



THE OFFICIAL PUBLICATION OF THE NEW YORK STATE BAR ASSOCIATION'S COMMITTEE ON ANIMALS AND THE LAW

From the Chair

The Committee on Animals and the Law is a resource for NYSBA members and the public about non-human, animal-related legal matters and associated humane considerations. Among the activities of the group, Committee members: (a) monitor and provide comment on relevant legislation and policy-making decisions at various levels of government; (b) offer continuing legal education as well as programs for the lay public on animal law; (c) compile and provide information and resources on animal law and other associated humane considerations to the public; (d) respond to requests for information from the public and attorneys related to animal law issues; and (e) encourage law student interest in animal law by various means including sponsoring a legal writing competition for law students.

I had the great honor of serving as the Chairperson of the Committee for the past three years. During my tenure, I have had the opportunity to learn and grow with like-minded individuals whose purpose is to volunteer their time to further education, awareness, and advocacy of animal-related legal matters.

While serving on this Committee, I had the fortune of watching the proliferation of similar groups throughout the

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“LIFE IS LIFE’S GREATEST GIFT. GUARD THE LIFE OF ANOTHER CREATURE AS YOU WOULD YOUR OWN BECAUSE IT IS YOUR OWN. ON LIFE’S SCALE OF VALUES, THE SMALLEST IS NO LESS PRECIOUS TO THE CREATURE WHO OWNS IT THAN THE LARGEST.” - Lloyd Biggle Jr.

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country. Thankfully, the NYSBA has been on the cutting edge of this all-important and ever-growing area of the law. The Committee was created in 2002 by the then President of the Association, the late Lorraine Power Tharp. Ms. Tharp clearly had the intuition that animal law would increasingly play a more prominent role within the State's legal system. She was certainly a visionary because, in the 15 years since the Committee was created, animal law has exploded within New York State and around the country. In the early 2000s, there were only a few law schools in the country offering courses in animal law. Today, more than 150 law schools offer animal law courses. While animal law in its own right is an area of law that draws interest because of people's commitment to animals, it is also one of the most unique areas of law because it provides its students an opportunity to fuse many different areas of law together: contract, criminal, tort, real estate, trusts and estates, just to name a few.

Laws & Paws is the Committee's official publication and it provides practitioners, experts and law students an opportunity to introduce us to issues that are on the forefront of animal law. In this issue, our contributors provided articles on such topics as: elephants in captivity, shark conservation, pet theft, and humane education in schools.

I want to applaud the efforts of the Publications Subcommittee, the contributors, and the NYSBA and its staff in all the work, effort, and assistance putting this volume of Laws & Paws together. We hope that you enjoy reading the works of our contributors. We aim to provide information that hopefully opens people's eyes, minds, and hearts to animal-related legal issues with the goal of prompting compassion, action, and change. The Committee will continue to educate and advocate on behalf of animals in an effort to make their world a better place because in turn they make ours a better place. Thanks for reading.

Best, Natalie A. Carraway, Esq. Chairperson

How to enter the 2017 Committee on Animals and the Law Student Writing Competition

The Committee on Animals and the Law of the New York State Bar Association is very pleased to announce the Ninth Annual Student Writing Competition. The deadline for submission is **July 14, 2017**.

The Committee on Animals and the Law was established to provide information resources for the New York State Bar Association's members and the public about non-human, animal-related humane issues, which arise from and have an effect upon our legal system. This competition seeks to foster legal scholarship among law students in the area of animals and the law. This competition provides law students with an incentive and opportunity to learn more about this area of law.

Law students (which include J.D., L.L.M., Ph.D., and S.J.D. candidates) are invited to submit to the Committee on Animals and the Law an article concerning any area of Animal Law. All submissions will be reviewed by a panel of attorneys and other professionals practicing or otherwise involved in animal law. The winner will be chosen in accordance with the competition rules. The first place winner will receive \$1,000 and a certificate of achievement. The second place winner will receive \$500 and a certificate of achievement.

Format: One hard copy of the written submission and one electronic copy in Microsoft Word format on a disk or CD must be submitted by mail, **postmarked no later than July 14, 2017**, and addressed to:

Eva Valentin-Espinal,
NYSBA Staff Liaison
Committee on Animals and the Law
New York State Bar Association
One Elk Street
Albany, NY 12207

Committee on Animals and the Law 2017 Annual Meeting

On January 25, 2017 the Committee on Animals and the Law held its annual CLE program "Practicing Animal Law: What Every Attorney Needs To Know About How Laws Impact The Animals in Our Homes and Lives." The program, presented by experts in their fields, offered a practical discussion of laws relating to animals. Topics discussed included planning for an animal's care after the owner's death or incapacity; conflict resolution with respect to animal custody upon dissolution of relationships; and laws that focus on service and emotional support animals.



The Student Writing Competition

This issue of *Laws and Paws* includes the 2016 Student Writing winning articles, First Place: *Giant Injustice: The Illegality of Elephants in Captivity*, by Laura Beth Jackson and Second Place: *Fearsome and Fragile: The Paradox Challenging Shark Conservation Law*, by Erin Brady.

