
UNCOMMON GOODS: ON ENVIRONMENTAL VIRTUES AND VOLUNTARY CARBON OFFSETS

INTRODUCTION

Although the United States has not yet adopted a cap-and-trade system to regulate carbon emissions,¹ individuals and organizations are voluntarily buying carbon offsets in private markets.² The language of carbon footprints is ubiquitous; companies increasingly allow customers to pay for carbon offsets when they purchase particular goods or services,³ and many have set “carbon neutrality” as an organizational goal.⁴ To meet this demand, a voluntary carbon offset market has grown exponentially in recent years, with \$704.8 million spent in 2008 to offset 123.4 million metric tons of carbon dioxide.⁵ Corporations

¹ See generally Robert R. Nordhaus & Kyle W. Danish, *Assessing the Options for Designing a Mandatory U.S. Greenhouse Gas Reduction Program*, 32 B.C. ENVTL. AFF. L. REV. 97 (2005) (discussing the fact that the federal government has not yet regulated greenhouse gases and providing details of potential regulatory tools, including cap-and-trade). Under a cap-and-trade system, “the government sets an aggregate limit to the amount of pollution that can be emitted, creates permits that allow the holders to emit some predetermined percentage of that total limit, distributes the permits, and then allows firms to trade permits.” Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California’s Carpool Lanes*, 75 IND. L.J. 1231, 1284 (2000). In this way, “the reductions in emissions will be made by those firms able to do so at the lowest cost.” *Id.*

² For a comprehensive summary of the nature and mechanics of voluntary carbon markets in recent years, see KATHERINE HAMILTON ET AL., ECOSYSTEM MARKETPLACE & NEW CARBON FINANCE, FORGING A FRONTIER: STATE OF THE VOLUNTARY CARBON MARKETS 2008 (2008), available at http://www.ecosystemmarketplace.com/documents/cms_documents/2008_StateofVoluntaryCarbonMarket2.pdf; and KATHERINE HAMILTON ET AL., ECOSYSTEM MARKETPLACE & NEW CARBON FINANCE, FORTIFYING THE FOUNDATION: STATE OF THE VOLUNTARY CARBON MARKETS 2009 (2009) [hereinafter HAMILTON ET AL., FORTIFYING THE FOUNDATION], available at http://www.ecosystemmarketplace.com/documents/cms_documents/StateOfTheVoluntaryCarbonMarkets_2009.pdf. For a discussion of both regulated and voluntary carbon markets, see KARAN CAPOOR & PHILIPPE AMBROSI, WORLD BANK, STATE AND TRENDS OF THE CARBON MARKET 2008 (2008), available at <http://siteresources.worldbank.org/NEWS/Resources/State&Trendsformattedo6May10pm.pdf>.

³ Michael P. Vandenberg & Anne C. Steinemann, *The Carbon-Neutral Individual*, 82 N.Y.U. L. REV. 1673, 1718 n.206 (2007) (listing examples of companies that offer offsets, including DHL, which will make a shipment carbon-neutral for a two percent premium on its usual shipping charge, and Pacific Gas & Electric, which gives customers the option of paying to offset the greenhouse gas emissions from their electricity use).

⁴ For example, a variety of not-for-profit organizations and governments, *id.* at 1719, and a lengthening list of big businesses, “ranging from the predictable (Ben & Jerry’s) to the surprising (Rupert Murdoch’s News Corporation),” have pledged to become carbon-neutral, *id.* at 1718. For a discussion of the rise of the carbon neutrality norm, see *id.* at 1717–20.

⁵ HAMILTON ET AL., FORTIFYING THE FOUNDATION, *supra* note 2, at 6, 31. Note that the aggregate estimates in this report may be conservative; the 2008 figure, for example, is based in part on data obtained from voluntary completion of surveys by 182 developers, aggregators, brokers, and retailers in twenty-eight countries. *Id.* at 5.

purchased the vast majority of these offsets, but individuals accounted for a significant minority.⁶

While the use of carbon markets as a regulatory tool has attracted much attention and opposition, the emergence and rapid growth of voluntary markets has received far less academic notice. Perhaps because voluntary offsets are not being used as part of an alternative to a traditional regulatory framework, but rather are created by private law contracts motivated by apparently altruistic concerns, they seem normatively unproblematic. This Note will argue not only that this lack of concern is misguided, but also that the standard arguments against regulatory markets have failed to identify what is truly ethically problematic about voluntary offsets.

What the standard arguments fail to consider is that environmentalism fosters and protects not only the value of the environment as such, but also the value of being the kind of person who leads a good life in relation to environmental values — or in other words, the value of living virtuously. As conceived by virtue ethics, an action is right not because it complies with a duty or achieves the right outcome, as in deontological or consequentialist theories, but rather because it is a manifestation of good character. And it is this type of good — specifically, the good of being the kind of person who avoids wastefulness — that the voluntary offset market threatens.

There are three ways in which the market threatens this good. By translating harm to the environment — and therefore, the good of the environment — into something measured in carbon, the market facilitates environmental use governed not by an ethic of good character, but rather by a principle of efficiency. In addition, it allows people to “do their part” without changing what they do, effacing the idea that being an environmentalist involves embodying environmental values in a corporeal way. Finally, the market dissolves important qualitative distinctions between types of carbon emissions, and in so doing undermines an idea of wastefulness that has been central to environmental ethics. In these ways, the market reshapes the principles that govern environmental consumption, the mechanism by which environmental action is achieved, and the conceptual framework in which environmental impacts are understood.

Thus, even if a voluntary market will bring about a reduction in aggregate emissions, it will not necessarily follow that it will be good for the environment. Rather, what this Note suggests is that the goal

⁶ Individual purchases accounted for approximately five percent of the market in 2006 and 2007, prior to the recession; in 2008, this number declined to two percent. *Id.* at 95. The report notes that the number assigned to individuals may be lower than the actual number, as it is “difficult to track credits sold to individuals through companies, such as airlines, whose primary business model is not supplying offset credits.” *Id.*

of carbon neutrality driving the market is at odds with a good traditionally protected by environmentalism — that the good of the commons is constituted by uncommon goods. For this reason, voluntary offsets will not always allow for the mere exercise of preexisting environmental commitments, but rather will often reshape the ethics that motivated these commitments in the first instance.

Whether this critique of the voluntary carbon market applies equally to the regulatory market is a question outside the scope of this Note. However, it is worth noting here a potential difference in the markets' social significance that might have some bearing on the question.⁷ Insofar as compliance with the law is seen as a requirement and thus not deserving of special moral praise, purchases of regulatory offsets differ significantly from purchases of voluntary offsets, which are motivated by — and therefore contribute to — the growing attitude that purchasing carbon offsets is a way of meeting the ethical requirements of environmentalism.⁸ Thus, if this growing attitude is in conflict with an ethos that has been traditionally encouraged by environmentalists, voluntary carbon markets may be more, not less, troubling than their regulatory counterparts.

I. THE NATURE OF THE GOOD OF THE ENVIRONMENT

While the emergence and rapid growth of the voluntary carbon offset market has received little critical academic attention,⁹ regulatory

⁷ A second type of difference between the markets that might have some bearing on the question lies in the nature of the actors involved. The standard proposals for regulatory markets, for example, would require corporations, but not individual people, to buy offsets — and it is arguable that corporations are not capable of embodying virtues in the same ways that people are. In this case, the use of regulatory offsets would not be objectionable in and of itself, or at least not in all the same ways that it may be when the actors are people. This is not to say, however, that a regulatory offset market would be unobjectionable. At the very least, any concerns that derive from the regulatory offsets' social significance and impact on individual action, if there is any such impact, would still be applicable.

