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# **A Whale of a Tale: Post-Colonialism, Critical Theory, and Deconstruction: Revisiting the International Convention for the Regulation of Whaling through a Socio-Legal Perspective**

## **Acknowledgements**

Thanks are due in large part to Associate Professor of Political Science Steven Taylor (Troy University) for encouraging the creation of this paper. Thank you to the New York City Law Review staff for their tireless and efficient work guiding this paper toward publication. As always, thanks to my father, Rick Sciallo, for encouraging me to question.

# A WHALE OF A TALE: POST-COLONIALISM, CRITICAL THEORY, AND DECONSTRUCTION: REVISITING THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING THROUGH A SOCIO-LEGAL PERSPECTIVE

*Nick J. Sciuлло\**

## INTRODUCTION

This Article will weave critical theory,<sup>1</sup> deconstruction,<sup>2</sup> and post-colonial<sup>3</sup> critiques into a tapestry of analysis of the Interna-

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\* Juris Doctor, West Virginia University College of Law; B.A., University of Richmond. Thanks are due in large part to Associate Professor of Political Science Steven Taylor (Troy University) for encouraging the creation of this paper. Thank you to the New York City Law Review staff for their tireless and efficient work guiding this paper toward publication. As always, thanks to my father, Rick Sciuлло, for encouraging me to question

<sup>1</sup> I am not concerned with hammering out a concrete definition for any of these terms. To be sure, there is a certain utility to definitional debate, but that debate is cumbersome and often not nearly as productive as originally envisioned. Critical theory concerns a vast number of authors and a vast number of texts, some seemingly related and others standing out starkly in contrast. *See generally* RICHARD DELGADO & JEAN STEFANGIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2001) (giving a thorough overview of one of critical theory's major sub-disciplines, Critical Race Theory); ALAN HOW, *CRITICAL THEORY* (Ian Craib ed. 2003) (discussing the history of critical theory as it relates to intellectual history and differentiating critical theory from post-modernism); *CRITICAL TRADITION: CLASSIC TEXTS AND CONTEMPORARY TRENDS* (David H. Richter ed. Bedford/St. Martin's 3d ed., 2007 (collection of texts from Plato onward that serve as the foundation for literary criticism and critical theory)); DAVID MACEY, *DICTIONARY OF CRITICAL THEORY* (2002) (providing an overview of the many schools of thought, scholars, debates, and subdisciplines associated with critical theory).

<sup>2</sup> *See generally* CHRISTOPHER NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* (Routledge 3d ed. 2002) (1982) (providing a concise overview of deconstruction and a solid introduction to Derrida); *DECONSTRUCTION IN CONTEXT: LITERATURE AND PHILOSOPHY* (Mark C. Taylor ed. 1986) (discussing many of the major works from major authors throughout deconstruction's development); JONATHAN CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (1982) (providing a readable synthesis of Derrida's ideas while providing thoughtful analysis with respect to deconstruction and derivations of feminism, literary theory, and psychoanalysis).

<sup>3</sup> *See generally* ROBERT J.C. YOUNG, *POST-COLONIALISM: AN HISTORIC INTRODUCTION* (2d ed. 2005) (investigating the post-colonial paradigm from a number of angles and with respect to many situations around the world beyond the author's experiences in the United Kingdom); BARBARA BUSH, *IMPERIALISM AND POST-COLONIALISM* (2006) (utilizing case studies from around the world to critically investigate the powerful forces of imperialism); ANIA LOOMBA, *COLONIALISM/POST-COLONIALISM* (2d ed. 2005)

tional Convention for the Regulation of Whaling.<sup>4</sup> Central to this endeavor will be considering the numerous and unique cultures intimately affected,<sup>5</sup> their problems, their heritage and their history.<sup>6</sup> The Article will focus, however, primarily on the Makah of North America—not because their whaling experience is more interesting or more worthy of attention, but because it is the most relevant to a critical inquiry into U.S. domestic law and policy. This Article will develop the whaling debate's background, but with an eye to opening up rhetorical space, not closing it. The goal here is not to rehash the excellent scholarship on the specific provisions, pitfalls, and successes of the laws, treaties, and other miscellanea that have colored the whaling debate's history.<sup>7</sup> Instead, this Article will consider post-colonialism, critical theory, and deconstructionism and how they can encourage scholars to ask questions that lead to better policies and a greater appreciation of different cultures. The very act of questioning will, in turn, lead to better policymaking.<sup>8</sup> The Article will present a venue where ideas can exist peacefully together with little attention paid to the constraints

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(giving thorough attention to Said, Foucault, and Althusser and their contributions to the debates).

<sup>4</sup> See International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72.

<sup>5</sup> Culture is another term I use loosely. Geert Hofstede is one of the preeminent authors in the field of culture and his works are generally useful in conceptualizing what constitutes culture and how to understand the concept. See generally GEERT HOFSTEDE, *CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS AND ORGANIZATIONS ACROSS NATIONS* (1980) (discussing the dimensions of culture and exploring cross-cultural competence).

<sup>6</sup> These two terms are different although not always conceptualized as such. Depending on where the reader looks for information, the differences may be distinct or mere nuisances of semantics. I use "history" to describe the past in a broad sense. History can also be thought of as the discipline or course of study of the past. It is neutral. Heritage is a pattern of behavior that can be passed from generation to generation. It is a collection of practices, ideas about identity, tradition and history. Whereas history may be and is often apolitical, heritage almost always has political undertones.

<sup>7</sup> Randall R. Reeves, *Review of Leviathan: The History of Whaling in America*, 24 MARINE MAMMAL SCIENCE 248, 248 (2008). "The subject of whaling history has been addressed from many different angles and by several types of scholars—historians, economists, geographers, and even, at least occasionally, biologists. Different questions have been raised and addressed, depending on the disciplinary emphasis." *Id.*

<sup>8</sup> I firmly believe that investigating issues of post-structuralism, critical theory, and/or post-modernism can help policymakers make "real world" decisions that affect the substantive nature of policy. Those who would argue that post-modernism does not provide a policy alternative may very well be correct, but that does not mean that the questions asked in the broad project of post-modernism do not provide insights into policy questions.

of form and style.<sup>9</sup> It seeks not only to speak to academia, but to the masses. It will focus on the issues of cultural property and cultural identity,<sup>10</sup> international law,<sup>11</sup> and historicism.<sup>12</sup> In short, it will argue that the ban on whaling is a culturally imperialistic policy designed to assert the superiority of the non-whaling world over a host of cultures, including but not limited to the Makah, viewed as “other.” This, the Article proceeds, is indicative of a decidedly

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<sup>9</sup> I do not dispute the utility of linear reasoning of formal legal scholarship. Clearly, those ideas have promoted a number of useful ideas and provided a framework for analysis that has produced tremendous scholarship on a variety of issues. We need to break free from the shackles of such argument, by expanding the substance and process of scholarship. Linear reasoning and formalistic logic can only take us so far. With critical questioning we can expand beyond those confines and begin to think differently about the same and more pressing concerns on the not so distant horizon.

<sup>10</sup> Cultural property is the real and personal property as well as the intellectual property, loosely defined, of a culture. *See, e.g.*, Cultural Property, <http://www.hanksville.org/sand/cp.html> (last visited February 18, 2009). More attention is paid to personal property, artifacts of various sorts, than the other types of property and that is the tragic flaw in the cultural property debate. The 1970’s United Nations Educational, Scientific, and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was surely a step in the right direction, but it did not adequately address the ethereal aspects of culture. Nov. 17, 1970, 823 U.N.T.S. 231.

<sup>11</sup> There are a number of international law scholars, even more international relations scholars, and even more individuals who claim to have some affinity for “the international.” Because international law covers a wide range of issues from international business to immigration, treaties to sovereignty, and human rights to environmental law, it would be impossible to properly discuss all of the many great texts that develop this information more fully. For that reason, as with most pursuits, spending a great deal of time reading and re-reading the general and even simplified treatises on international law can be very helpful to not only the casual observer, but also the informed scholar. *See generally* SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* (2006) (providing a thorough introduction that is well-organized, readable, and firmly based in the relevant scholarship); MALCOLM N. SHAW, *INTERNATIONAL LAW* (5th ed. 2003) (developing a general overview of international law scholarship in the “nutshell” fashion familiar to many lawyers and law students); JAMES H. WOLFE, *MODERN INTERNATIONAL LAW: INTRODUCTION TO THE LAW OF NATIONS* (12th ed. 2000) (providing an analysis of international law that focuses on the politics of international law especially); MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* (4th ed. 2003) (providing a topical approach to some of the major debates in international law with excellent footnoting and referencing).