Natalie A. Carraway, Esq., Committee Chairperson
Amy Pontillo, Esq., Committee Vice Chairperson
Kirk Passamonti, Esq., Publications Subcommittee Chairperson
Charis Nick-Torok, Esq., Secretary

Giant Injustice:
The Illegality of Elephants in Captivity

Laura Beth Jackson
Emory University
School of Law
Class of 2016

GIANT INJUSTICE: THE ILLEGALITY OF ELEPHANTS IN CAPTIVITY

I. INTRODUCTION

“Perhaps the most important lesson I learned is that there are no walls between humans and elephants except those that we put up ourselves, and that until we allow not only elephants, but all living creatures their place in the sun, we can never be whole ourselves.”¹

Lawrence Anthony was a world-renowned conservationist, environmentalist, explorer and author who founded Thula Thula, an enormous game reserve in Zululand, South Africa.² He engaged in bold animal conservation initiatives such as the rescue of animals at the Baghdad Zoo during the 2003 invasion of Iraq,³ and eventually, at Thula Thula, took in a herd of rogue elephants that were slated to be culled.⁴ Years later, upon Mr. Anthony’s death in 2012, the herd of 20 elephants made a 12-mile journey from their habitat to Mr. Anthony’s house on the edge of the reserve.⁵ Mr. Anthony’s son, Jason, said the elephants had not visited the compound for a year and a half – but they arrived shortly after Mr. Anthony’s death and stayed for two days.⁶ This “vigil” was their way of saying goodbye to the man that saved them.⁷

Modern African elephants are the largest land mammals on the planet.⁸ According to scientists, elephants are “just as brilliant as they are big,”⁹ and the elephant as a species is no-

¹ Lawrence Anthony & Graham Spence, *The Elephant Whisperer: My Life With the Herd in the African Wild*, St. Martin’s Griffin, (Reprint Edition May 2012).

² Robert Stokes, *The Grief of Elephants*, Conn. Post, August 10, 2012, <http://www.ctpost.com/opinion/article/The-grief-of-elephants-3778603.php>.

³ *Id.*

⁴ See Anthony, *supra* note 1.

⁵ See Stokes, *supra* note 2.

⁶ *Elephants Who Appeared to Mourn Their Human Friend Remain Protected*, CBC.com, July 25, 2012, <http://www.cbc.ca/strombo/news/saying-goodbye-elephants-hold-apparent-vigil-to-mourn-their-human-friend.ht>

⁷ See Stokes, *supra* note 2.

⁸ Lisa Kane, *A Case Study of African Elephants’ Journey from Swaziland to US Zoos in 2003: A Question of Commerce and a Tale of Brinkmanship*, 6 J. Animal L. 51, 53 (May 2010).

⁹ Ferris Jabr, *The Science Is In: Elephants Are Even Smarter Than We Realized*, Scientific American, February 26, 2014, <http://www.scientificamerican.com/article/the-science-is-in-elephants-are-even-smarter-than-we-realized-video/>

doubt highly intelligent, belonging to the small, elite group of “self-aware” species of animals that includes only humans, cetaceans, and non-human primates.¹⁰ Both humans and elephants infiltrated African forests and savannas at the same time, subsequently emigrating to Europe and Asia.¹¹ Both species kept evolving into complex societies and both developed communication systems and increased brain sizes.¹²

Elephants were around long before human beings, and they survived and evolved *despite* the challenges they faced from increased human populations. The current elephant species’ populations did not start to seriously decline in numbers until the last 500 years,¹³ with the main reasons being habitat loss and ivory poaching – both problems caused by humans.¹⁴ The African elephant population was estimated at approximately 26 million in the 1500s.¹⁵ By 1989, the population was down to a bare 600,000.¹⁶

Elephants in the United States

The phenomenon of shrinking populations is nothing new, and neither is the conservationist movement in the United States.¹⁷ The United States responded to shrinking wildlife populations with the Endangered Species Act (“ESA”) of 1973, the “most comprehensive legislation for the preservation of endangered species ever enacted.”¹⁸ The ESA

¹⁰ Interview: All Things Considered with Robert Siegel, interview with Joshua Plotnik, *Elephants Have a Concept of Self, Study Suggests*, NPR Research News, October 31, 2006, <http://www.npr.org/templates/transcript/transcript.php?storyId=6412620>

¹¹ Jabr, *supra* note 11.

¹² *Id.*

¹³ *Key Milestones in Elephant Conservation*, Great Elephant Census (last visited April 9, 2016), <http://www.greatelephantcensus.com/background-on-conservation/>

¹⁴ *Threats to African Elephants*, World Wildlife Fund (Last visited April 9, 2016)

http://wwf.panda.org/what_we_do/endangered_species/elephants/african_elephants/afelephants_threats/

¹⁵ Great Elephant Census, *supra* note 16.

¹⁶ *Id.*

¹⁷ Shannon Petersen, Comment, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 *Envtl. L.* 463, 467 (1999)

¹⁸ *See Id.*, at 464.

provides for the listing of endangered and threatened species by the Secretaries of the Interior and Commerce, and subsequent laws and regulations protecting those species.¹⁹ In Part II, this paper will focus primarily on the fact that zoo captivity of the elephant species is immoral. In Part III, I will discuss how captivity violates the ESA, because the inherently harmful conditions to which elephants are subjected in captivity constitutes a prohibited “taking” under the Act. In Part IV, I will discuss why the same institutions violate the Animal Welfare Act (“AWA”), a more detailed set of laws that governs the treatment of animals under human control. Finally, in Part V, I propose three actions that should be taken to address the plight of currently captive elephants. The first suggestion is to relocate current zoo elephants to certified sanctuaries in the U.S., Africa, and Asia. The second is to increase the funding and implementation of the African and Asian Elephant Conservation Acts. The third suggestion is to bring suits on the elephants’ behalf first, pursuant to the ESA, and second, by filing writs of *habeas corpus*.