⁸ To say that the purchases of offsets are “motivated by” this attitude is not to say that the purchasers always believe that they have an ethical obligation to do so. They might, for example, be buying offsets solely to comply with an externally imposed norm, such as social pressure to “be green.” But they would only do so if they thought that these purchases were a way of complying with that norm; in this sense, the purchasers are motivated by the norm, whether or not they internalize it. That this norm is widespread is demonstrated by the size and growth of the voluntary market in recent years. See HAMILTON ET AL., FORTIFYING THE FOUNDATION, *supra* note 2.

⁹ The most thorough academic discussions of these markets have been positive, recommending them as a way of achieving environmental goals. See, e.g., Vandenberg & Steinemann, *supra* note 3, at 1720–24. The limited criticisms fall into two categories. First, in the academic literature, there is a concern that offsets do not always provide genuine emissions reductions — that an offset “may purport to displace a carbon-emitting activity that would not have occurred without the offset in the first place,” or that “the offset-generating activity may have uncertain scientific

carbon markets have been the focus of extensive discussion by legal scholars and policymakers.¹⁰ A review of these debates reveals an important limitation in the critical work on carbon markets thus far.

In the literature on regulatory markets, critics of offsets have advanced two primary arguments. The first is the “right to pollute” critique, according to which the buying and selling of offsets is objectionable on deontological grounds. The idea here is that polluting is itself morally objectionable, and as such is a type of act — like cruelty or racial discrimination — that one should not be able to buy the right to do.¹¹ The second critique, regarding “commodification,” is generally framed in consequentialist terms. It advances the claim that the sale of pollution rights makes people less likely to protect the environment because it “undermines the current social sanction that attaches to excessive emissions, thereby transforming pollution from a social evil in-

validity.” *Id.* at 1722. However, these claims are not a criticism of the voluntary offset market per se, but rather of the ways in which the voluntary offsets are created — a problem that could be solved through regulation. Second, in the popular media, offsets have also been criticized on the grounds that they are comparable to papal indulgences. *See, e.g.*, Charles Krauthammer, *Limousine Liberal Hypocrisy*, TIME, Mar. 26, 2007, at 24; Andrew C. Revkin, *Carbon-Neutral Is Hip, but Is It Green?*, N.Y. TIMES, Apr. 29, 2007, § 4 (Week in Review), at 1; *see also* Robert E. Goodin, *Selling Environmental Indulgences*, 47 KYKLOS 573 (1994) (providing a more sophisticated version of the “indulgence” argument, made with respect to pollution offsets and taxes). But this second criticism has generally gained little traction in the academic literature, as it seems that the analogy breaks down in crucial ways: indulgences did not provide an enforceable contract for a place in heaven and did not materially reverse the impact of the predicate sin, whereas a carbon offset can provide an enforceable contract that eliminates carbon from the atmosphere. On the basis of this disanalogy, market advocates reject the “indulgences” criticism. *See, e.g.*, Vandenberg & Steinemann, *supra* note 3, at 1722 n.235 (explaining that “[t]he analogy is false,” *id.* at 1723 n.235). However, in making this argument, market advocates assume that eliminating the impact of the emission constitutes an elimination of what, if anything, is ethically objectionable about causing the emission. *See, e.g., id.* at 1720 (“Carbon neutrality . . . enables individuals to be confident that regardless of others’ behavior, they are not contributing to the harm.”). It is this assumption that will be challenged in this Note.

¹⁰ For a helpful summary of these debates, see Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 82 NOTRE DAME L. REV. 313, 325–34 (2006); and Strahilevitz, *supra* note 1, at 1284–88. In general, scholars have long suggested that economic analyses and tools do not adequately protect the good of the environment. *But see* Barton H. Thompson, Jr., *What Good Is Economics?*, 37 U.C. DAVIS L. REV. 175 (2003) (responding to the standard criticisms and making an environmental case for the use of economics). On the rising role of environmental economics in environmental legal policy over the past thirty years, see Wallace E. Oates, *From Research to Policy: The Case of Environmental Economics*, 2000 U. ILL. L. REV. 135.

¹¹ For a short articulation of this argument, see Nash, *supra* note 10, at 326. *See also* John P. Dwyer, *The Use of Market Incentives in Controlling Air Pollution: California’s Marketable Permits Program*, 20 ECOLOGY L.Q. 103, 111 (1993) (stating that some environmental groups and regulators claim that “creating property rights in pollution is morally wrong”); James L. Huffman, *Markets, Regulation, and Environmental Protection*, 55 MONT. L. REV. 425, 432 (1994) (“Most environmental groups have opposed the tradeable emissions approach, generally on the ground that no one should have a right to pollute.”).

to a neutral commodity.”¹² Whether these two standard criticisms of regulatory uses of offsets withstand scrutiny,¹³ and whether they are applicable to the voluntary market,¹⁴ is not relevant here. What is important is what is missing from these critiques — the set of ethical concerns that have thus far been overlooked.

An implicit assumption in these critiques is that what is protected by environmental ethics is the inherent value that exists in the environment in and of itself, or the utility value that derives from our uses of it. While this assumption may seem reasonable at first, it fails to fully account for the nature of a core type of environmental value. An examination of the general norm against wastefulness helps illustrate the point.

While people will not always agree about what “being wasteful” involves in particular situations, there will be core cases on which there is widespread agreement,¹⁵ and what matters for this argument are the concerns that motivate this core. It is clear that, in part, a shared concern about wastefulness has to do with the consequences of being wasteful: people want to discourage others from consuming things that could be put to better use, with “better” conceived of in ethical or economic terms. This concern does not, however, completely explain standard ethical objections to wastefulness.

Take, for example, the case of parents scolding their children for wasting food, reminding them that children elsewhere are starving. The logic of the reprimand is foolish from a straightforward consequentialist or deontological point of view: the starving children were

¹² Strahilevitz, *supra* note 1, at 1232; see also STEVEN KELMAN, WHAT PRICE INCENTIVES?: ECONOMISTS AND THE ENVIRONMENT 49 (1981) (“The ‘license to pollute’ that an economic incentives policy implies may influence citizen preferences in a direction that gives achievement of a clean environment less weight . . .”); Bruno S. Frey, *Motivation as a Limit to Pricing*, 14 J. ECON. PSYCHOL. 635, 652 (1993) (“Decision-makers fear that the use of pricing instruments would lead to a counterproductive effect: the quality of the environment is improved in those areas where tradeable licenses . . . are applied, but environmental quality is lowered in all other areas because the guiding environmental ethic has weakened or has been completely destroyed. This reduced ethic moreover hampers individuals’ willingness to accept any kind of action to fight pollution, i.e. political support for environmental policies would also be decreased.”); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2045–46 (1996) (“Critics claim that emissions trading has damaging effects on social norms by making environmental amenities seem like any other commodity . . .”).

¹³ For a review of the critical responses to these lines of argument, see Nash, *supra* note 10, at 325–34; and Strahilevitz, *supra* note 1, at 1284–88.

¹⁴ It is important to note that, unlike the purchase of regulatory offsets, the purchase of voluntary offsets does not involve the purchase of a right to pollute. If the offset is structured as a contract, it does create a right. But unlike in the regulatory context, it is merely a private right against the seller of the offset; the right against the public — the right to emit the carbon — preexists the creation of the contract or commodity.

¹⁵ Cf. H.L.A. HART, THE CONCEPT OF LAW 126 (2d ed. 1994) (“General terms would be useless to us as a medium of communication unless there were such familiar, generally unchallenged cases.”).

not going to receive the excess food, and the parents' purchase of the food did not really mean the starving children had any less. But for many, the reprimand still has normative force, as it conveys the message that wasting food is bad — not because of any harm caused, but rather because it suggests a lack of awareness of or sympathy for those who have less, or a sense of entitlement to live in a world of plenty. The reprimand makes sense because it seeks to promote good character. The same is true of arguments about environmental responsibility.