<sup>12</sup> Historicism is an idea begun by Georg Wilhelm Friedrich Hegel. Critical theorists have utilized the term, “new historicism.” Historicism is the belief that all human activities are defined by their history. Historicists believe that time, place, and space are crucial to understanding events. New historicists rely on reading a broad area of literature and applying the lessons learned from this literature to the analysis at hand. *See generally* GEORG WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF HISTORY* (Dover ed. 1956) (making inroads to understanding how important history is in shaping events); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., Vintage Books ed. 1979) (developing the ideas of Hegel into a new theory of historical understanding).

post-colonial era where poorly conceived public policy, denigration of minority groups, and ethnocentrism reign supreme.<sup>13</sup>

Instances of post-colonialism abound,<sup>14</sup> but the whaling debate continues coming back to the forefront. Once maligned as an esoteric issue, the whaling debate has now become a serious matter for a diverse group of actors.<sup>15</sup> The Article will avoid, for the most part, discussions of U.S. imperialism with respect to treaty negotiations and ratification or accession<sup>16</sup> to the extent that those arguments devolve into a “he said, she said” battle amongst conservative and liberal forces pushing broad policy platforms, economic arguments for and against whaling,<sup>17</sup> and most of the environmental arguments related to whaling.<sup>18</sup> Those are all important arguments that figure greatly into the broader discussion of whaling, but to give each its due would exceed this Article’s scope and purpose. Furthermore, a treatise on treaty history would not encourage a forward-looking, more modern approach to intercultural relations. The Article will conclude with arguments in favor of cultural relativism and an ethic of critical inquiry. It will call for public policy that is more responsive to groups of divergent backgrounds and less imperialistic.

Whaling is an interdisciplinary issue. To view it as any less

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<sup>13</sup> Ethnocentrism is one of the primary characteristics of culture. One need not be an imperialist leader or a part of the decision-making body of an imperialistic regime to displace ethnocentrism. Larry A. Samovar & Richard E. Porter, *Understanding Intercultural Communication: An Introduction and Overview*, in INTERCULTURAL COMMUNICATION 9–10 (9th ed. 2006).

<sup>14</sup> See *supra* note 4.

<sup>15</sup> Robert J. Miller, *Exercising Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 166 (2000–01) (“American Indian tribes and Alaskan and Hawaiian natives have long suffered under the cultural oppression of European and American societies. As a result many tribal traditions, cultures, and languages have disappeared from the North American continent and Hawaiian Islands.”). The whaling debate concerns a number of countries, the Makah people now located in the State of Washington in the United States, environmental advocates from across the world, an equally large number of scientists, and a plethora of other interested parties and individuals. The whaling debate also concerns economics, culture, environmentalism, history, science, and international politics.

<sup>16</sup> There is an interesting debate about the differences between accession and ratification. Accession is defined as a state accepting the opportunity or offer to become a part of a treaty already signed or in force. Vienna Convention on the Law of Treaties art. 2(1)(b), art. 15, May 23, 1969, 1155 U.N.T.S. 331. Ratification is the act whereby a state agrees to be bound by the provisions of a treaty. *Id.* art. 2(1)(b), art. 14(1), art. 16.

<sup>17</sup> See generally Anthony Matera, *Whale Quotas: A Market-Based Solution to the Whaling Controversy*, 13 GEO. INT’L ENVTL. L. REV. 23 (2000).

<sup>18</sup> See generally William C. Burns, *The International Whaling Commission and the Future of Cetaceans: Problems and Prospects*, 8 COLO. J. INT’L ENVTL. L. & POL’Y 31, 64–8 (1997) (discussing the environmental impacts of whaling for economic benefit).

would risk limiting the many voices that are critical to whaling's investigation. This Article will discuss international relations, law, anthropology, sociology, narratology,<sup>19</sup> and even popular culture. Law is not a narrow field, but is instead an important thread that runs through the cultural tapestry. The inclusion of diverse perspectives is intentional as it helps to illuminate the issues presented from a number of different angles. It exposes the full refractory potential of the prism. It would be an injustice to the whaling discussion to ignore the numerous perspectives of interested parties, the numerous disciplines utilized to understand whaling, and the myriad of criticisms leveled for and against whaling. Legal analysis is lacking when it bars the powerful analytical tools that other disciplines bring.

Of particular interest are the environmental arguments against whaling,<sup>20</sup> which, while often well reasoned, do not carry the day when compared with the threat of post-colonialism and the evils associated with that type of worldview. The cultural interests of certain groups are more persuasive than the environmental perspectives in the whaling debate and the threats to cultural interests pose a very real threat to the survival of peoples. Not because the humyn world is more worthy than the non-humyn world,<sup>21</sup> but because the more imminent threat to the world's wellbeing is the powerful and destructive force of imperialism and post-colonialism. This is not to say that the environmental arguments do not make valid points or that preserving our environment ought not to

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<sup>19</sup> Narratology is the theory and study of narratives. It is and has been a primary focus in literature studies, media studies, and is now making its way into a variety of other disciplines. See generally MIEKE BAL, *NARRATOLOGY: INTRODUCTION TO THE THEORY OF NARRATIVE* (Christine VonBoheemen trans. 1997); *WHAT IS NARRATOLOGY?: QUESTIONS AND ANSWERS REGARDING THE STATUS OF A THEORY* (Tom Kindt & Hans-Harald Miller eds., 2003); MIEKE BAL, *ON STORY-TELLING: ESSAYS IN NARRATOLOGY* (David Jobling ed., 1991).

<sup>20</sup> Burns, *supra* note 18. Whaling has certainly exacted a toll on the North Pacific ecosystem. Patricia Pierce Erickson, *A-Whaling We Will Go: Encounters of Knowledge and Memory at the Makah Cultural Research Center*, 14 *CULTURAL ANTHROPOLOGY* 556, 556 (1999) (noting that the North Pacific ecosystem has been so altered by commercial whaling that it no longer supports the Makah tradition of eating gray whale).

<sup>21</sup> I anticipate some anthropocentric arguments being made against this claim and whole-heartedly reject those arguments. My argument is not that one world is, or should be, supreme, but that we need to recognize how the non-humyn and humyn world interact. That being said, it is not necessarily anthropocentric to suggest that issues appear to affect the humyn world more than the non-humyn world. Imperialism has clearly wreaked havoc on the non-humyn world. One must only look to the diamond and gem markets in Africa, which not only oppressed indigenous populations, but also took an exacting toll on ecosystems. See generally MARTIN MEREDITH, *DIAMONDS, GOLD, AND WAR: THE BRITISH, THE BOERS, AND THE MAKING OF SOUTH AFRICA* (2007); GREG CAMPBELL, *BLOOD DIAMONDS* (2004).

be an important consideration in our socio-legal discourse. On the contrary, environmentalism (and its permutations) has been one of the most important movements of the last thirty years. Ultimately, the negative impacts of imperialism and post-colonialism have resulted in a variety of ills that include, but are not limited, to environmental destruction, war, and slavery. Without addressing these worldviews, environmental agendas will go unmet and environmental denigration will continue.

The international reach of whaling makes it a particularly important avenue of study for critical theory, deconstructionism, and post-colonial critiques. To discuss whaling, one must not deny its impact on the United States, on other countries, such as Norway<sup>22</sup> or Japan,<sup>23</sup> or on other cultures, such as the Makah.<sup>24</sup> While one may choose to focus on a particular country or people, one must not forget that this is an issue of international proportions. The problem must be viewed as a whole and the impact of the actors understood in such a manner that the interrelatedness of their aims, beliefs, and struggles become not only evident, but instructive as to the analysis necessary to whittle away the minutia of policy hacks,<sup>25</sup> myopic activists,<sup>26</sup> and misinformed constituencies.<sup>27</sup>

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<sup>22</sup> See generally Sonja Marta Halverson, *Small State with a Big Tradition: Norway Continues Whaling at the Expense of Integration and Nordic Cooperation*, 31 SYRACUSE J. INT'L L. & COM. 121 (2004) (discussing the cultural significance of whaling in Norway); Brian Trevor Hodges, *The Cracking Façade of the International Whaling Commission as an Institution of International Law: Norwegian Small-Type Whaling and the Aboriginal Subsistence Exemption*, 15 J. ENVTL. L. & LITIG. 295 (2000) (analyzing the importance of whaling to Norway and hypothesizing political outcomes of the disagreements in the International Whaling Commission regarding subsistence exemptions).