II. MORAL OBLIGATIONS TO ELEPHANTS

A writer in Los Angeles described visiting the zoo as a “rite of passage.”²⁰ He was worried that closing the elephant exhibit at the L.A. Zoo – an exhibit comprised of only 0.57 acres – would negatively impact his children’s ability to have that same rite of passage.²¹ The only elephant left at the zoo, Billy, suffered from infections, premature aging, and a head tic caused by extreme duress.²² Regardless, the writer described the zoo as “a window into the larger

¹⁹ *Id.*, at 464-65.

²⁰ Hector Tobar, *Zoo without elephant would be a loss for the children of L.A.*, LA Times, Dec. 9 2008, <http://www.latimes.com/local/la-me-tobar9-2008dec09-story.html>.

²¹ *Id.*

²² Lori Marino, Gay Bradshaw & Randy Malamud, *Zoos without elephants: A lesson in compassion*, LA Times, Dec. 15, 2008, <http://www.latimes.com/opinion/la-ow-marino15-2008dec15-story.html>.

world we want our children to know,” and protested the zoo closing even though he admitted that a sanctuary “probably would have been better for Billy.”²³

Zoos all over the United States are in this same ethical dilemma. In 2005, the Detroit Zoo became the first zoo to close its elephant exhibit on purely ethical grounds.²⁴ Speaking on the decision, zoo director Ron Kagan stated that life in captivity causes physical and psychological problems for elephants; he cited boredom, stress, and chronic health problems as significant factors.²⁵ He also said that zoo visitors expect the animals they view to “have a good life,” and the zoo simply could not provide that for its two elephants.²⁶ The idea that zoo visitors want to see the animals having a good life speaks to our inherent ideals of humanity, but contradicts the idea of the father in Los Angeles who wanted the lone elephant to stay locked up.²⁷ Finally, Mr. Kagan said that elephants “are the only animals at the zoo for which there is a great disparity between what they need and what we can provide. In the future, there may very well be more species that we’ll look back and say, ‘We just didn’t understand.’”²⁸

If we take Billy and the writer as a small representation of the larger ethical dilemma of zoos, how do we balance their competing interests? On one hand, parents of children may want their children to be able to see a live elephant, like the parents were able to do when they were children. On the other hand, zoo elephants suffer – continuously and tremendously. As humans, we have laws that protect our fundamental right to bodily liberty, or to be free from suffering.

²³ See Tobar, *supra* note 22.

²⁴ *Detroit Zoo to Send Elephants to Refuge*, USA Today, May 20, 2004, http://usatoday30.usatoday.com/news/nation/2004-05-20-detroit-zoo-elephants_x.htm#.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Tobar, *supra* note 22.

²⁸ *Id.*

And, it goes without saying that animals can suffer. They clearly do. Why are their interests not covered under the law? How are we supposed to think about animals in that context?

Peter Singer’s utilitarian “equal consideration of interests” theory sheds some light on the gap in our thinking about animal rights.²⁹ The main premise of this theory is equality.³⁰ Singer suggests that any assessment of whether an act should take place should consider the interests of all of those affected by the action, weighing these interests equally.³¹ To be entitled to equal consideration of one’s interests, one must have the ability to suffer.³² Applying this theory to animals, Singer says that the interests that non-human animals have in not suffering outweigh the many marginal interests of their use for human benefit.³³

We know that animals have the ability to suffer. Elephants not only feel physical pain, but they experience emotional trauma as well.³⁴ Gay Bradshaw is a well-published psychologist that studies elephant neuroscience at Oregon State University.³⁵ Her research has highlighted the similarities between human and elephant brains. Bradshaw says “elephants are suffering and behaving in the same ways that we recognize in ourselves as a result of violence,” and that “it is entirely congruent with what we know about humans and other mammals.”³⁶ For example, elephants mourn their dead – and not only dead members of their herd. Elephants will cover exposed carcasses or bones of an unrelated elephant that the herd passes in the wild, and will

²⁹ Peter Singer, *Animal Liberation* 2-20, HarperCollins, Updated Ed. 2009 (1973)

³⁰ David A. Fennell, *Tourism, Animals and Utilitarianism*, *Tourism Recreation Research* Vol. 37(3) 239-249, *Tourism and Animal Ethics Series – II*, 2012.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ G.A. Bradshaw & Lorin Lindner, *Post-Traumatic Stress and Elephants in Captivity*, Elephants.com, http://www.elephants.com/joanna/Bradshaw&Lindner_PTSD-rev.pdf.

³⁵ Seibert, *supra* note 15.

³⁶ *Id.*

hang around longer at these sites than they will at, say, a rhinoceros carcass or pile of bones.³⁷ Further, animal behaviorists have identified the behaviors that elephants exhibit when they are experiencing emotional or psychological trauma. Similar to a human pacing in a jail cell, elephants in small enclosures sway back and forth, bob their heads, and gnaw on metal bars.³⁸ These behaviors are not exhibited in the wild.³⁹

“Zoos are, first and foremost, for people, not animals.”⁴⁰

The problem with the L.A. writer’s balancing of his children’s interests against Billy the elephant’s interests is that it is not equal. The writer was speaking from his own perspective and failed to take into account that of the elephant. Billy was clearly suffering emotional and physical harm in the zoo. This is a result of captivity that the writer’s children *would not suffer* were Billy to be released. Sure, they may be disappointed, but the point is that the absence of an elephant from a zoo does not cause the zoo-goer physical harm. The marginal annoyance that the zoo-goer will suffer pales in comparison to the negative quality of life an elephant is constantly experiencing in a zoo exhibit.