As a source of norms about how people ought to live, environmentalism has long made claims about the kind of citizens they ought to be and the virtues that they ought to embody.¹⁶ Thus, when environmentalists have spoken of the good of the environment, they have spoken not only of a good that is inherent in the environment,¹⁷ but also of a human good — and not merely of a human good that is derivative from our uses of the environment,¹⁸ but also of one that originates in us by virtue of the way we relate to it.¹⁹ Environmentalism has sought to protect the value of the environment as such, as well as the value of being the kind of person who embodies environmental virtues.

As conceived by virtue ethics, an action is right only if “it is what a virtuous agent would, characteristically, do in the circumstances.”²⁰ In contrast with other common ethical approaches “that appraise actions, atomistically, in terms of consequences or compatibility with deonto-

¹⁶ On the historical place of virtue ethics in some key environmentalist writings, see generally Philip Cafaro, *Thoreau, Leopold, and Carson: Toward an Environmental Virtue Ethics*, in ENVIRONMENTAL VIRTUE ETHICS 31 (Ronald Sandler & Philip Cafaro eds., 2005).

¹⁷ See, e.g., JOHN MUIR, OUR NATIONAL PARKS 57–58 (1901) (“[T]he question comes up, ‘What are rattlesnakes good for?’ As if nothing that does not obviously make for the benefit of man had any right to exist; as if our ways were God’s ways. . . . [T]hey are all, head and tail, good for themselves, and we need not begrudge them their share of life.”); Holly Doremus, *The Rhetoric and Reality of Nature Protection: Toward a New Discourse*, 57 WASH. & LEE L. REV. 11, 32–41 (2000) (providing examples of this theme in American environmental writings and legislation).

¹⁸ See, e.g., GEORGE PERKINS MARSH, MAN AND NATURE 42–43 (David Lowenthal ed., Univ. of Wash. Press 2003) (1864) (arguing that destruction of the forests threatened the future availability of natural resources essential to human prosperity); Doremus, *supra* note 17, at 16–23 (providing examples of this theme in American environmental writings and legislation).

¹⁹ For modern theories of environmental virtue ethics, see generally ENVIRONMENTAL VIRTUE ETHICS, *supra* note 16; RONALD L. SANDLER, CHARACTER AND ENVIRONMENT: A VIRTUE-ORIENTED APPROACH TO ENVIRONMENTAL ETHICS (2007); and LOUKE VAN WENSVEEN, DIRTY VIRTUES: THE EMERGENCE OF ECOLOGICAL VIRTUE ETHICS (2000).

²⁰ ROSALIND HURSTHOUSE, ON VIRTUE ETHICS 31 (1999) (internal quotation mark omitted). While this “agent-centered” approach is dominant in the literature, there is an alternative “agent-based” approach, according to which an act is right if and only if it exhibits good motivation. See generally, e.g., MICHAEL SLOTE, FROM MORALITY TO VIRTUE (1992) (developing an agent-based approach).

logical rules,” virtue ethics appraises people over time.²¹ This distinction does not mean that an action’s consequences are irrelevant, or that some things might not be categorically objectionable.²² The point is merely that it is not an action’s consequences or adherence to a rule that makes it good.²³ Rather, what is important is the character of the actor. And good character is manifest not only in specific actions, but also in reasons for action and modes of relation to the objects of action.²⁴ For example, a person who performs a seemingly altruistic action for the wrong reasons is not virtuous,²⁵ nor is the person who does the action for the right reason, but with the wrong attitude toward the subject of action.²⁶ An action exhibits “altruism” and therefore virtue when it is undertaken in the way that a person of altruistic character would undertake it.²⁷

There are several reasons that an environmentalist might be concerned about the erosion of environmental virtues themselves as distinct from simply bad environmental effects. In line with traditional consequentialist and deontological moral theory, one may think that a society that fosters environmental virtues will produce citizens who are

²¹ Yochai Benkler & Helen Nissenbaum, *Commons-based Peer Production and Virtue*, 14 J. POL. PHIL. 394, 404 (2006).

²² See Martha C. Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in 13 MIDWEST STUDIES IN PHILOSOPHY: ETHICAL THEORY: CHARACTER AND VIRTUE 32, 44 (Peter A. French et al. eds., 1988); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 865 (2009) (“The moral (or, perhaps more frequently, immoral) quality of certain sorts of conduct are often sufficiently categorical that their status can be captured by ‘rules of thumb’ of varying degrees of breadth.”).

²³ See Peñalver, *supra* note 22, at 865 (“An action is virtuous because it is the sort of action a virtuous person undertakes; rules merely describe or generalize about what those actions would be under a range of uncontroversial circumstances.”).

²⁴ See ROBERT MERRIHEW ADAMS, *A THEORY OF VIRTUE: EXCELLENCE IN BEING FOR THE GOOD* 9 (2006) (arguing that virtue is not only a manifestation of action, but a manifestation of appropriate emotions as well).

²⁵ For example, “[o]ne who saves a child from drowning solely to enjoy the acclaim and publicity his act would most likely bring, has done the right thing but not in the right spirit, has done a good thing but not done it well, with a good motive.” N.J.H. DENT, *THE MORAL PSYCHOLOGY OF THE VIRTUES* 7 (1984).

²⁶ For example, one “who engages in acts of charity with a sense of condescension or disgust toward the people he helps” has not acted with the right mode of relation. Peñalver, *supra* note 22, at 865. See also HURSTHOUSE, *supra* note 20, at 118–19, 123–26 (noting that the agent must have the “appropriate feeling(s) or attitude(s) when she acts,” *id.* at 125).

²⁷ See HURSTHOUSE, *supra* note 20, at 11 (“If you have the virtues of, say, generosity, honesty, and justice, generous, honest, and just is the sort of person you are.”); Peñalver, *supra* note 22, at 865 (“An action is ‘brave’ and therefore virtuous, not (ultimately) because it is consistent with a moral rule mandating a particular sort of action under a particular set of circumstances. The action is ‘brave’ because it is the sort of action that a brave person would undertake when confronted by that situation.”).

more likely to fulfill their duties to the environment,²⁸ or more likely to act in ways that produce the best environmental outcomes.²⁹ Alternatively, following some branches of legal and political theory, one might worry that the erosion of virtue will lock society into ways of relating to the environment that will inhibit future political imagination about how humans might relate to nature.³⁰ Both of these approaches would certainly provide a fruitful avenue for further research on carbon markets, and would find support in well-established lines of environmental thought. What this Note focuses on, however, is the strand of environmental ethics that takes virtue to be an irreducible good — that values good character because it is good.

Of the many types of virtue that have been promoted in environmental writing, this Note is primarily concerned with that of avoiding wastefulness. In classical language, one might call this virtue temperance³¹ — as opposed to gluttony,³² conceived broadly as including all forms of unnecessary consumption of natural resources.³³ The ultimate foundations of this virtue, however, are not crucial for the argument here. Rather, following the work of Professors Yochai Benkler and Helen Nissenbaum, this analysis will try to stay “as close as possible to an intuitively plausible sense of virtue, remaining neutral on many of the most controversial theoretical questions.”³⁴

II. VALUES AND MARKETS

Insofar as the good of the environment is constituted by the good character of those acting virtuously in relation to it, there are two bodies of literature that indicate — albeit indirectly — that critical atten-

²⁸ Cf. MARCIA W. BARON, *KANTIAN ETHICS ALMOST WITHOUT APOLOGY* (1995) (developing a neo-Kantian, duty-based approach to ethics that treats virtue and character as important); BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* (1993) (same).

