries. Changing norms is not easy or quick, but once change starts, a tipping point may occur as more people believe in the new norm until behaving in concert with it is the norm. The early end of the 2011 Japanese whaling season indicates that international ENGOs are having some success in changing Japan’s current utility calculus in favor of whaling. If a major whaling nation like Japan stops killing whales, then the IWC might be able to become more proactive in protecting whales and moot the need for ethically infirm market-based rejoinders to its ineffectiveness.

412. FADIMAN, *supra* note 1, at 90.

413. Stoett, *supra* note 2, at 171.

414. D’Amato & Chopra, *supra* note 47, at 22 (“Neither the present opposition to whaling of an overwhelming number of states nor the ethical *revulsion of many people throughout the world protects whales from the whale-hunting minority of states or gives them an international legal entitlement to survive.*”).