In fact, the writer acknowledges that when he says that a sanctuary “would probably be better for Billy.”⁴¹ What the writer in this analysis suffers from is “speciesism,” meaning the writer gives greater weight to the interests of members of his own species (here, his children) when there is a clash between their interests and the interests of members of another species

³⁷ Jabr, *supra* note 11.

³⁸ See Bradshaw & Lindner, *supra* note 49.

³⁹ *Id.*

⁴⁰ Laura Smith, *Zoos Drive Animals Crazy*, Slate.com, June 20, 2014, http://www.slate.com/blogs/wild_things/2014/06/20/animal_madness_zoochosis_stereotypic_behavior_and_problems_with_zoos.html

⁴¹ See Tobar, *supra* note 22.

(here, the elephant species).⁴² So, if elephants must endure pain and suffering in a zoo, and if the interests of humans in simply observing the elephants in zoos arbitrarily take precedence over the interests of the animals – as they do in the writer’s mind – zoos should then be considered immoral according to Singer’s theory.⁴³

“It would be comforting to believe that they [animals in zoos] are happy there, delighted to receive medical care and grateful to be sure of their next meal. Unfortunately, ... there is no evidence to suppose that they are.”⁴⁴

By arbitrarily considering human interests as weightier than animal interests when it comes to zoos, we are serving to “sustain the legacy of human domination over animals via the zoo.”⁴⁵ Sure, we can improve the zoo animals’ welfare – increasing cage size and so on – but that is simply not enough when balancing interests.⁴⁶

The question remains, then, *why should we care?* What if the ability to suffer is not enough for moral consideration? One answer is a question of our humanity – How can we be justified in ignoring the pain of another being?⁴⁷ Given the body of science that has emerged regarding the complexity of elephant emotions, their pain is hard to ignore. Ethologist Marc Bekoff, co-founder with primatologist Jane Goodall of Ethologists for the Ethical Treatment of Animals, points out that, “not unlike humans, animal sentience has a dark side.”⁴⁸ He says that elephants, as well as great apes and other animals, suffer from mood and anxiety disorders when

⁴² See Singer, *Practical Ethics*, *supra* note 47.

⁴³ See Fennell, *supra* note 43.

⁴⁴ *Id.*, quoting Masson & McCarthy, *When Elephants Weep: The Emotional Lives of Animals*, New York. Delta. (1995)

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*, quoting Matheny, *Utilitarianism and Animals*, in Singer, *In Defense of Animals: The Second Wave*, Oxford, (2006)

⁴⁸ Maureen Nitra, *Animals Are Persons, Too*, Earth Island Journal, http://www.earthisland.org/journal/index.php/eij/article/animals_are_persons_too/.

faced with adversity.⁴⁹ Captive animals, harmed by their situations, engage in such behaviors as self-mutilation, repetitive rocking, ceaseless pacing, and loss of appetite.⁵⁰ Indeed, many elephants have died in American zoos due to complications from loss of appetite, and weakness that manifested itself in the elephants' being unable to stand.⁵¹ We, as observant and, hopefully, empathic human beings, should not need laws to spell out for us when an animal is suffering.

Lawrence Anthony described what he learned while rehabilitating the African elephant herd: that all life forms are important to each other in our common quest for happiness and survival, and that there is more to life than just yourself, your own family, or your own kind.⁵² As a species, humans are often unable to take into account the interests of those least like us. With elephants, however, that should not be so difficult, because they are actually a lot like us. That concept is easy to forget, though, and when human moral convictions fail to protect animals, the law should intervene.

III. ZOO CONFINEMENT OF ELEPHANTS VIOLATES THE ENDANGERED SPECIES ACT

Overview

In response to declining wildlife populations, the ESA contains vast protections designed to save certain species from extinction.⁵³ Section 9(a)(1)(B) prohibits the “taking” of a species listed as endangered or threatened by the Secretary.⁵⁴ A “taking” is defined in Section 3(19) of the Act as any action that intends to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture,

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Elephant Deaths at Facilities Accredited by the Association of Zoos and Aquariums (AZA)*, Peta.org, visited April 9, 2016, <http://www.peta.org/issues/animals-in-entertainment/zoos/elephant-deaths/>.

⁵² See Anthony, *The Elephant Whisperer*, *supra* note 1.

⁵³ See Petersen, 29 *Envtl. L.* at 464.

⁵⁴ *Babbitt v. Sweet Home Ch. of Comtys. for a Great Or.*, 515 U.S. 687, 687 (1997).

or collect,” or attempt to engage in any of those actions.⁵⁵ The term “harm,” specifically as it is included in the definition of “take,” is defined at 50 CFR Section 17.3 as “an act which actually kills or injures wildlife,” even including habitat modification.⁵⁶ “Harass” is defined as “an intentional or negligent act or omission” creating the “likelihood of injury to wildlife” such that it will disrupt normal behavioral patterns.⁵⁷

Because elephants are listed by the Secretary as endangered (the Asian Elephant) and threatened (the African Elephant), zoos operate under “Section 10” permits to import elephants for captivity.⁵⁸ This provision does not cover animals *born* in captivity. Section 10 of the Act allows the Secretary to authorize these imports, which are otherwise prohibited by Section 9, where the Secretary determines the import will “enhance the propagation or survival” of the species in question.⁵⁹ However, once the elephants are in captivity, they are still covered by the Act’s prohibitions on takings.⁶⁰ Permitting zoos to house elephants violates the Act because it constitutes a “taking” under Section 9 that cannot be authorized by FWS, since zoos do nothing to enhance the survival of the elephant species.