²⁹ Cf. JULIA DRIVER, *UNEASY VIRTUE* (2001) (developing a version of consequentialism that draws on the insights of virtue ethics); BRAD HOOKER, *IDEAL CODE, REAL WORLD: A RULE-CONSEQUENTIALIST THEORY OF MORALITY* (2000) (same).

³⁰ Cf. Laurence H. Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 *YALE L.J.* 1315 (1974) (discussing the emergence of artificial environments and concluding that the logic that prompts the creation of plastic trees to satisfy our desires “leads finally not to human satisfaction but to the loss of humanity,” *id.* at 1348).

³¹ See, e.g., ARISTOTLE, *NICOMACHEAN ETHICS* bk. III, ch. 12, l. 1119b, at 59 (Lesley Brown ed., David Ross trans., Oxford Univ. Press 2009) (“[T]he temperate man craves for the things he ought, as he ought, and when he ought; and this is what reason directs.”).

³² See, e.g., PLATO, *Phaedrus*, in *SYMPOSIUM AND PHAEDRUS* 45, 54 (Candace Ward ed., Benjamin Jowett trans., Dover Publ’ns 1993) (“The desire of eating, which gets the better of the higher reason and the other desires, is called gluttony, and he who is possessed by this is called a glutton . . .”).

³³ Cf. WENDELL BERRY, *A CONTINUOUS HARMONY* 111, 181 (1972) (discussing the “way out of the wastefulness of consumerism,” *id.* at 111, and, in the context of environmental conservation, referring to the logic of the “glutton” and “man eating himself to death,” *id.* at 181).

³⁴ Benkler & Nissenbaum, *supra* note 21, at 403–04.

tion to the voluntary carbon market is warranted. Before looking in detail at the specific relationship between environmental virtues and carbon offsets, the insights of this scholarship should be outlined in order to contextualize the subsequent analysis.

The first body of relevant literature is the extensive work on the origin and function of norms and social meaning.³⁵ Although this scholarship has generally focused on legal institutions,³⁶ important work has been done on the relationship between virtues and modes of production and use.³⁷ The central insights of this work can be applied generally to social institutions that structure human relationships. Of particular interest are the insights into the ways in which norms and related meanings may be underspecified and malleable.³⁸ If an esteem-worthy activity is specified at a fairly general level of activity, for example, it might not be clear whether a particular action is an instance of that activity.³⁹ And for the same reason that preferences are not fixed, consensus about the esteem-worthiness of engaging in a given activity may be reshaped through subsequent iterations or “framing.”⁴⁰

³⁵ See generally, e.g., Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996); Richard H. McAdams, Comment, *Accounting for Norms*, 1997 WIS. L. REV. 625; Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

³⁶ The scholarship on the expressive functions of law is particularly relevant here. See generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Sunstein, *supra* note 12. For a criticism of this approach to law, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

³⁷ See, e.g., Benkler & Nissenbaum, *supra* note 21 (arguing that participation in commons-based peer production can foster important moral and political virtues); Peñalver, *supra* note 22 (developing a virtue-oriented approach to land use). Also relevant here is the scholarship in the social sciences showing that “[v]alues may be ‘built into’ technical design characteristics of technologies, which, in interaction with the social, political, economic and cultural characteristics of the contexts in which they are embedded, produce outcomes skewed in one way or another.” Benkler & Nissenbaum, *supra* note 21, at 416.

³⁸ See, e.g., Lessig, *The Regulation of Social Meaning*, *supra* note 35, at 952 (noting that the meaning conveyed by buckling a seatbelt in a Budapest taxi, where no seatbelt is required by law, may signal mistrust of the driver, but that a similar action in a city with a seatbelt requirement may convey no meaning or, at most, signal that the occupant is law-abiding).

³⁹ For example, even if there were strong agreement that “environmentally conscious activity deserves esteem,” or that “one should not pollute unnecessarily,” the underlying categories of action might be reconstituted by applications of the norm to new situations. In a world with carbon offsets, there may be new questions about what counts as “polluting.” If someone emits carbon, but buys an offset, he has not caused an aggregate increase in carbon, so one might question whether he has “caused pollution.”

⁴⁰ In general, the idea of framing effects is that “the precise way in which a problem or choice is presented — i.e., its frame — may affect the decisionmaker’s perception of the problem or choice, and ultimately the decisionmaker’s preference.” Nash, *supra* note 10, at 316. For more detailed discussions of this concept, see *id.* at 316–20 (presenting an overview of behavioral law and economics and its insights into framing effects); and Amos Tversky & Daniel Kahneman, *The*

This scholarship on norms is, for the purposes of this Note, complemented by the growing body of empirical behavioral research on the framing effects of money. In a wide variety of contexts, researchers have found that the introduction of economic incentives to encourage or discourage a type of conduct has produced the opposite result. For example, at a day care center, parents picked up their children later, rather than earlier, when a fine was imposed on coming late.⁴¹ And in communities facing the choice of whether to allow locally undesirable land uses, opposition increased when monetary incentives to accept the uses were provided.⁴² From this type of research, it has become well established that motivation may be negatively affected, or “crowded out,” when a previously nonmonetary relationship is transformed into an explicitly monetary one.⁴³

Of course, the scope of these studies is not directly on point for the question in this Note — for whereas the studies focus on monetary incentives’ effects on the people who receive them, the question here is about their effects on the people who provide them. But it is not clear that this difference is relevant. Whether it is depends on how the causal mechanism for crowding out is understood. Some scholars have argued that crowding out is caused by the payment’s psychological impairment of the self-determination or self-esteem of the recipient of the payment.⁴⁴ If this explanation is complete, the experimental results would not provide any reason to expect a change in the behavior of the person providing the payment.

However, if crowding out is not adequately explained by payment as such, as some scholars have suggested,⁴⁵ there is reason to expect

Framing of Decisions and the Psychology of Choice, 211 SCI. 453 (1981) (explaining framing effects and their significance to rational-choice theory).

⁴¹ See Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory*, 15 J. ECON. SURVEYS 589, 603–04 (2001).

⁴² See Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1 (2000).

⁴³ See Frey & Jegen, *supra* note 41 (surveying the literature on the crowding out effect). For an overview of the literature and some points of disagreement within it, see Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273, 321–28 (2004).

⁴⁴ One of the most developed accounts is Professor Bruno Frey’s psychological model of crowding out, which Benkler summarizes clearly:

A simple statement of this model is that individuals have intrinsic and extrinsic motivations. . . . Extrinsic motivations are said to “crowd out” intrinsic motivations because they (a) impair self-determination — that is, a person feels pressured by an external force, and therefore feels overjustified in maintaining her intrinsic motivation rather than complying with the will of the source of the extrinsic reward; or (b) impair self-esteem — they cause an individual to feel that his internal motivation is rejected, not valued, leading him to reduce his self-esteem and thus to reduce effort.

Benkler, *supra* note 43, at 323–24.