<sup>23</sup> The majority of the whaling literature in law reviews and journals in the United States and Canada makes only passing reference to Japanese whaling. This is an area that ought to be further developed to help improve the body of scholarship on whaling and related topics. See generally MASAYUKI KOMATSU & SHIGEKO MISAKI, *THE HISTORY AND SCIENCE OF WHALES* (2004) (arguing in favor of Japanese whaling).

<sup>24</sup> Many articles describe the Makah people, as they seem to be the most palpable example to United States and Canadian readers. I do not know that any article is better than another or even that there is a top-10 list to which I could refer interested parties. Robert J. Miller provides a very thorough look at the Makah. His article suffers least from the tendency to confound arguments about the whaling practices of different cultures. Though the cultures are similar to the extent that they all whale, many articles gloss over the complexities of those cultures. See Miller, *supra* note 15 (providing the best general overview of the Makah's whaling without meandering into the whaling practices of other peoples or countries).

<sup>25</sup> There is an industry of public policy professionals that often know much about how to write policy, but little of the subject matter contained in that policy. Oftentimes environmental debates attract quite a few interested parties who are excellent at garnering media attention and are excellent at producing flashy materials, but are closed-minded and short on topic expertise.

<sup>26</sup> In my experience with activists, issue advocates, and others of similar purposes,



However, make no mistake—the whaling debate is political.<sup>28</sup> As the world shrinks, it is becoming easier to have intercultural experiences<sup>29</sup> and increasingly every policy and proclamation has international impact.<sup>30</sup> Policy discussions on whaling must be viewed from a perspective that seeks to include the myriad of international parties involved because, at a very basic level, whales do not reside in countries, but in oceans in which all countries have a stake.<sup>31</sup>

#### I. THAT'S ONE OLD WHALE! HISTORICAL CONSIDERATIONS IN THE WHALING DEBATE

Indigenous peoples of what is now the United States are di-

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many of these individuals have blinders on. The mission or goal is so great that compromise is not an option. They are unwilling to concede even small points in order to further their larger agenda. Aside from flying in the face of much strong rhetorical theory, this position does not promote a positive policy environment. Activists have mobilized against the Makah's whaling activities, raising anti-indigenous sentiments to a recent high. See Erickson, *supra* note 20, at 563.

<sup>27</sup> We are surrounded by lies and misinformation. We receive more information, but the quality of that information is poor. Our news has been reduced to sound bites on radio and television and even over the internet. We see scrolling news bars on websites, blogs, CNN, and ESPN. It is difficult to take an objective look at policies and evaluate alternatives in a sensible, logical manner. See generally AL FRANKEN, LIES AND THE LYING LIARS THAT TELL THEM: A FAIR AND BALANCED LOOK AT THE RIGHT (2003) (providing criticism of conservative news personalities); JOHN STAUBER & SHELDON RAMPTON, TOXIC SLUDGE IS GOOD FOR YOU! (1995) (indicting the public relations industry for making false claims about the safety of environmental hazards); RAMPTON & STAUBER, TRUST US WE'RE EXPERTS! (2002) (discussing the misinformation propagated by industry); RAMPTON & STAUBER, WEAPONS OF MASS DECEPTION (2003) (discussing the Bush Administration's use of deception to build support for the war in Iraq).

<sup>28</sup> Kumiko Murata, *Pro and Anti-Whaling Discourses in British and Japanese Newspaper Reports in Comparison: A Cross-Cultural Perspective*, 18 DISCOURSE & SOC'Y 741, 741 (2007).

<sup>29</sup> The world is becoming smaller. Classes and textbooks on intercultural communication abound. Many (if not most) international relations textbooks give at least a nod to culture's importance. As economies and information become more intertwined, so too do people.

<sup>30</sup> One might ask, does the Farm Bill not have international repercussions? What about income tax policy? It does not take long to see that domestic policy can have effects that travel beyond borders. The Farm Bill affects pricing of goods and international trade. Income tax affects how U.S. citizens choose to save and spend their money. These are a few examples. See Nick J. Sciallo, "This Woman's Work" in a "Man's World": A Feminist Analysis of the Farm Security and Rural Investment Act of 2002, 28 WHITTIER L. REV. 709 (2006) (describing the impacts of the 2002 Farm Bill well beyond the borders of the United States).

<sup>31</sup> Anne M. Creason, *Culture Clash: The Influence of Indigenous Cultures on the International Whaling Regime*, 35 CAL. W. INT'L L.J. 83, 85 (2004); Alyson Decker, *Save the Whales—Save the Whaler—Wait, Just Save the International Whaling Commission: A Fresh Look at the Controversy Surrounding Cultural Claims to Whale*, 16 S. CAL. INTERDISC. L.J. 253, 255 (2006).

verse and distinct from White culture.<sup>32</sup> They existed free from the influences of Christianity, Europe, and the powerful oppression of manifest destiny. Indigenous peoples had thriving economies that rivaled the efficiency and success of more storied European economies.<sup>33</sup> They advanced powerful ideas of philosophy, science, agriculture, and religion.<sup>34</sup> Indigenous people are not alike, nor are all members of a particular culture, tribe, clan, or other group alike. Their diversity is one of the most interesting aspects of indigenous studies.

Steven L. Newcomb argues that “we as Indigenous peoples must be extremely cautious and discriminating when it comes to conceptualizing ourselves in terms of the non-Indian society’s dominating categories, concepts, and metaphors, and other cognitive operations.”<sup>35</sup> While clearly arguing for resistance by native peoples, Newcomb’s call for caution may be applied to all. Our historical understanding should be characterized by the active inclusion of competing views, especially those of native peoples who have been particularly and carefully removed or “otherized” in discussions about their history and the importance of that history in shaping current cultural practices.

Whaling has been a historical reality for many groups over the years.<sup>36</sup> Much of the whaling debate in the United States focuses on the cultural/historical significance of whaling to the Makah, but this discussion is shrouded in disdain, if not absolute disgust, for whaling.<sup>37</sup> For the Makah, whaling is a culturally significant practice, and not simply an exploitation of resources.<sup>38</sup> The Makah began whaling, roughly 4000 years ago, and have done so continuously for the past 1500 years.<sup>39</sup> They are an ocean peo-

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<sup>32</sup> Steven T. Newcomb, *On the Rightful Political Heritage of Native Nations*, 2 UCLA INDIGENOUS PEOPLES J. L. CULTURE & RESISTANCE 1, 4 (2005).

<sup>33</sup> John L. Williams *Paving the Way for the Future: Potential Structures for Tribal Economic Development*, 2 UCLA INDIGENOUS PEOPLES J. L. CULTURE & RESISTANCE 59, 61 (2005).

<sup>34</sup> See Newcomb, *supra* note 32, at 4.

<sup>35</sup> *Id.* at 9.

<sup>36</sup> The Japanese, New Zealanders, and the Makah are examples. There are many societies that have engaged in whaling including the Norse and the English. Historical accounts are plentiful as are literary accounts.

<sup>37</sup> See Decker, *supra* note 31, at 253–54.

<sup>38</sup> Russell C. D’Costa, *Reparations as a Basis for the Makah’s Right to Whale*, 12 ANIMAL L. 71, 72 (2005); Miller, *supra* note 15, at 175.

<sup>39</sup> Lawrence Watters & Connie Dugger, *The Hunt for Gray Whales: The Dilemma of Native American Treaty Rights and the International Moratorium on Whaling*, 22 COLUM. J. ENVTL. L. 319, 341–42 (1997); Miller, *supra* note 15, at 175.

ple,<sup>40</sup> having long depended on the ocean to maintain their society.<sup>41</sup> Whaling has provided valuable resources beyond supplying food,<sup>42</sup> including providing heat,<sup>43</sup> tradable goods,<sup>44</sup> spiritual significance,<sup>45</sup> and other necessities. The Makah is “the only tribe in the United States with an explicit treaty right to hunt whales.”<sup>46</sup>

Whaling is not a practice unique to the Makah. New Zealand has a long history of whaling.<sup>47</sup> Japan also has a long history of whaling that dates back to its earliest coastal communities.<sup>48</sup> The Basque people whaled in the 13th century.<sup>49</sup> To understand the cultural significance of whaling, one must understand that whaling is an historical practice that dates back thousands of years,<sup>50</sup> and is not a new invention, trend, or exploitive behavior. Without a historical understanding of whaling, the scholar is unable to appreciate the nuances of the arguments for cultural whaling. Failing to understand its history inevitably leads to a failure to understand cultural claims.