Unsurprisingly given the broad interpretation of the Act, the term “take” is not limited to direct applications of force against a protected species.⁶¹ The Supreme Court has held that the term “take” should be interpreted as broadly as possible to protect endangered species.⁶² Zoos that house elephants harm them in many ways, the most significant being causing severe foot

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 50 C.F.R. 17.3 (West 2016)

⁵⁸ Anne Haas, Comment, *Interpreting “Enhancement of Survival” In Granting Section 10 Endangered Species Act Exemptions to Animal Exhibitors*, 32 Pace Env’tl. L. Rev. 956, 956 (2015).

⁵⁹ See Haas, *supra*, citing § 1539(a)(1)(A) of the Endangered Species Act, 7 U.S.C. § 1539 (West 2015).

⁶⁰ 80 Fed. Reg. 7380, 7385 (Feb. 10, 2015) (captive members of a listed species are also subject to the relevant provision of section 9 of the ESA as warranted).

⁶¹ *Babbitt*, 515 U.S. at 697.

⁶² See *Babbitt*, generally.

injuries to the elephants that often result in their euthanasia.⁶³ Zoos harass elephants as well, the most significant example being the psychological harm elephants experience in captivity as a result of poor social structures, boredom, and too little space.⁶⁴

Zoo Captivity Harms Elephants

Elephants are severely harmed in zoos because of the inevitable foot problems they experience there for two reasons: first, being forced to stand on hard surfaces causes the elephants pain and irreversible damage to their feet; and second, zoos are inherently unable to give elephants enough physical room to walk, which prevents their blood to flow from their feet and causes severe health problems.⁶⁵

Hours standing on hard surfaces causes foot infections and arthritis, which is the leading cause of death for captive elephants.⁶⁶ The Pittsburgh Post-Gazette, in 2006, documented the foot problems that plagued the elephants at the Pittsburgh Zoo.⁶⁷ The newspaper interviewed experts and discovered that the foot of an elephant is “a masterful piece of evolutionary development” that is designed for walking long distances daily.⁶⁸ Elephants walk on tiptoe, with soft, wedge-like soles for support.⁶⁹ When zoo elephants stand around, they get fat and their nails grow.⁷⁰

⁶³ Symposium, *International Wildlife Trafficking: Law and Policy: Changing the Dialogue About Elephants*, 33 *Quinnipiac L. Rev.* 485, 489 (2015).

⁶⁴ See Jabr, *supra* note 11.

⁶⁵ Barry Newman, *Zoo Confinement Gives Elephants Problem Feet*, *The Wall Street Journal*, November 17, 2006, <http://www.post-gazette.com/news/nation/2006/11/17/zoo-confinement-gives-elephants-problem-feet/stories/200611170141>.

⁶⁶ See *Changing the Dialogue About Elephants*, *supra* note 85, at 487.

⁶⁷ See Newman, *supra* note 87.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

When a fat, long-nailed elephant takes a step on concrete, his or her nails crack.⁷¹ Water or waste seeps into the cracks and results in infections that are, in most cases, fatal.⁷²

Further, simply not walking enough will cause fluid build-up in an elephant's extremities that leads to infections and other foot maladies.⁷³ Elephants in the wild walk between 10 and 30 miles a day, foraging for food.⁷⁴ This constant movement allows the thick pads in an elephant's feet to expand and contract, "pumping" blood and fluids through its body. Theoretically, an elephant in a zoo enclosure could pace around a tiny enclosure for days on end, but elephants tend not to move without a purpose.⁷⁵ In a zoo, elephants need not forage for food, and as a result, no matter how much space a zoo gives an elephant, the elephant will simply not exercise enough to be healthy.

Case Study: the Oregon Zoo

In 1998, the Oregon Zoo, in response to early deaths of its elephants, held the first-ever North American Conference on Elephant Foot Care and Pathology.⁷⁶ The organizer of the conference was Blair Csuti, the biologist that ran the zoo's conservation programs from 1997 to 2006.⁷⁷ The conference concluded that "lack of exercise, long hours standing on hard substrates and contamination resulting from standing in their own excreta are major contributors to elephant foot problems," and that "irresolvable foot infection and arthritis are the major reasons for euthanizing elephants."⁷⁸ Csuti further states that "elephants don't really belong in zoos."⁷⁹

⁷¹ *Id.*

⁷² *Id.*

⁷³ Allan Classen, *No Place for Elephants*, NW Examiner, last visited April 11, 2016, <http://nwexaminer.com/no-place-for-elephants>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Classen, *supra* note 94.