⁴⁵ *Id.* at 325 (“Frey’s psychologically based extrinsic-/intrinsic-motivation distinction is helpful, and the empirical evidence is powerful. The psychological construct does not, however, seem fully to account for motivation in social sharing frameworks.”).

changes in the motivation of the person providing the payment and others who become aware of these transactions. Framing effects, for example, would presumably work on both parties.⁴⁶ Further empirical work would be needed to test this hypothesis. But taking this possibility as a conceptual starting point, the following analysis will begin to explore ways in which the creation of a new market relationship — that of the voluntary carbon offset — may reshape the environmental ethic that motivates the decision to buy the offsets in the first instance.⁴⁷

III. THE MEANING OF VOLUNTARY OFFSETS AND THE PROBLEM OF WASTEFULNESS

This Part identifies three ways in which the emergence of the voluntary offset market threatens to reorient environmentalism. Section A looks at the principles that govern environmental consumption. It argues that in transforming the harm of environmental consumption — and by implication, the good of the environment — into something measured in carbon, the market facilitates consumption of natural resources that is governed not by virtue ethics, but rather by an ethic of efficient use. Section B looks at the mechanism by which environmental action is achieved. The argument here is that the market allows people to “do their part” without changing the way that they act, thereby displacing the idea that being an environmentalist involves embodying environmental values in a corporeal way. Section C looks at the conceptual framework in which environmental impacts are understood. It argues that when every unit of carbon costs the same, no emission — no matter how wasteful — counts very much, and thus that the market dissolves the qualitative distinctions between types of carbon emissions that underlie evaluations of virtuous character. In all three of these sections, a guiding concern is that the purchase of voluntary offsets derives from and engenders the increasingly prevalent attitude that doing so is a way of being “environmental.” The aim is to

⁴⁶ Even Frey, the main proponent of the psychological explanation, is sympathetic to the idea that framing plays a central role. See, e.g., Frey & Jegen, *supra* note 41, at 592 (suggesting that crowding out may be the result of changes in “the perceived nature of the performed task” or “the task-environment” (emphasis omitted)); see also Bruno S. Frey & Alois Stutzer, *Environmental Morale and Motivation* 14–16 (Univ. of Zurich, Inst. for Empirical Research in Econ., Working Paper No. 288, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=900370 (arguing that tradeable emissions rights and emissions taxes could create different crowding-out effects because of differences in their “expressive connotation,” *id.* at 15).

⁴⁷ Cf. DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* (20th anniversary ed. 1996) (arguing that capitalism and the culture it creates harbors the origins of its own collapse by creating a need among successful people for personal gratification — a need that corrodes the work ethic that originally led to their success).

identify the type of environmental ethics that will be fostered by the market, and the type that will be effaced.

A. Consumption: From Temperance to Efficient Use

This section explores the ways in which the carbon market may influence the type of ethic that governs the use of natural resources, shaping how people think about the problem of consumption and thus the good of the environment.⁴⁸ It argues that what is problematic about the market is not just that it provides a monetary cost for carbon, but also — and perhaps more fundamentally — that the market suggests that carbon should be the focus of ethical concern. Under the market framework, the “good of the environment” is conceptualized in purely consequentialist terms: carbon emissions avoided. In this way, the market facilitates consumption that is governed not by virtue, but rather by an ethic of efficient use.⁴⁹

Take, for example, an individual who wants to buy an environmentally friendly car. When guided by the norm of carbon neutrality that motivates the carbon market, the individual will inquire into the carbon emissions of his various options and find that an average passenger car in the United States emits 4.78 metric tons of carbon dioxide per year, while an average light truck emits 6.00 metric tons.⁵⁰ In addition, he will find that the average price of offsetting a metric ton is around seven or eight dollars,⁵¹ such that the cost of offsetting the carbon footprint of an SUV instead of a sedan is about nine dollars per year.

In this example, vehicles have been translated into carbon emissions with prices, and there are a few ways in which this translation might make the consumer more willing to purchase the vehicle with

⁴⁸ Consumption in this context can be conceptualized in two ways that are directly related: the consumption of the resource that produces the emissions, and the consumption of the ability of the atmosphere to process the emissions.

⁴⁹ This development parallels one in tort law, where the standard of negligence has shifted from being an evaluation of whether the act that caused the harm was ethically objectionable to being an evaluation of whether the act was economically efficient. See Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1802–11 (1997) (providing a brief overview of the corrective justice and economic efficiency views of tort law). For a more detailed exposition and analysis of the development of the dominant theories of tort law in the twentieth century, see generally John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003).

⁵⁰ ENVTL. PROT. AGENCY, OFFICE OF TRANSP. & AIR QUALITY, EMISSION FACTS: GREENHOUSE GAS EMISSIONS FROM A TYPICAL PASSENGER VEHICLE 6 (2005), available at <http://www.epa.gov/OMS/climate/420f05004.htm>.

⁵¹ The average price of carbon in the over-the-counter market in 2008 was \$7.34 per metric ton. HAMILTON ET AL., FORTIFYING THE FOUNDATION, *supra* note 2, at 7.

the greater carbon footprint.⁵² No matter which choice he makes, however, the standard story that an economist will tell is that the market has increased transparency and thereby efficient consumption. It has provided new information, as well as new options, allowing the consumer to recognize or satisfy his environmental preferences more completely.⁵³

When faced with this example, some environmentalists might conclude that what is objectionable about the carbon market is that it leads the SUV consumer to the “wrong” choice, undervaluing the good at stake by attaching only nine dollars to it. Environmental market advocates, however, point out that if the information provided by the market is accurate, it helps people who want to behave environmentally act in ways that minimize their emissions. Professors Michael Vandenbergh and Anne Steinemann, for example, note that studies show that people “tend to overemphasize the energy-reducing value of behaviors that have perceptible effects, such as turning off lights, and to discount behaviors that are less perceptible but have much greater effects on energy savings, such as improving the efficiency of heating and cooling systems.”⁵⁴ Insofar as this is a general problem caused by a lack of information about the relative impact of different activities, the existence of an offset market can help environmentally conscious individuals minimize their emissions in two ways. First, by providing information about the relative carbon costs of common activities, such as driving versus flying, it can offer guidance in prioritizing efforts. In addition, it allows people to use offsets — rather than changes in personal conduct, which can require complex information about relative consequences — to comply with their convictions. In either of these cases, advocates of the market suggest, the good of the environment is better served.

The problem with “transparency,” however, is that it can be transformative. While the economist’s information-oriented model is useful for some purposes, it obscures an important part of what has happened with marketization, for it assumes a stability of preferences and values from the pre- to post-market scenarios. The validity of this assumption, however, has been significantly challenged by social scien-

⁵² For example, the individual might decide that the cost of driving the SUV over the sedan is not as high as he had thought — that the enjoyment of driving the SUV is worth an extra nine dollars per year — and choose to buy the SUV and pay for this offset, thereby remaining “carbon neutral” (that is, with respect to the baseline of buying the sedan). Or he might conclude that the impact on the environment is not as high as he had imagined, and thus decide to buy the SUV without the offsets, without feeling any guilt.

⁵³ On this account, the consumers without a market are failing to act in accordance with their own environmental preferences or values by over- and under-correcting for their personal emissions.

⁵⁴ Vandenbergh & Steinemann, *supra* note 3, at 1725.

tists, who have found that preferences, values, and attitudes regarding particular issues are often dependent upon the context in which they are expressed. “Markets and other economic institutions do more than allocate goods and services: they also influence the evolution of values, tastes, and personalities.”⁵⁵ For example, a person may have one set of preferences arising from civic commitments when acting in a social or political context, but a different set of preferences — in tension with, or contradicting, the first — when acting in the market context.⁵⁶ Thus, marketization can bring about a significant change in the principles that govern an actor’s use of a good.