Cinnamon Carlarne, an author who has written extensively on whaling, is one such scholar who has failed to fully explore the traditions of the Makah while thoroughly analyzing other whaling cultures.<sup>51</sup> In a recent law review article,<sup>52</sup> Carlarne, who has an

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<sup>40</sup> Linguistically, “Makah” means “dwellers of the cape.” It is not a native term and is reinforced by several linguistic traditions that denote place. Carroll L. Riley, *The Makah Indians: A Study of Political and Economic Organization*, 15 *ETHNOHISTORY* 57, 58 (1968).

<sup>41</sup> See Miller, *supra* note 15, at 171–2; George Gibbs, *Tribes of Western Washington and Northwest Oregon*, 1 *CONTRIBUTIONS TO NORTH AMERICAN ETHNOLOGY* 175 (1877); James G. Swan, *The Indians of Cape Flattery*, 16 *SMITHSONIAN CONTRIBUTIONS TO KNOWLEDGE* 1, 18–25 (1870).

<sup>42</sup> Ramsey Henderson, *The Future of Whaling: Should the International Whaling Commission Create a Broadened Cultural Exemption to the Whaling Moratorium for Iceland?*, 33 *GA. J. INT’L & COMP. L.* 655, 656 (2005); Clay Erik Hawes, *Norwegian Whaling and the Pelly Amendment: A Misguided Attempt at Conservation*, 3 *MINN. J. GLOBAL TRADE* 97, 99 (1994).

<sup>43</sup> Henderson, *supra* note 42, at 656.

<sup>44</sup> See Miller, *supra* note 15, at 178–179.

<sup>45</sup> D’Costa, *supra* note 38, at 78.

<sup>46</sup> Zachary Tomlinson, *Abrogation or Regulation? How Anderson v. Evans Discards the Makah’s Treaty Whaling Rights in the Name of Conservation Necessity*, 78 *WASH. L. REV.* 1101, 1102 (2003) (citing *Metcalf v. Daley*, 214 F.3d 1135, 1140 (9th Cir. 2000)).

<sup>47</sup> Creason, *supra* note 31, at 90–91 (describing how New Zealand’s Maori would use all parts of a stranded whale).

<sup>48</sup> *Id.* at 96–97.

<sup>49</sup> Howard Scott Schiffman, *The Protection of Whales in International Law: A New Perspective for the Next Century*, 22 *BROOK. J. INT’L L.* 303, 307 (1996).

<sup>50</sup> *Id.* at 305.

<sup>51</sup> Carlarne holds the Harold Woods Junior Research Fellowship in Environmental Law and is a Research Fellow at the Centre for Socio-Legal Studies at Oxford University.

impressive record of publication and scholarly achievement,<sup>53</sup> does not give so much as a nod to the continuing debate surrounding the Makah. The history of the International Whaling Commission (“IWC”) in her article is self-described as brief, but manages to list multiple other cultures who have participated in whaling.<sup>54</sup> When discussing an issue that is of tremendous international importance, there is a danger of forgetting the many groups inside a country that may have different and competing stakes in the issues and policies at hand. This is truly an error or omission that speaks to the tendency of scholars to ignore or conveniently forget the discussion of a country’s indigenous populations.

Whales are important both as a source of food and as an essential component of ocean ecosystems.<sup>55</sup> Ecosystem management is not a one-way street. The call to halt whaling is not a reaction to recent events, but is instead positioned against a long history. The problem with many modern environmental movements is that they take a tragically extreme worldview—one that seeks not compromise, but victory. That very ethic of victory seems counterproductive for an environmentalist agenda, because it is indeed the capitalist desire for victory that many environmentalists attack. It is in this rhetorical space that we see division amongst environmentalists into at least two camps—preservationists<sup>56</sup> and conservationists.<sup>57</sup> In order to manage effectively the many competing interests

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<sup>52</sup> Cinnamon Carlarne, *Climate Change—The New “Superwhale” in the Room: International Whaling and Climate Change Politics—Too Much in Common?*, 80 S. CAL. L. REV. 753 (2007).

<sup>53</sup> See generally Cinnamon Carlarne, *The Kyoto Protocol and the WTO: Reconciling Tensions Between Free Trade and Environmental Objectives*, 17 COL. J. INT’L ENVTL. L. & POL’Y 45–88 (2006); *Climate Change Policies an Ocean Apart: United States and European Union Climate Change Policies Compared*, 14 PENN ST. ENVTL. L. REV. 435–82 (2006).

<sup>54</sup> See Carlarne, *supra* note 52 at 756–7; cf. Cinnamon Carlarne, *Saving the Whales in the New Millennium: International Institutions, Recent Developments & the Future of International Whaling Policies*, 24 VA. ENVTL. L.J. 1, 12, n.65 (2005) (discussing the history of the Makah).

<sup>55</sup> See WHALES, WHALING, AND OCEAN ECOSYSTEMS 1–3 (James A. Estes et al. eds., 2007) (providing a comprehensive analysis of the ecological impacts of whales and whaling and the importance of whales in ecosystems); A. M. Springer et al., *Sequential Megafaunal Collapse in the North Pacific Ocean: An Ongoing Legacy of Industrial Whaling?*, 100 (No. 21) PNAS 12223 (2003) (discussing the cascading effects of industrial whaling on the North Pacific ecosystem).

<sup>56</sup> Preservationists are usually described as less pragmatic and more extreme. For a lively journey on board an eco-pirate’s ship see PETER HELLER, *THE WHALE WARRIORS: THE BATTLE AT THE BOTTOM OF THE WORLD TO SAVE THE PLANET’S LARGEST MAMMALS* (2007) (describing the author’s experience on board the ship of Sea Shepherd Conservation Society leader Paul Watson).

<sup>57</sup> Conservationists tend to be more pragmatic and work toward stewardship and compromise.

in an ever-changing and increasing complex environment, we must rise to the challenge and promote an enlightened discussion focused on compromise and understanding, rather than a competitive engagement.

## II. THREE ACTS<sup>58</sup>: THE TRAGEDY OF THE POST-CRITICAL LEGAL SCHOLAR

What can be said of the post-critical legal scholar? Both nothing and everything simultaneously. As the field of critical legal studies<sup>59</sup> expands, so too does the resistance to expansion.<sup>60</sup> The journey beyond traditional understandings of law—natural law,<sup>61</sup> positivism,<sup>62</sup> and realism<sup>63</sup>—has been difficult. Scholars in the new school, who grew up in an era radically different from the formalistic 1940s and 1950s, exhibit the characteristics of the traditional drama's tragic hero.<sup>64</sup> At a more basic level, they bring new exper-

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<sup>58</sup> Thinking about the three theories as interrelated helps us all to understand that critical perspectives on international relations or law are not black and white. Definitions are fuzzy and theories overlap constantly. By attempting to make some dramatic allusions, it is my hope that critical international relations becomes more of a story and less of a subject. Everyone can have a seat at the table of critical international relations.

<sup>59</sup> This is an area of legal scholarship that includes feminism and the law, law and literature, law and film, critical race theory, and arguably law and economics.

<sup>60</sup> One need only look at the progress of George Mason's law school, Judges Richard Posner, or Frank Easterbrook. To be sure, law and economics has flourished in many universities, often as a reaction to the claim that law schools and higher education lean to the left. *See generally* ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (5th ed. 2007); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007); JEFFERY L. HARRISON, *LAW AND ECONOMICS* (2d ed. 2007); STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* (2004).

<sup>61</sup> Thomas Hobbes, John Locke, and Thomas Jefferson all contributed greatly to the advancement of natural law. Natural law is an ethical paradigm where law is created in nature, or morality, and that because is everywhere, law is valid everywhere. The Internet Encyclopedia of Philosophy, Natural Law, <http://www.iep.utm.edu/n/natlaw.htm> (last visited Dec. 9, 2008).

<sup>62</sup> Positivism stands in contrast to natural law, but is certainly not too far removed. Positivism relies heavily on rationality, but recognizes that laws may change. It does not accept that morality determines laws. Positivism stands for the proposition that law and ethics can be separated. Stanford Encyclopedia of Philosophy, Legal Positivism, Jan. 3, 2003, <http://plato.stanford.edu/entries/legal-positivism/>.

<sup>63</sup> Realism is traditionally thought of as an international relations concept, but with the many intersections of international relations and law, it makes sense to conceptualize traditional international relations theory as applying to law and traditional jurisprudential theory and international relations. JACK DONNELLY, *REALISM AND INTERNATIONAL RELATIONS I* (2000).