The zoo's own veterinarian wrote a book documenting the ill effects of keeping elephants in zoos. Michael Schmidt was employed as the zoo's veterinarian for 25 years beginning in 1973.⁸⁰ In 2002, he wrote in *Jumbo Ghosts*: "As the joints and feet become progressively injured by life spent on a concrete floor, the pain elephants feel makes them reluctant to move around as much on their sore legs and feet. This creates a vicious circle and downward spiral of pain, followed by less movement, causing further injury... etc. It is a slow gradual process that does its damage bit by bit and this damage continues hourly, daily, weekly, monthly and through the long decades of a zoo elephant's life."⁸¹

Instead of taking this information and applying it, the Oregon Zoo has ignored the conference's findings and is instead trying to expand its elephant exhibit by a meager 6.25 acres – with only 2 acres actually going to the elephants.⁸² Moreover, Csuti states that the elephants will still be "locked up in a barn for 15 hours a day."⁸³ The project is estimated to cost \$53 million.⁸⁴

Zoo Captivity Harasses Elephants

Animal scientists have found that an animal's psychological health is essential to its overall physical well-being.⁸⁵ Qualities that make large animals models for understanding humans are the same qualities that make them equally vulnerable to pain and suffering.⁸⁶ Elephants are actually susceptible to their own form of Post-Traumatic Stress Disorder, and one

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*, citing *Jumbo Ghosts*.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See *Petersen*, 29 *Envtl. L.* at 959.

⁸⁶ See *Bradshaw & Lindner*, *supra* note 49.

of the main events that underlies its development is “forced incarceration,” or captivity.⁸⁷ An elephant in captivity has likely experienced one or more of the other events listed: threat of death; physical abuse; deprivation; torture; isolation; and witnessing the loss, death, or threat of death to a loved one.⁸⁸ Because individual elephants are separated from the rest of their herd by the time they reach a zoo, they lack the cohesive community that helps them cope with traumatic events in the wild.⁸⁹ As a result, elephants that experience any stressful event in captivity will experience more resulting stress than an elephant experiencing the same event in the wild.

One of the most significant ways an elephant in captivity is harassed psychologically is by being separated from its family. Elephants are almost never imported as a herd, and even if a herd is imported to the United States, the individual elephants will likely be sent to different zoos.⁹⁰ Captivity leaves no choice to an elephant but to co-exist with other elephants with which it may not be compatible.⁹¹ Breeding programs in zoos will move an elephant around the country while the programs attempt to identify a “genetically suitable mate” for the animal.⁹² This is especially stressful to elephants given how strong their family structures are in the wild. Elephants in the wild live in strict matriarchal groups, and stay together for life.⁹³ Male elephants usually leave the herd once they reach puberty, but join all-male herds upon leaving.⁹⁴ The suffering that ensues from the lack of family structure in captivity is “on display most starkly in

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Christina Russo, *Why the U.S. is Allowing Zoos to Import Wild Elephants From Africa*, National Geographic, Feb. 18, 2012, <http://news.nationalgeographic.com/2016/02/160218-elephants-zoos-swaziland-cites-fish-and-wildlife-service/>.

⁹¹ Ed Stewart, *No Ethical Way to Keep Elephants In Captivity*, National Geographic Voices: A Forum for Discussion, May 3, 2013, <http://voices.nationalgeographic.com/2013/05/03/no-ethical-way-to-keep-elephants-in-captivity/>.

⁹² See Smith, *supra* note 55.

⁹³ See *Changing the Dialogue*, *supra* note 85, at 494.

⁹⁴ See Jabr, *Elephants Are Smarter Than We Realized*, *supra* note 11.

zoos.”⁹⁵ Stereotypic stressful behavior manifests itself in elephants in the form of head-bobbing, gnawing on the bars of their enclosures, swaying, and aggression, among others.⁹⁶

Zoos do not enhance survival of the elephant species

The sobering reality is that zoo elephants, despite veterinary care and absence of predators, live only half as long as those in wild populations.⁹⁷ A recently published study in the journal *Science* shed light on the short lifespans of zoo elephants.⁹⁸ The five authors of the study compiled data from over 4,500 individual elephants and concluded that, particularly with Asian elephants, stress and/or obesity contributes to an elephant’s “compromised survivorship” in zoos, a trait that may be passed prenatally.⁹⁹

Another reason elephants in zoos die prematurely is because of a deadly, widespread virus called elephant endotheliotropic herpes virus, or EEHV, which causes massive internal bleeding.¹⁰⁰ EEHV has taken about one-fourth of the elephants born in North American Zoos in the past three decades.¹⁰¹ Martha Fischer, who manages the elephant program at the St. Louis Zoo, said that they “assume [the virus] will strike,” but they continue with breeding programs anyway.¹⁰² Breeding elephants in the midst of the existence of such a virus is a futile exercise, the main purpose of which is to bring in more visitors and money.¹⁰³ Breeding elephants does not

⁹⁵ See Smith, *supra* note 55.

⁹⁶ See Bradshaw & Lindner, *supra* note 49.

⁹⁷ Sandy Bauers, *Elephant Populations Decline in the Wild, but Zoos May Not Be the Answer*, Phys.org News, January 4, 2009, <http://phys.org/news/2009-01-elephant-populations-decline-wild-zoos.html>.

⁹⁸ Ros Clubb, Marcus Rowcliffe, Phyllis Lee, Kyne U. Mar, Cynthia Moss & Georgia J. Mason, *Compromised Survivorship in Zoo Elephants*, *Science* Vol. 322, Issue 5908, pp. 1549 (Dec. 12, 2008), available at: <http://science.sciencemag.org/content/322/5908/1649.abstract>.