A frequently discussed study of “crowding out” at an Israeli day care center by Professors Uri Gneezy and Aldo Rustichini illustrates the point.⁵⁷ In this study, the center imposed a fine on parents who picked up their children late with the expectation that this would decrease late pickups; to their surprise, it caused an increase. The monetary value attached to the time seemingly indicated to the parents that this aspect of their relationship with those working at the center was one of contract, not of social duty. They understood the arrangement as providing a price, which allowed them to consume as much of the service as they desired.⁵⁸

In a significant sense, the creation of voluntary offsets for carbon emissions is analogous to the creation of fines at the day care center. In both, consumers are being given the opportunity to pay to do something that previously had social costs but no monetary costs associated with it. Although there are differences between the scenarios (most significantly, at the day care the costs were not optional), the day care study is nonetheless instructive, as it shows that the ability to pay to do something that previously had social costs can bring about a significant change in behavior. Under the market framework, the good that

⁵⁵ Samuel Bowles, *Endogenous Preferences: The Cultural Consequences of Markets and Other Economic Institutions*, 36 J. ECON. LITERATURE 75, 75 (1998); see also *id.* at 77 (“[E]conomic institutions are situations in the social psychological sense and thus have framing and other situation construal effects; people make different choices depending on whether the identical feasible set they face is generated by a market-like process or not . . .”).

⁵⁶ See Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1402–03 (1981); see also Mark Sagoff, *At the Shrine of Our Lady of Fatima or Why Political Questions Are Not All Economic*, 23 ARIZ. L. REV. 1283, 1286 (1981) (“I speed on the highway; yet I want the police to enforce laws against speeding. . . . I love my car; I hate the bus. Yet I vote for candidates who promise to tax gasoline to pay for public transportation. . . . I support almost any political cause that I think will defeat my consumer interests. This is because I have contempt for — although I act upon — those interests. I have an ‘Ecology Now’ sticker on a car that leaks oil everywhere it’s parked.”).

⁵⁷ See Gneezy & Rustichini, *supra* note 42.

⁵⁸ *Id.* at 13–14. For other possible explanations, see *id.* at 10–13. Notably, the subsequent removal of the fine did not bring back the norm. *Id.* at 15. The authors suggest that this might be explained by another social convention: “Once a commodity, always a commodity.” *Id.* at 16.

was once protected by a social norm — the time of day care center workers, or the environment — becomes seen as something that can be properly put to efficient use.

In addition, when one can comply with one's environmental obligations through the market, compliance — or the lack thereof — is evaluated in very different ethical terms than it is when one is governed by a substantive standard of conduct. Deliberation is no longer required — on the part of the actor or the community — to decide in the first instance whether an activity is reasonable.⁵⁹ The question of whether someone is behaving responsibly with respect to global warming can be reduced to the question of whether he or she is carbon neutral. In these ways, a market facilitates a thinning of the ethical vocabulary used for thinking about environmental obligations.⁶⁰

Thus, the fundamental problem with the carbon market is not, as some critics suggest, that it leads the SUV consumer to the wrong choice, providing information that *undervalues* the good of the environment.⁶¹ What both these critics and the market advocates who point to its informational functions fail to see is that the market *revalues* the environment, changing the terms in which the good of the environment is conceived. By transforming environmental harm — and by implication, environmental good — into something measured in carbon, the market fosters a purely consequentialist framework. Con-

⁵⁹ On this view, it would seem that a market may not be democracy-enhancing, as many advocates of regulatory markets suggest. See, e.g., Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171, 178–88 (1988) (arguing that, in the regulatory context, the shift from command and control to cap-and-trade will catalyze meaningful discussion by the public about the environment in which we want to live).

⁶⁰ Cf. JOHN H. EVANS, PLAYING GOD?: HUMAN GENETIC ENGINEERING AND THE RATIONALIZATION OF PUBLIC BIOETHICAL DEBATE (2002) (arguing that bioethics has become thin in recent decades, focused no longer on an inquiry into what ends are worth achieving, but rather on finding the most efficacious means of achieving assumed ends); Daniel Y. Elstein & Thomas Hurka, *From Thick to Thin: Two Moral Reduction Plans*, 39 CANADIAN J. PHIL. 515, 515–16 (2009) (“Many philosophers of the last century thought all moral judgments can be expressed using a few basic concepts — what are today called ‘thin’ moral concepts such as ‘good,’ ‘bad,’ ‘right,’ and ‘wrong.’ . . . In recent decades a contrary view has emerged According to its proponents, terms like ‘courageous’ and ‘kindly’ have both morally evaluative and descriptive meaning, but the two interpenetrate each other in a way that makes the separation a reductive analysis requires impossible. Thick concepts are therefore not derivative from thin ones On the contrary, on some versions of this anti-reductive view it is the thick concepts that are primary, with the thin ones mere abstractions from them.”). Advocates of carbon offsets seem to accept the idea that the norm of carbon neutrality is fairly thin, in that it requires only a minimal conception of the nature of the good life. See, e.g., Vandenberg & Steinemann, *supra* note 3, at 1721 (“Compliance with the carbon-neutrality norm does not require that individuals adopt other environmental beliefs, norms, or lifestyles that are inconsistent with their own.”).

⁶¹ Undervaluation is not inherent to the market framework, as the market may just as likely place a dollar value on an activity that is higher than expected or that “overvalues” the environment.

sumption of natural resources is governed not by temperance, but rather by an ethic of efficient use — by a calculation of whether an action is worth the carbon, or its offsetting monetary cost. Under this ethical framework, the good of acting virtuously in relation to the environment is no longer treated as part of the good of the environment.

B. Burdens: From Embodied to Outsourced Action

Environmentalism has long promoted the idea that everyone must do his or her part to help the environment. And historically, compliance with this norm has required a change in conduct — as in, for example, the waste reduction mandate, “reduce, reuse, recycle.” With the recent emergence of the norm of carbon neutrality and carbon markets, however, a new type of opportunity is presented: the possibility of “doing one’s part” without actually changing what one does. In this section, the normative significance of this shift from burdens of conduct to monetary burdens will be analyzed. To begin, a couple of simple hypotheticals are helpful.

Imagine, for example, that two individuals feel bound by environmental norms to reduce their personal carbon emissions by twenty percent, but that because of differences in the alternative sources of energy and travel available to them — differences for which they are not morally responsible — the cost of doing so means that one will end up paying \$50 per ton of carbon dioxide that he reduces, while the other will pay only \$10. In this case, a system that requires each individual to achieve his own reductions personally will have a disproportionate impact, causing one to pay five times as much as the other. A system that allows one party to buy offsets from the other, however, will reduce this disparity: if the cheapest cost avoider sells the offsets for cost, both parties will pay the same. On these grounds, one might conclude — along with market advocates — that it is the offset market, not the requirement of personal conduct, that fairly distributes any common environmental obligations that humans might have, and thus that a shift to the market-based system is normatively desirable.

This conclusion, however, deserves further analysis. For with collective burdens related to common goods, the cost of paying and the cost of acting are not always fungible — even if they are traded as such on a market. A second hypothetical helps illustrate this point.

Imagine two individuals facing the burden of providing the good of national security in a time of conscription. One is drafted, but would pay to avoid service; the other is not drafted, but would be willing to serve if paid. If the drafted soldier is allowed to pay the other to take his place, one might question whether he has done his part. This was the system in the Civil War, and in retrospect, many find it objectionable — not only because of its distributional effects, but also because of a sense that in a time of conscription, the legal duty to serve be-

comes an ethical duty as well.⁶² On this view, serving and paying are not equivalent.⁶³

Of course, it is debatable whether military or environmental duties should be considered, as a positive or normative matter, part of a special category for which monetary cost and burden of action are not equivalent.⁶⁴ But arriving at an answer to this question is not necessary here. What the military example is meant to illustrate is that a shift from one paradigm to the other (from a culture that requires action to one that allows payment) is an ethically significant event, involving a shift in the ethos of the culture. The point is that something important is at stake whenever societies develop new ways of complying with burdens demanded by the good of the commons, or the common good.