<sup>64</sup> The tragic hero is a common literary motif. The tragic hero is someone who has flaws, suffers greatly, is not unlike others in society, is intelligent, and whose life is on a downward trajectory. *See, e.g.*, MEYER HOWARD ABRAMS, *DOING THINGS WITH TEXTS: ESSAYS IN CRITICISM AND CULTURAL THEORY* 44–6 (1989). The post-critical legal

iences to the table. Applied to whaling, this means we may be able to develop ways of thinking about an ancient practice that moves beyond polarizing rhetorical battles.

International relations and the many sub-disciplines and ancillary disciplines associated with it require something more free-formed. So often when reading textbooks about politics or international affairs, the reading is not interesting. That may be much to the chagrin of authors and this Article's author is aware that his writing may not be everyone's cup of tea. There are too many notes, a long theory section with little practical application, bad writing, a clear political agenda, no context, and no room for interpretation.<sup>65</sup> Thoughts have been put on a canvas thus far to describe general scenery. This article's intention was not to promise solutions or prescribe specific policy proposal, but to encourage questioning, develop interest, and encourage further reading. Now we are able to ask the same questions and open up the same space for methods to think about whaling issues. In the opening of space, progress comes.

Stuck in a world that does not change fast enough, lacking agency, and in a constant struggle for release, the critical legal scholar performs criticism in choppy waters. The story unfolds thusly: Stuck in a room, pen to paper, thoughts abound. City lights cast an eerie glow over the manufactured edges of the paper, the desk . . . disgruntled with the technology that provides so much artificial closeness the author has but one thought, "Escape!" But the call of the document, the persistence of the policies, and the permanence of the institutions beckons forth like a gentle tide, a warm gust of wind, or a blossoming meadow in the subtle subdued morning fog of spring.

Critical, they say, a post-such and such, but to what and for what reason. If it's true what they say, that realism<sup>66</sup> is the controlling force in not only domestic politics,<sup>67</sup> but international<sup>68</sup> as

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scholar exhibits many of these characteristics as well. I hope that the trajectory downward will not result in death, but with a resurgence in neoconservatism and law and economics scholarship, it is not out of the question to consider a decline in critical legal studies as the reactionary forces mobilize.

<sup>65</sup> See Amir Hetsroni, *Academic Mediocrity Not Surprising*, YNETNEWS.COM, Oct. 9, 2006, <http://www.ynetnews.com/articles/0,7340,L-3312694,00.html> (last visited Mar. 31, 2009). There are numerous readability indexes most of which score law reviews and many other academic journals severely toward the unreadable.

<sup>66</sup> PATRICK CALLAHAN, *THE LOGICS OF AMERICAN FOREIGN POLICY* 30 (2004).

<sup>67</sup> It is easy to see how realism affects domestic policy as well as international politics. International politics seem to be expressions of domestic priorities as much as they are indicia of a nation-state's perspectives on international order.

well, then what's the point? Why question? International relations suffers from a lack of critical theory.<sup>69</sup> More so than the typical criticism that international relations is devoid of the input of women,<sup>70</sup> other than a relatively few scholars—James Der Derian,<sup>71</sup> Paul Virilio,<sup>72</sup> and Richard Ashley<sup>73</sup>—few critical-minded theorists have made much headway in the field of international relations.<sup>74</sup> It is within us to question.

Closer to an opus than an opiate, the author develops ideas, tests hypotheses and endeavors to create something new. Tax bills, registrations, parking tickets, association dues, and numerous other obligations pile up. The refuge of the author is the words and the words are the power. The power of the people is their words and the words can be spread to others, paradoxically those who view the author as “other.”

There are varying degrees of interest in the debate regarding how critical theory is different from post-modernism,<sup>75</sup> which of course is different from post-structuralism and again, not to be

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<sup>68</sup> Sterling-Folker states, “One way to think of IR theory is as a set of templates or prepackaged analytical structures for the multiple ways in which an event or activity that is international or transnational might be categorized, explained, or understood.” Jennifer Sterling-Folker, *Making Sense of International Relations Theory*, in MAKING SENSE OF INTERNATIONAL RELATIONS THEORY 5 (Jennifer Sterling-Folker ed. 2006). This definition provides a workable understanding of international relations and international relations theory.

<sup>69</sup> There are many great texts on critical international relations, but when compared with more traditional schools of thought, the number is small. See generally CRITICAL THEORY AND INTERNATIONAL RELATIONS: A READER (Steven C. Roach ed. 2007); JIM GEORGE, DISCOURSES ON GLOBAL POLITICS (1994); CYNTHIA WEBER, INTERNATIONAL RELATIONS THEORY: A CRITICAL INTRODUCTION (2d ed. 2004).

<sup>70</sup> For an explanation of my spelling see Nick J. Sciallo, “This Woman’s Work” in a “Man’s World”: A Feminist Analysis of the Farm Security and Rural Investment Act of 2002, 28 WHITTIER L. REV. 709, n.10 (2006).

<sup>71</sup> See generally JAMES DER DERIAN, ON DIPLOMACY: A GENEALOGY OF WESTERN ESTRANGEMENT (1987); JAMES DER DERIAN, ANTIDIPLMACY: SPIES, TERROR, SPEED, AND WAR (1992); JAMES DER DERIAN, VIRTUOUS WAR: MAPPING THE MILITARY-INDUSTRIAL-MEDIA-ENTERTAINMENT NETWORK (2001).

<sup>72</sup> See generally PAUL VIRILIO, WAR AND CINEMA (1989); PAUL VIRILIO, BUNKER ARCHAEOLOGY (1994); PAUL VIRILIO, DESERT SCREEN: WAR AT THE SPEED OF LIGHT (2005).

<sup>73</sup> See generally Richard K. Ashley, *The Eye of Power: The Politics of World Modeling*, 37:3 INT’L ORG. 495 (1983); Richard K. Ashley, *The Geopolitics of Geopolitical Space: Toward a Critical Social Theory of International Politics*, 12 ALTERNATIVES 403 (1987).

<sup>74</sup> See DONNELLY, *supra* note 63.

<sup>75</sup> This is a difficult term with which to wrestle. I am not as convinced as many scholars are that critical theory and post-modernism can be situated together. Professor Cynthia Weber distills the opus that is Michael Hardt and Antonio Negri’s *Empire* and provides some sound instruction on how we can make sense of post-modernism in politics. WEBER, *supra* note 69, at 122–48. Professor Sterling-Folker, while somewhat rigid and unfortunately ultra reliant on her rigid definitions, manages to highlight some of post-modernism’s major points: a focus on language, a desire to resist

confused with deconstruction. Avoiding that conversation, other than to acknowledge the dispute, serves us all the better because to fight over the terms that we use to characterize a larger critical project of investigation is to undo the work of the great post-modernists/critical theorists/deconstructionists of the last fifty years. That being said, this Article will utilize some of those terms to provide a rough outline of the discussion. In international relations theory, realism still rules.<sup>76</sup> Realism probably seems less applicable to the whaling debate because whaling is not so much a question of a nation-states's power, but instead a question of how we value and protect what matters to cultures. The whaling debate provides much room for critical inquiry.

### III. THEORIES

#### A. *Critical Theory: Literature, Worlds, and Interdisciplinarity*

Many scholars will suggest that critical theory involves the examination of society through literature.<sup>77</sup> Though this is true, defining critical theory as such does not necessarily exclude other theorists who examine society through a sociological,<sup>78</sup> psychological,<sup>79</sup> anthropological,<sup>80</sup> or film studies perspective. All of these theories can likely find supporters that investigate the questions of reality, truth, justice, and humynity. Critical theory may be viewed as a catchall that encompasses a number of movements and theories including, but not limited to, deconstruction, post-structuralism, post-modernism, and theories that combine pop culture and academic disciplines like law and literature, political science and film studies. Who is to say that one or another interdisciplinary approach is more appropriate for the label that is "critical theory?" Critical theorists often reject labeling, or, on the other hand, will

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and upset order, and questioning of that which is termed "real" or "true." Sterling-Folker, *supra* note 68, at 157–8.

<sup>76</sup> See generally MARTIN GRIFFITHS, REALISM, IDEALISM AND INTERNATIONAL POLITICS: A REINTERPRETATION (1992); JACK DONNELLY, REALISM AND INTERNATIONAL RELATIONS (2000); ASWINI K. RAY, WESTERN REALISM AND INTERNATIONAL RELATIONS: A NON-WESTERN VIEW (2004); NAYEF R.F. AL-RODHAM, SYMBIOTIC REALISM: A THEORY OF INTERNATIONAL RELATIONS IN AN INSTANT AND AN INDEPENDENT WORLD (2008).