⁹⁹ *Id.*

¹⁰⁰ Diane T. Keaggy, *St. Louis Zoo Continues to Breed Elephants Despite Protests*, *St. Louis Post-Dispatch*, Mar. 26, 2013.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

contribute to conservation because those elephants are never released back into the wild.¹⁰⁴ Even the management at the St. Louis zoo agreed that fewer zoos should attempt to house and breed elephants.¹⁰⁵

Case Study: Chai

In 1980, Thai Airways International gifted a baby Asian elephant named Chai to Seattle's Woodland Park Zoo.¹⁰⁶ Immediately prior to this, the zoo's elephant exhibit was slated to close because of the poor conditions.¹⁰⁷ After Chai arrived, attendance at the zoo skyrocketed, and the next year another baby Asian elephant, named Sri, joined Chai.¹⁰⁸ These two babies, along with two teenage elephants, shared two small rooms: an 8-by-18-foot room and a 20-by-42-foot room.¹⁰⁹ The conditions were so poor that the zoo's highly regarded habitat architect, David Hancocks, resigned, prompting the zoo to update the elephant habitat.¹¹⁰ When the update was completed in 1989, the zoo decided to breed Chai.¹¹¹ Instead of transferring Chai to another zoo for her to breed naturally, which would cost the zoo money and attention, the zoo decided to artificially inseminate Chai, which required painful chaining to train Chai to stand still for long periods of time.¹¹² After 91 failed attempts and four years, Woodland decided to send Chai to Dickerson Park Zoo, which had recently experienced a deadly outbreak of EEHV.¹¹³ Despite the

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Michael Berens, *Elephants are dying out in America's zoos*, Seattle Times, last modified December 4, 2012, available at: http://old.seattletimes.com/html/nationworld/2019809167_elephants02m.html.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

horrific outbreak, the Association of Zoos and Aquariums, the national zoo accreditation body, approved the transfer.¹¹⁴

At Dickerson, a zoo that practiced violent “free contact” training between handlers and zookeepers, Chai was chained and beaten, and as a result showed irregular aggression.¹¹⁵ Free contact means that the handlers have no barriers between them and the elephants, so the elephants are “controlled” by the use of restraints and bullhooks – fire-poker-like tools used to “mold behavior” and “establish who is in charge.”¹¹⁶ The herd at Dickerson did not accept Chai, and at times physically attacked her.¹¹⁷ One herd elephant even bit off a piece of Chai’s tail. The experience was so stressful to Chai that she had to be given Valium, and lost over 1,300 pounds.¹¹⁸ However, the Woodland Park Zoo got its wish, and Chai gave birth to a baby elephant named Hansa in November 2000. Two months after Chai left Dickerson, a baby elephant there died from EEHV. Six years after that, the virus killed Hansa.¹¹⁹

Mr. Hancocks spoke out: “Elephants don’t thrive in zoos. We didn’t understand elephants very well in the 1970s or 80s. But there is overwhelming scientific evidence today that shows the harmful impact of captivity.”¹²⁰ Mr. Hancocks was not speaking specifically about the treatment of Chai, but about captive elephants in general. This treatment, and the similar treatment of countless other elephants in American zoos, is an egregious, repetitive violation of not only the text of the ESA, but is a violation of the humane, conservationist principles that the ESA represents.

¹¹⁴ *Id.*

¹¹⁵ Berens, *supra* note 138.

¹¹⁶ See Berens, *supra* note 138.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

IV. ZOO CONFINEMENT OF ELEPHANTS VIOLATES THE ANIMAL WELFARE ACT

Codified at 7 U.S.C. § 2131, the Animal Welfare Act (“AWA”) was originally enacted in 1966 to address the problem of cats and dogs being illegally sold to research facilities.¹²¹ The 1970 Amendments brought more entities under the purview of the AWA, including animal exhibitors (i.e., zoos), and also protected a greater number of animal species, including elephants.¹²² Exhibitors are defined as including “carnivals, circuses, and zoos exhibiting such animals” whether operated for profit or not.¹²³

Although filled with good intentions, the AWA contains little more than those.¹²⁴ The Endangered Species Act and the AWA work together: the prohibition on “taking” in the ESA contains exceptions for “animal husbandry practices that meet or exceed the minimum standards for facilities and care under the AWA,” including breeding procedures and exhibition.¹²⁵ There are two main issues with the AWA. First, it is not enforced – the Department of Agriculture lacks sufficient resources to enforce it,¹²⁶ and the lack of a citizen-suit provision leaves enforcement discretion essentially “unchecked.”¹²⁷ Second, the AWA only sets forth minimum care standards for individual zoo animals and fails to take into account the psychological well-

¹²¹ David Favre, *Animal Law: Welfare, Interests & Rights* 352, Aspen Publishers, March 2008.

¹²² *Id.*

¹²³ 7 U.S.C. § 2132(f).

¹²⁴ Emily A. Beverage, Comment, *Abuse Under the Big Top: Seeking Legal Protection for Circus Elephants After ASPCA v. Ringling Brothers*, 13 Vand. J. Ent. & Tech. L. 155 (Fall 2010).

¹²⁵ See Haas, *supra* note 78, at 963.

¹²⁶ Cass R. Sunstein & Martha C. Nussbaum, *Animal Rights: Current Debates and New Directions* 252, Oxford University Press (November 2005).