In the environmental context, the limit of conceptualizing collective responsibility in terms of monetary contribution is that doing so reframes people's normative orientation toward the problem of global warming. Motivated and justified by consequentialism, it invites people to subsidize the adoption of more carbon-efficient practices by others, rather than changing their own. The underlying norm of carbon neutrality effaces the virtue-oriented approach according to which being an environmentalist involves *embodying* environmental values in a corporeal way.

This is not to say that market action can never be a component of virtuous action. There are certainly situations in which it might. But the carbon market is very unlike other grassroots market solutions to environmental problems that one might argue foster environmental virtues. Buying organic food, for example, differs from buying offsets in two significant ways. First, the organic foods market is the primary nonlegislative way for a food consumer to incentivize a change in farmers' uses of pesticides, whereas the carbon offset consumer has direct control over the conduct to which he objects — his own. Second,

⁶² See generally GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 158–65 (1978) (discussing the history of American approaches to military service); JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 600–11 (1988) (providing an overview of the Civil War system of conscription).

⁶³ The view that embodied action and payment are not morally equivalent presumably prevails in other contexts as well. Take, for example, a debate about vegetarianism. The market logic would suggest that someone who feels compelled by vegetarian arguments could, rather than changing his own eating habits, pay someone else to change instead — that morally speaking, there would be no difference. It seems likely, however, that many people would disagree on the grounds that paying another and changing one's personal consumption are not equivalent.

⁶⁴ Some people would likely argue that military service is a type of action that can belong in a special category of civic duties that require all individuals to “do their part” by sharing equally in the burden of action — and that environmental duties do not or should not have this status. Others would respond that environmental protection, like national security, is about protecting a special form of common good and that similar types of social norms should protect both.

although the purchase of both organic foods and carbon offsets causes a positive environmental change in the conduct of the producer of the commodities, the consumer of organic goods has also changed his own environmentally problematic consumption, whereas the consumer of carbon offsets has not.

In sum, the norm of carbon neutrality and the offset market invite the view that the burden of reducing carbon emissions is not one that individuals need to carry themselves, but rather is something that can be distributed via the market.⁶⁵ By allowing for the equation of payment and action, the market displaces the idea that environmentalism calls on people to embody environmental values — to manifest their concern for wasteful consumption in their conduct.

*C. Emissions: From Wasteful Pollution
to Undifferentiated Carbon*

When one can use a carbon market to comply with all carbon emissions norms,⁶⁶ important distinctions between “types” of carbon emissions are dissolved. Uses of natural resources and impacts on the environment are conceptualized in terms of their carbon footprint, instead of their wastefulness. Emissions are no longer categorically differentiated into reasonable and unreasonable, or good and bad. And this is troubling, this section will argue, as these qualitative distinctions underlie important evaluations of environmental virtue.⁶⁷

To avoid begging the question with this introduction, however, it is important to start by clarifying whether it actually makes sense to qualitatively differentiate between types of carbon emissions. This issue has been the subject of much discussion in the scholarship on regulatory uses of offsets, where market advocates responding to the “right to pollute” critique have argued that carbon emissions cannot be meaningfully conceived as being qualitatively “bad.” The details of their argument are worth further examination.

As articulated by Professor Remy Nash, the basic argument is that because carbon dioxide emissions are an unavoidable consequence of

⁶⁵ Cf. Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 34 (“When we reconceptualize the use of common resources as individual property rights, we attenuate the moral rhetoric of contribution and trying harder for the common good.”).

⁶⁶ This is, of course, not the only way that a voluntary carbon market might function. For example, one can imagine a society in which it is agreed that only certain types of activities (such as those that are seen as reasonable) can be meaningfully offset — a society in which, for example, the owner of a mega-yacht cannot comply with environmental norms merely by buying offsets for it. In the interest of clarifying the core market case, however, this section will explore the environmental significance of a society in which there are no such limitations.

⁶⁷ Note that categorical prohibitions do have a place in virtue ethics. See sources cited *supra* note 22.

beneficial economic activity, and are in fact necessary for life, the purchase of carbon offsets is ethically distinct from purchasing the right to do something that is inherently harmful.⁶⁸ Unlike in the toxic pollution context, the purpose of limiting carbon emissions is one of allocating a scarce resource — the ability of the atmosphere to process emissions — not one of penalizing inherently wrongful acts. In addition, Nash argues, markets are not unique in creating pollution rights: any environmental norm or rule that does not prohibit all pollution implicitly licenses a “right to pollute” — and it is, moreover, those systems that impose categorical limits that often allow some pollution “for free.”⁶⁹ Nash suggests, finally, that the failure to recognize these facts is due to a framing effect. Because “a marketable permit system gives rise to a ‘disconnect’ between the pollution emissions and the beneficial activity,” it is easy to see the emissions as inherently harmful, when in fact they are not.⁷⁰

The market advocates’ diagnosis of the “right to pollute” argument is helpful when thinking about voluntary markets, as it clarifies the problem in thinking that carbon offsets license inherently harmful activity. However, the diagnosis does not — as Nash suggests — support the conclusion that no carbon-emitting activity can be coherently opposed in categorical terms. Rather, what this argument implicitly indicates is that people commonly differentiate between the types of be-

⁶⁸ Nash, *supra* note 10, at 360–61 (“Pollution is a necessary byproduct of many beneficial activities and services; racial discrimination and murder simply are not. Thus, while it is appropriate fully to condemn racial discrimination and murder, the same is not true of pollution.” (footnotes omitted)); *see also, e.g.*, Huffman, *supra* note 11, at 432–33 (“Most environmental groups have opposed the tradeable emissions approach, generally on the ground that no one should have a right to pollute. . . . These moral arguments lead inexorably to the implausible case for zero pollution. In a world of organic and inorganic processes, with or without humans, zero pollution is neither possible nor desirable.”); Rose, *supra* note 65, at 7 (“Most people are willing to put up with some level of air pollution, because we think we need to do so for our transportation and electricity, among other things, which in themselves may be more important to our health and well-being than the next increment of clean air.”); Richard B. Stewart, *Economic Incentives for Environmental Protection: Opportunities and Obstacles*, in ENVIRONMENTAL LAW, THE ECONOMY, AND SUSTAINABLE DEVELOPMENT 171, 199 (Richard L. Revesz et al. eds., 2000) (“The discharge within proper limits of residuals from socially productive activities . . . can by no means be equated with sin or murder or racial discrimination. The laws of physics make such residuals an inevitable consequence of human activity. Zero residuals discharge is an unattainable and undesirable objective.”). As Professor Nash notes, however, “even if the eradication of pollution is not itself viable, it can be identified — and indeed is identified in various pollution control statutes — as a societal aspiration.” Nash, *supra* note 10, at 340 n.105; *see also* Clean Water Act § 101(a)(1), 33 U.S.C. § 1251(a)(1) (2006) (“[I]t is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985 . . .”).

⁶⁹ *See* Nash, *supra* note 10, at 334–43; *see also* Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 724 (1999) (noting that “it is conduct rules and fixed quantity rules, ironically, that truly license a right to pollute for free”).

⁷⁰ Nash, *supra* note 10, at 361.

havior underlying emissions: those that are judged to be acceptable, and those that are objectionable.⁷¹

While Nash is right to suggest that the market creates a “disconnect” between emissions and benefits, he inaccurately suggests that the disconnect is merely one of framing. It is, rather, substantive. Whereas moral or legal prohibitions against certain types of pollution-causing conduct condemn the conduct on the basis of social evaluations of its inadequate benefits, the standard carbon market allows one to buy offsets for an activity irrespective of whether the activity would be regarded as sufficiently beneficial to merit the pollution.