<sup>77</sup> CRITICAL THEORY SINCE 1965 1–22 (Hazard Adams & Leroy Searle eds., 1986).

<sup>78</sup> Michel Foucault utilized a very sociological approach to address many problems. Foucault inspired many thinkers to look at society's various institutions with a more critical perspective.

<sup>79</sup> Jacques Lacan was a psychoanalyst. See generally JACQUES LACAN, THE LANGUAGE OF THE SELF: THE FUNCTION OF LANGUAGE IN PSYCHOANALYSIS (1968).

<sup>80</sup> To some extent Foucault engaged in an anthropological inquiry in many of his texts. Many scholars have focused on several cultures, comparing and contrasting them. This would be an example of an anthropological inquiry.



accept any label given to them. To understand critical theory, one must approach it with an open mind.

Whaling has a long and storied history in the world,<sup>81</sup> but it is rarely analyzed from a critical theory perspective. There are countless literary tales about whaling,<sup>82</sup> numerous collections of narratives, and a multitude of reports that recount the cultural significance of whales. The mythology of whaling spans many cultures—from the indigenous populations of the United States and Japan to Norse mythology. The historic accounts, fictional and non-fictional, are plentiful. They appear on websites and in books, as anecdotes and as novels. There is something about whales in the popular imagination that reveres these giants. Perhaps it is a fascination with giants that encourages so many to defend the whales or the apes or to protect Mt. Rushmore or the Everglades. This is not to say that those endeavors are not worthwhile, but there seems to be a fascination with the large. From this we can understand why the momentum seems to be with those hoping to prevent whaling at all costs. How could we, after all, condemn these gentle giants?

Most individuals have not had the opportunity to see a whale, let alone fish for one. For all intents and purposes, whale is not eaten in the United States. Even in aquariums, we are unlikely to see whales, the space constraints are simply too strong. The author has known many individuals who have gone on whale watching trips at coastal towns who have come back not having seen a whale. They are a rarity. It is difficult to conceptualize the need of different cultures to whale. What basis could most of us have to support this claim? These are the existential barriers to the realization that some cultures depend on whales or have depended on whales and have a right to do so now. Does the United States really have that much concern for Iceland or Norway's heritage? International relations is a tricky business and to effectively manage competing interests, nation-states must communicate.<sup>83</sup> Of course, understanding the background and history of communication amongst

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<sup>81</sup> Herman Melville's *Moby Dick* is perhaps the most accessible or recognizable work on whaling, but there have been more. See generally ERIC JAY DOLIN, *LEVIATHAN: THE HISTORY OF WHALING IN AMERICA* (2007) (discussing the cultural significance of whaling in the United States).

<sup>82</sup> See, e.g., Northvegr Foundation, *Saga of Fridthjof the Bold* (Ch. VI), <http://www.northvegr.org/lore/viking/026.php> (last visited Mar. 3, 2008).

<sup>83</sup> The pluralism movement in international relations addresses the importance of competing interests. KATHERINE SMITS, *RECONSTRUCTING POST-NATIONALIST LIBERAL PLURALISM: FROM INTEREST TO IDENTITY* 1–10 (2005).

nations and groups is critical to successful communication. Unfortunately, a lack of communication has prevented a full and open conversation about whaling.

What seems particularly troubling about the momentum of the anti-whaling faction is that while the United States has been a firm supporter of this effort,<sup>84</sup> historically it has been a whaling nation. A somewhat schizophrenic condition exists where history and current law battle. Why did the reversal come about and how does the United States get to decide who can and who cannot whale? The IWC is a member organization and the United States is not in control in any strict sense; but as can be imagined and as is true with many international bodies, the United States has a commanding presence.<sup>85</sup> What brought the United States into the IWC and what does this say about the relationship between the United States and indigenous people?

One can utilize various fields to analyze whaling. Those fields can, in turn, be combined with other fields.<sup>86</sup> The diversity of groups involved in the debate is evidence enough that there is plenty of rhetorical space upon which to engage in dialogue.<sup>87</sup> Critical theory offers several advantages to the whaling debate. It encourages international dialogue and urges that all cultures be understood and represented.<sup>88</sup> It requires a great deal of reading, fiction and non-fiction—multidisciplinarity.<sup>89</sup> Critical theory does not happen; it grows, reproduces, and reconfigures itself as it

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<sup>84</sup> Stephen S. Boynton, "Whaling Policy" of the United States Yesterday, Today and Tomorrow, 11 ISANA 1 (1994), available at [http://luna.pos.to/whale/jwa\\_v11\\_boy.html](http://luna.pos.to/whale/jwa_v11_boy.html).

<sup>85</sup> *Id.*

<sup>86</sup> There are many educational and informative works on international relations that take into account many other disciplines. See generally BORDERSCAPES: HIDDEN GEOGRAPHIES AND POLITICS AT TERRITORY'S EDGE (Prem Kumar Rajaram & Carl Grundy-Warr eds., 2007) (utilizing critical theory, geography, political science, and cultural studies to address issues of international affairs); MARLA BRETTSCHEIDER, DEMOCRATIC THEORIZING FROM THE MARGINS (2002) (focusing on class politics and identity politics to investigate international affairs); WEBER, *supra* note 69 (developing a theory of international relations through film studies). Whaling is no exception to this trend.

<sup>87</sup> Where groups and opinions are many, space is plentiful. When one group seeks to assert authority over other groups or seeks to affix a sense of privilege to their words or actions, problems arise. Space is inevitably skewed when Western or Christian voices are allowed to dominate discourse about indigenous peoples. We must be open to discussion and change.

<sup>88</sup> It is important to stress the role of dialogue amongst groups. We must consider, in developing interactions between competing ideas allowing, all voices to be heard. There is no answer, only ways to mediate.

<sup>89</sup> Herman Melville's *Moby Dick* or John Singleton Copley's *Watson and the Shark* are but a few examples.

evolves through interactions with theory, text, and action.<sup>90</sup> Making informed decisions and engaging in policy after a thorough reading of materials should not be discounted. There have often been times where practitioners have rejected academics—not only in international affairs,<sup>91</sup> but in law and political science, art and sociology. Critical theory encourages interdisciplinary solutions to interdisciplinary problems. The questions contained in this section are but a start to the critical project of understanding whaling.

### B. *Deconstruction*

Deconstructing whaling is a difficult task. There is a tendency, when deconstructing, to rant and rave about everything, attempt to disprove everything, and deny everything else.<sup>92</sup> Deconstructionists should take a more responsible role in the theoretical framework<sup>93</sup> of the discipline in which they act by embracing not only deconstruction, but also the results of changes brought by deconstruction. Unfortunately, the critical legal scholar is never out of the systems at play that is the loci of their criticisms.<sup>94</sup> Deconstruction and those engaged in that pursuit are always in a difficult position and are, therefore, open to intense criticism regardless of the insights arising from their critical journey.<sup>95</sup> How can one critique

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<sup>90</sup> See generally LOIS TYSON, *CRITICAL THEORY TODAY: A USER-FRIENDLY GUIDE* 1–10 (2006); M.H. ABRAMS, *DOING THINGS WITH TEXTS: ESSAYS IN CRITICISM AND CRITICAL THEORY* 3–30 (1989); *CRITICAL THEORY SINCE 1965*, *supra* note 77, at 1–22.

<sup>91</sup> This is a common divide in most disciplines. Without rehashing the complexities of the debates, the general idea is that theory is too far removed from practice so as to render it irrelevant, misleading, or even detrimental to the actual practice of the discipline. Eloise Buker notes: “Hollow abstractions are used to affirm such issues as diversity, freedom, democracy, equality, and fairness without giving them sufficient content to even make conversations about them meaningful.” ELOISE A. BUKER, *TALKING FEMINIST POLITICS: CONVERSATIONS ON LAW, SCIENCE, AND THE POST-MODERN* 5 (1999).

<sup>92</sup> It is from this space that many critics of deconstruction argue that deconstruction is nihilistic, radically existential, or both. It is important to understand that critical thought seeks to open terrain and, in so opening terrain, engages in a constructive process of inquiry.

<sup>93</sup> My idea here is that deconstruction can operate in a number of disciplines. We need not think of deconstruction as an exclusive tool for literary critics or for obscure communications scholars. Deconstruction can fit into different frameworks even while attempting to unmask those very frameworks.

<sup>94</sup> Capitalism, government, politics, law, and conservatism exist and scholars who make inroads to their investigation and even to their demise must do so as those forces attempt to constrict, manipulate, and influence their actions. The forces of control and order are great and the resistance to change even greater. Progressive thought and politics will remain connected to the systems they seek to reject, even as they protest against them.

<sup>95</sup> Deconstruction, critical theory, and their cognates are often the subject of vehement criticism. Progressive politics are the subject of criticism precisely because they

the systems that are inescapable? It is perhaps exactly this notion that warrants continued questioning.

One of the most interesting puzzles for deconstruction in the whaling debate is deconstructing the “cultural exemption” that allows some groups the ability to whale. “Cultural” is a complex word used to convey complex ideas. That discussion is developed more fully in the proceeding section. Why do we call it an exemption? Is the idea of exemption even appropriate? Did anyone choose to be exempt from their culture only to claim exemption to be let back in? That seems curious. What is cultural? How long must something continue for it to be ingrained in culture? The United States engaged in whaling, but has not called for an exemption. England has whaled, but has not sought an exemption. The answers to these questions are not easy and even answering them would bring about more questions.

There are many avenues for deconstructing the international order, capitalism, democracy, etc. Those criticisms are often generic and because they do not focus on the associations of individuals in those larger groups, to pursue such a path would be counterproductive. Deconstructing complex systems often denies the import of those systems on the people those systems affect. Deconstruction becomes void of power when it rejects people, when it overlooks the impacts of the critical project on individuals.

Attempting to deconstruct the IWC similarly only gets us so far. The better use of our deconstructive muscle is to consider what it means to be a culture and how rights and history make a culture. There are no easy answers here, however. Deconstruction can further address the definition of rights and of history. That is part of the exciting journey that is deconstruction. It can continue to break down every word until we can better understand what the issues are. Deconstruction’s goal of facilitating a deeper understanding of critical inquiry is based in sound logic. Applying it to the whaling debate then may be a fruitful endeavor if it allows us to question the underlying assumptions about culture, politics, and resistance that shape the debate.

Deconstruction is particularly useful when talking about culture because culture’s many complexities demand a careful critical inquiry. Academics and policy-makers alike should find use in deconstruction’s proverbial peeling back the layers of the onion.

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are progressive. Because deconstruction seeks to unmask the status quo, it too is a frequent criticism focus. Hopefully such criticism will not derail the progress of critical ideas.

To understand how best to enforce rights and encourage cultural appreciation, we must attempt to understand the differences of cultures as well as the assumptions that characterize cultural labels.

### C. *Post-colonialism*

The arrival of non-Indians here led to multiple tragedies that have continued long after the non-Indians should have known better, and these clashes have called forth from many Indian people and tribes so multifarious an array of creative transformations of themselves that no single book, and not even a multi-volume set of books, could chronicle them all.<sup>96</sup>

No alleged effect of colonization evokes greater moral indignation or fretful nostalgia than fragmentation. Colonialism breaks things. It shatters an imagined wholeness. Colonialism's will to power creates binaries where a unified field and healthy singularity of cultural purpose once existed. The self of the colonizer explodes a native cultural solidarity, producing the spiritual confusion, psychic wounding, and economic exploitation of a new and dominated other. Colonization imposes evil, fear, and ignorance on the innocent native landscape.<sup>97</sup>

The post-colonialism debate is very much about robbery—a spiritual theft of subjectivity that manifests itself through practices of cultural superiority, xenophobia, and the oppressor's lack of humynity. What was once whole, striated, expansive and indefinite is now smoothed by a larger discourse of dominance. The development of colonialism and its refinements and rebirths have perpetuated a psychology of control that has injured, actually and metaphorically, indigenous populations.

Post-colonial critiques are often multifaceted, but all center on a rejection of imperialism and/or a rejection of the blanket concept of "Enlightenment Thinking."<sup>98</sup> Post-colonial critiques have also been termed "radical anti-imperialism" by Patrick Callahan.<sup>99</sup>

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<sup>96</sup> JAKE PAGE, *IN THE HANDS OF THE GREAT SPIRIT* 405 (2003). I prefer the term "indigenous," but can accept the lively debate surrounding terminology. All sides make valid points that lend credence to the validity of a host of linguistic selections. *Id.* at 8. I offer up that the debate should continue and that those people these terms seek to represent be included in the fray.

<sup>97</sup> Houston A. Baker, Jr., *Colonialism and the Post-colonial Condition*, 110 *PMLA* 1047, 1047 (1995).

<sup>98</sup> Enlightenment thinking usually involves an intense belief in reason and rationality, through the lens of European consciousness. It is that European consciousness which has encouraged colonization again and again. See Richard Hooker, *The European Enlightenment*, <http://www.wsu.edu/~dee/ENLIGHT/ENLIGHT.HTM> (last visited Feb. 10, 2009).

<sup>99</sup> CALLAHAN, *supra* note 66, 114–5.

The argument that the United States has or is an empire is hotly debated, mostly because parties focus on indicia of formal empire—control over cultures, sovereignties, economic strength, etc. To be sure, there is a compelling case to be made that the United States is an empire when considering its relationship to the indigenous peoples of the United States. With the recent events of September 11, 2001 deployed as a call for a new imperialism, the post-colonialism critique is relevant to today's political and philosophical discourses.<sup>100</sup> However, perhaps the most palpable example of the United States' empire is indirect empire.<sup>101</sup> Indirect empire often arises out of advantages in international trade, popular culture indoctrination, and the spread of a country's commercial interests and objectives—Starbucks, McDonalds, etc. Both types of empire are serious problems for subalterns of all varieties.<sup>102</sup>

These "serious" problems pose serious threats to the existence of the Makah.<sup>103</sup> There is clearly a war of words over the appropriateness of whaling. However, what is particularly stressing is the threat to Makah identity. Anti-whaling arguments are made in a manner that challenges the subjectivity of the Makah by debasing various cultural claims about the relationship between the Makah and whaling.<sup>104</sup> The denial of subjectivity is the most unfortunate philosophical turn toward destruction.

Post-colonial critiques often rely on historical and sociological analysis, paying special attention to the impacts of international relations not only on nation-states and large bodies, but also on the individual.<sup>105</sup> Here post-colonial critiques pick up where standard deconstruction fails. The Makah have a long history of contact with the forces of colonization through the nineteenth century.<sup>106</sup> Because post-colonial critiques involve a critique of imperialism, they are particularly effective tools in discussions of international

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<sup>100</sup> Malini Johar Schueller, *Post-colonial American Studies*, 16:1 AM. LIT. HIST. 162, 162 (2004).

<sup>101</sup> CALLAHAN, *supra* note 66, at 115–6.

<sup>102</sup> See generally Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 271–313 (Cary Nelson & Lawrence Grossberg eds., 1988) (providing the background work for the post-colonial studies movement); Gyan Prakash, *Subaltern Studies as Post-colonial Criticism*, 99 AM. HIST. REV. 1475–90 (1994) (discussing subalterns in great detail).

<sup>103</sup> See Erickson, *supra* note 20, at 564.

<sup>104</sup> *Id.*

<sup>105</sup> See generally LOOMBA, *supra* note 3, at 12–39 (explaining through case study the historical, sociological, and cultural impacts on post-colonial critiques and development).

<sup>106</sup> See Riley, *supra* note 40, at 59.

relations and international law. They also offer important insights in the analysis of indigenous populations.

There is a long history of U.S. imperialism<sup>107</sup> and a clear exercise of cultural genocide with respect to the United States' indigenous populations. Even though Sumner Wells, Franklin Delano Roosevelt's Undersecretary of State, famously declared "the age of imperialism is ended,"<sup>108</sup> that notion has not resonated with the colonized within the United States' borders. The Makah have been no exception to the deplorable treatment of indigenous people by the U.S. government.<sup>109</sup> The ban on whaling is not a policy solely against the Makah, it is the support of a convention that desires to ban whaling across the globe, denying the cultural and historic practices of many people. This is an example of international relations no longer being about East versus West, but at a deeper level being about Michael Hardt and Antonio Negri's notions of empire.<sup>110</sup> Although this Article focuses largely on the Makah, arguments could be made that incorporate post-colonial criticisms as they relate to a number of other countries and cultures.