Thus, while the “right to pollute” argument, as traditionally formulated, has little applicability to carbon emissions in general, it is a mistake to conclude on this basis that categorical norms have no coherent place in this context. Understanding environmentalism as encompassing the virtue of avoiding wastefulness helps clarify what the “right to pollute” critique of markets, as well as responses to this critique, miss. They both fail to recognize that although not all carbon emissions are objectionable, those reflecting wastefulness may be. Insofar as people meaningfully differentiate between emissions — and in creating these categories, identify some as categorically wasteful — what is potentially transformative about carbon markets is the fact that they ignore, and thus might obscure, this line.

Owning a mega-yacht, for example, is only problematic under the market framework if one does not pay to offset its carbon emissions. In this way, the market transforms a categorical obligation into a conditional one. And while it is arguable that this feature of the market is unremarkable, in that all norms and legal prohibitions can be treated as conditional — the fine or jail sentence with which the violation of a law is punished, for example, can always be seen as a price — a society will generally agree that doing so is morally acceptable in some cases, but not in others.⁷² And in the latter cases, paying is not the same as complying.⁷³ Thus, when a prohibition shifts from being a

⁷¹ Cf. *id.* (“The appropriateness of a pollution emission can . . . be judged in light of the benefit that results from the activity that produces the pollution as a byproduct.”).

⁷² In some cases, there will be disagreement. For example, while the law and economics literature often suggests that a tort is a mere price, there have been some objections to this theory on the grounds that the tortfeasor is being permitted to “steal” or condemn the other’s entitlement. See generally, e.g., Daniel A. Farber, *Reassessing Boomer: Justice, Efficiency, and Nuisance Law*, in PROPERTY LAW AND LEGAL EDUCATION 7 (Peter Hay & Michael H. Hoeflich eds., 1988) (arguing that victims of egregious nuisances “should be presumptively entitled to an injunction,” *id.* at 8); see also Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 YALE L.J. 2149, 2165 n.48 (1997).

⁷³ Cf. Saul Levmore, *Norms as Supplements*, 86 VA. L. REV. 1989 (2000) (arguing that “norms help us to know whether to regard legal rules and sanctions as mere prices or as something to be followed even where we are willing to pay the stated, legal price associated with a violation,” *id.*

categorical to a conditional one, it is a normatively significant cultural shift.⁷⁴

A proponent of offsets might respond that the market framework actually enriches thinking about the problem of carbon emissions — that it fosters the idea that all emissions have a cost, and in this way facilitates greater environmental consciousness.⁷⁵ But this possibility, while certainly real, does not speak to the concerns raised in this section. The point here is that insofar as emissions are not all equally objectionable, there are costs that may not be captured, but rather lost, in the carbon market system. For when every unit of emissions is offset with an identical financial cost, no unit — no matter how wasteful the cause — counts or matters very much.⁷⁶

IV. CONCLUSION

From the perspective of economists, it might seem that money is nothing other than stored value, and thus that no value can be lost through associating goods — or costs — with money. This Note has suggested that this is not the case. The trouble with using a market to effectuate environmental goals is not just that it might be difficult to attach a dollar value to the environmental good, but rather that there are some values that fungible units of money are incapable of storing — social values that are lost when one tries to do so.

This argument is not predicated on the assumption that framing effects of markets are psychologically hardwired, but it does assume that

at 1990); see also Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1524–31 (1984) (discussing the different functions of prices and sanctions).

⁷⁴ In the criminal law context, for example, Professor Dan Kahan has argued that we should reject proposals to replace imprisonment with more cheaply administered sanctions, such as fines, because it is easy to see a fine as a mere price, which fails to condemn the activity sufficiently — an important goal according to both deterrent and retributive theories of punishment. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996). Thus, he argues, the government should combine fines with prison sentences, which stigmatize the action in a way that causes internalization of the categorical prohibition. *Id.* at 650–51; see also Lessig, *Social Meaning and Social Norms*, *supra* note 35, at 2188 (“By tying the fine to some other unambiguously condemnatory punishment, one reduces on the margin the ambiguity in fining . . .”).

⁷⁵ This is an argument that has been widely advanced in the regulatory context. See, e.g., Stewart, *supra* note 68, at 198 (“[C]ommand-and-control regulation does not stigmatize or send any negative signal with respect to the residuals that are permitted by command standards. By contrast, [economic incentive systems] impose an economic cost on all residuals, reminding sources that any level of residuals may impose social costs.”); Wiener, *supra* note 69, at 724 (“Taxes and tradeable allowances, by contrast, force the polluter to *pay* for every unit of emissions . . .”). Regarding voluntary offsets, it has been argued that individuals who mitigate their contribution to social harms expect reciprocity from others, including the government. See, e.g., Vandenbergh & Steinemann, *supra* note 3, at 1723.

⁷⁶ This is not to say that under the market, no unit can have a high value. Rather, the point is that no unit matters very much relative to any other. There is no differentiation of types of emission units, and in this sense, none has particular significance. All units are fungible.

they are deeply connected to cultural forms of life.⁷⁷ Members of a culture see some costs as a price and others as a sign of a prohibition, and do not have the option of seeing them otherwise. This is why someone contemplating murder would be “mistaken,” not just immoral, if he were to see the prison sentence for murder as a price that he needed to pay in order to get what he wanted. He would have failed to understand what the cost actually was.⁷⁸

The point of the carbon market is to allow one to become carbon-neutral — absolutely, or with respect to some baseline. But this goal does not, at least in and of itself, impose any particular substantive burdens on the way in which the individual relates to the environment. One can achieve carbon neutrality despite living a life of excessive consumption; it does not matter if one is offsetting the minimal carbon produced by a hybrid car, or the substantial carbon produced by a private plane. In this way, the carbon market obscures the idea that the environmental ethic against wastefulness is not just about outcomes, but about an ethos — a type of character.

What constitutes the “good of the environment” is value that resides not only in the environment as such, but also in human actors — and not merely in the utility that we derive from our uses of the environment, but also in a good that originates in us through the ways that we treat the world. In short, the good of the environment is in part constituted by the good of human virtues. And this good, traditionally

⁷⁷ Cf. Benkler, *supra* note 43, at 324 (noting that the crowding out effect seems to arise from a “culturally contingent notion of what one ‘ought’ to do if one is a well-adjusted human being and member of a decent society”).

⁷⁸ Cf. HART, *supra* note 15, at 88–91 (distinguishing between the internal and external view of social rules). Professor H.L.A. Hart explains:

What the external point of view, which limits itself to the observable regularities of behaviour, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society. . . . For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility.

Id. at 90. On community and reason, Professor Stanley Cavell writes:

The philosophical appeal to what we say, and the search for our criteria on the basis of which we say what we say, are claims to community. And the claim to community is always a search for the basis upon which it can or has been established. I have nothing more to go on than my conviction, my sense that I make sense. It may prove to be the case that I am wrong, that my conviction isolates me, from all others, from myself. That will not be the same as a discovery that I am dogmatic or egomaniacal. The wish and search for community are the wish and search for reason.

STANLEY CAVELL, *THE CLAIM OF REASON* 20 (1979).

protected by environmentalism, is at odds with the goal of carbon neutrality that drives the carbon market. For while the carbon market may lead to a decrease in aggregate carbon emissions, it will do so only by undermining the very idea of wastefulness. The good of the commons is, in other words, constituted by uncommon goods. Thus, a carbon market is not a mere tool that allows for the exercise of pre-existing environmental commitments, but rather is an institution that will often reorient the ethic that motivated these commitments in the first instance.