Imperialism is a particularly naughty tactic that reinforces itself through the oppressive cycle. Once a country is in, it is hard to get out.<sup>111</sup> Imagine indigenous peoples in the United States rejecting all federal government assistance or imagine Venezuela not shipping oil to North America and Europe. Those situations are simply not feasible in a practical sense. However, imperialism is inherently unstable.<sup>112</sup> The risk of constant social rebellion is a real threat to the established order.<sup>113</sup> Because the goal of imperialism is dominance, individuals are always placed in a disadvantageous position against the system. Furthermore, the United States and its leadership enjoy making declarations that the United States has broken free of the Western world's colonial traditions, reifying

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<sup>107</sup> See Schueller, *supra* note 100, at 171 ("Post-colonial studies can intervene to suggest how US cultural history has always been a contradictory set of narratives with an endless entanglement of imperial and colonial experiences, and native resistances.").

<sup>108</sup> WILLIAM ROGER LOUIS, *IMPERIALISM AT BAY: THE UNITED STATES AND THE DECOLONIZATION OF THE BRITISH EMPIRE, 1941-1945* 154-5 (1978).

<sup>109</sup> See Miller, *supra* note 15, at 201-4; Burns, *supra* note 18, at 364-6 (discussing the United States's historical abuses of indigenous people generally).

<sup>110</sup> MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 8 (2000) (discussing capitalism as the "new" imperialism); see also LOOMBA, *supra* note 3, at 214.

<sup>111</sup> CALLAHAN, *supra* note 66, at 116.

<sup>112</sup> *Id.* at 117 (discussing how political control hinges on the exchange of goods or trade).

<sup>113</sup> *Id.*

the goodness of the system being critiqued. Richard Nixon, during a campaign speech, famously declared, "For the first time in history we have shown independence of Anglo-French policies toward Asia and Africa which seemed to us to reflect the colonial tradition. That declaration of independence has had an electrifying effect throughout the world."<sup>114</sup> This assertion would prove to be wrong in the years to come and does not take into account the continued domestic imperialism practiced against indigenous people of the United States.

What can whaling countries do? They might resume whaling temporarily, knowing that they might be able to whale for at least a short time before pressure from other countries becomes too great. That would never solve anything and would only give whaling countries a small glimpse at their previous way of life. As mentioned previously, the cultural exemption debate tops the list of post-colonial critiques. This Article, however, is more about the need to open up the space for post-colonial critique than it is to define the specifics of place.

The cultural exemption rests on the IWC's use of the term "subsistence whaling," which is "whaling, for purposes of local aboriginal consumption carried out by or on behalf of aboriginal, indigenous or native peoples who share strong community, familial, social and cultural ties related to a continuing traditional dependence on whaling and on the use of whales."<sup>115</sup> The exemption is a logical compromise designed to promote a better understanding of different cultures. It is an attempt to be responsive to the needs of societies and to recognize many of the constituent parts of culture.<sup>116</sup> It provides some hope. Geert Hofstede, one of the preeminent sociologists in the field of intercultural relations, found culture to be "the collective programming of the mind which distinguishes one hum[an] group from another. . . . Culture is to a hum[an] collectivity what personality is to an individual."<sup>117</sup> Whaling is a programmed activity,<sup>118</sup> a characteristic of certain cultures,

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<sup>114</sup> HERMAN FINER, *DULLES OVER SUEZ: THE THEORY AND PRACTICE OF HIS DIPLOMACY* 397 (1964).

<sup>115</sup> Jennifer L. Tomsen, "Traditional" Resource Uses and Activities: Articulating Values and Examining Conflicts in Alaska, 19 ALASKA L. REV. 167, 175 (2002).

<sup>116</sup> Culture is difficult to define. There are many more definitions than could be fully discussed in a work of manageable size. Culture involves everything from foodways to language, familial responsibilities to gender roles, religion to opinions of work.

<sup>117</sup> HOFSTEDE, *supra* note 5, at 25.

<sup>118</sup> Whaling is a traditional Makah pursuit. See Miller, *supra* note 15, at 167.



similar to how certain jobs are characteristic of different regions of the United States—farming in the Midwest, for example.

International relations, to work effectively, must involve policies that seek a middle ground and the cultural exemption is, on paper, an opportunity to engage in intercultural dialogue. We must be sensitive to the paper of laws, however. Laws, by their words, often serve to divert post-colonial critiques. Those words, while attempting to offer solutions, often have no practical effect.<sup>119</sup> The whaling debate can take into account multiple points of view; however, the fact that many countries must first go to the IWC indicates that there are still post-colonial apparatuses in the system. Mediating between cultures is then synonymous with mediation between groups of people. The framework exists in this exemption language. The whaling exemption is designed to promote those things that set societies apart from one another. Indeed, for several cultures, a major cultural marker is whaling.

One criticism of the post-colonial scholars is that they are concerned with the humyn world and not the non-humyn world. To the extent that they do address the non-humyn world, they do so with a distinct favoritism for the humyn world.<sup>120</sup> Of course, modern ecological thought would suggest that it is all the same world, and that idea is one I take to heart.

Philip Armstrong notes:

Concerned as it is with the politics of historical and contemporary relations between “Western” and other cultures since 1492 or thereabouts, post-colonial studies has shown little interest in the fate of the non-hum[y]n animal. In identifying the costs borne by non-European “others” in the pursuit of Western cultures’ sense of privileged entitlement, post-colonialists have concentrated upon “other” hum[y]ns, cultures, and territories but seldom upon animals.<sup>121</sup>

Understanding that post-colonialism and imperialism take an ecological toll is vitally important to understanding post-colonial studies. Professor Armstrong is at once correct and incorrect—his observation certainly resonates with a thorough understanding of post-colonial literature, but it suggests that ecological concerns are not a concern for post-colonial scholars. That characterization is

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<sup>119</sup> Marouf Hasian, Jr., *Rhetorical Studies and the Future of Post-colonial Theories and Practices*, 20 RHETORIC REV. 22, 26 (2001) (describing, for example, how the passage of child labor laws has done little to solve the problem of child labor in sweatshops).

<sup>120</sup> See MEREDITH, *supra* note 21.

<sup>121</sup> Philip Armstrong, *The Post-colonial Animal*, 10:4 SOC’Y & ANIMALS J. 413, 413 (2002), available at <http://www.psyeta.org/sa/sa10.4/armstrong.shtml>.

misleading at best and vitriolic at worst. To be sure, there are synergies between animal rights discourse and post-colonial criticism.<sup>122</sup> The resistance to Cartesian analysis is very much a central focus of both schools of thought, albeit each focusing on slightly different segments of Descartes' argument.<sup>123</sup>

Although there are flaws in the system—perhaps because having a system is, in itself, flawed—there remains room for intercultural awareness and for an expanded dialogue on whaling culture. Of course, that might be theory talking and not practice. The debates about the appropriate lens through which to view cultures still rage on today. If they continue to go on without a concentrated effort to realize the cultural differences across the world in relation to whaling, then perhaps we need a new course. We do a disservice to ourselves, philosophically and politically, if we fail to consider alternate views on whaling. Armstrong notes: “Encountering the post-colonial animal means learning to listen to the voices of all kinds of ‘other’ without either ventriloquizing them or assigning to them accents so foreign that they never can be understood.”<sup>124</sup> These are not simple questions of right and wrong, but truly strike at fundamental notions of fairness, subjectivity, and the integrity and value of culture. The cultural exemption debate underscores how the whaling debate is more than a crisis in international relations, law, or politics, but instead is a much broader discussion of how we understand each other.<sup>125</sup>

#### CONCLUSION

Critical studies in the form of deconstruction, post-colonial criticism, and critical theory promise to open doors for continued discussion and a better understanding of the people around us. The whaling debate is a situation ripe for critical inquiry with its many parties, broad issues, and interdisciplinary appeal. Hopefully, readers have been encouraged to read more about the whaling issue. The questions and tools utilized in the three theories discussed have broad applicability to other pursuits. The United States has done a disservice to the Makah and that is part of a larger policy of imperialism and disrespect for others. The United

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<sup>122</sup> *Id.* at 414 (noting that “the definition of ‘the animal’ is inextricably bound up with the formation of other notions fundamental to the work of colonialism: ‘the hum[y]n,’ ‘the natural,’ ‘the cultural’”).

<sup>123</sup> *Id.* at 414.

<sup>124</sup> *Id.* at 417.

<sup>125</sup> Post-colonial criticism encourages a melding of scholarship and political action. See LOOMBA, *supra* note 3, at 204–28.

States is proving what many critics have stated—that the United States is concerned only about itself and moreover only about those in power. The whaling debate will continue for the foreseeable future, until anti-whaling countries can take a more moderate stance or the IWC regime crumbles.