¹²⁷ See Beverage, *supra* note 154, at 158-59.

being of the animals,¹²⁸ with an exception for the psychological well-being of non-human primates.¹²⁹

Inhumane Conditions

The AWA sets threadbare standards for the humane housing of zoo animals. The standards set forth by the USDA require little more than that animals be kept in “reasonably clean and safe enclosures that allow them to make ‘species-appropriate postural adjustments.’”¹³⁰ While zoos could technically meet the standard of clean and safe enclosures, they still are inherently unable to meet the broader requirement of the AWA that is presented in its Congressional Statement of Policy: that exhibited animals are treated humanely.¹³¹

Inhumane Treatment

In *A Detailed Look at the Laws Affecting Zoos*, Kali Grech discusses the directive in the AWA that states that animals shall only be exhibited consistent with their “well-being.”¹³² While this is a very vague directive, no matter how narrowly or broadly we construe the term “well-being,” zoos lose every time.

In captivity, elephants are deprived of their social companions and family members.¹³³ Young are separated from their mothers when they are still at a nursing age, and are typically kept with no more than two to five elephants with whom they may not even be compatible.¹³⁴ Therefore, zoos are inherently incapable of providing an atmosphere conducive to positive

¹²⁸ See Haas, *supra* note 78, at 965.

¹²⁹ See Sunstein & Nussbaum, *supra* note 156, at 239.

¹³⁰ Mariann Sullivan, *The Animal Welfare Act -- What's That?*, 79-Aug N.Y. St. B.J. 17, 18 (July/August, 2007).

¹³¹ Animal Welfare Act (AWA) of 1966, 7 USC § 2131 (West 2015).

¹³² Kali S. Grech, *Detailed Discussion of the Laws Affecting Zoos*, Animal Legal & Historical Center, 2004, <https://www.animallaw.info/article/detailed-discussion-laws-affecting-zoos>.

¹³³ *Id.*

¹³⁴ *Id.*

elephant well-being and thus violate, at the very least, the tenets of the Animal Welfare Act as it relates to zoos.

This inhumane treatment is entrenched in the hierarchy of accreditation and regulation. The AZA's suggestions for housing elephants are inhumane as well. The AZA Standards for Elephant Management and Care, which was last updated in 2012, frequently cite "lack of information" regarding standards of housing and care, despite the fact that there are scientists, researchers, and countless organizations dedicated to studying the elephant species.¹³⁵ The regulations, in Section 2.2.1.1: "Group Composition," suggest that each zoo holding elephants must have ... the space to hold three females.¹³⁶ This particular regulation not only makes an easy, obvious exception for zoos that house elephants in isolation, but says nothing about keeping families or companions together, except that "multigenerational groups must be maintained when possible."¹³⁷

The well-publicized incidents at the San Francisco Zoo serve as a painful reminder that zoos are not run with the welfare of large animals in mind. Tinkerbelle, an elephant known for hurting a veterinary technician in the nineteen-nineties due to painful training practices; and Lulu, another elephant, were kept in solitary confinement in separate lots of less than half an acre each.¹³⁸ They had each previously had one other elephant companion, but those two elephants died the previous year, within two months of each other.¹³⁹ The zoo was forced to give up Tinkerbelle and Lulu to sanctuaries after pressure from animal rights groups and the disapproval

¹³⁵ See *AZA Standards for Elephant Management and Care* (last updated April 2012), <https://www.aza.org/uploadedFiles/AZA%20Standards%20for%20Elephant%20Management%20and%20Care.pdf>, at Section 1.4.1.2.

¹³⁶ *Id.* at 2.2.1.1.

¹³⁷ See *AZA Standards*, at section 2.2.1.6.

¹³⁸ *Id.*

¹³⁹ See Grech, *supra* note 162.

of the San Francisco County Board of Supervisors.¹⁴⁰ Unfortunately, Tinkerbelle had to be euthanized only four months after arriving at the sanctuary due to the joint disease and foot problems she developed at the San Francisco Zoo.¹⁴¹

V. PROPOSED ACTIONS

Send elephants to sanctuaries and stop importing them.

Zoos should simultaneously and immediately end the importation of elephants for any reason and transport currently captive elephants to sanctuaries. There is no reason, other than the zoo's desire to display the elephants for the public, for the practice of importation to continue. The Dallas Zoo; the Sedgwick County Zoo in Wichita, Kansas; and the Henry Doorly Zoo in Omaha, Nebraska; paid \$450,000 for the eighteen elephants that were recently imported from Swaziland.¹⁴² While they were claiming to be "saving" the elephants from being culled, the truth is that zoos cannot rely on their current elephant populations to breed, and must turn to global trade to continue to house elephants here.¹⁴³ The Amboseli Trust for Elephants in Kenya provides just \$500,000 per year to Amboseli National Park as well as the Kenyan farmers nearby to care for elephants— that is barely more than what the zoos paid, not including transportation.¹⁴⁴ If zoos truly care about the conservation of this species, they will send money they currently spend housing elephants to conservation efforts that could, with the right amount of funding, actually make a difference for the species.

¹⁴⁰ Associated Press, *S.F. Zoo gives up its last elephant*, Science on NBCNews.com, December 13, 2004, http://www.nbcnews.com/id/6707666/ns/technology_and_science-science/t/sf-zoo-gives-its-last-elephant/#.Vw2-0DbSHEX.

¹⁴¹ *Elephant Deaths at Facilities Accredited by the Association of Zoos and Aquariums (AZA)*, Peta.org, visited April 9, 2016, <http://www.peta.org/issues/animals-in-entertainment/zoos/elephant-deaths/>.

¹⁴² Christina Russo, *U.S. Says Yes to Importing 18 Elephants from Swaziland*, National Geographic, January 22, 2016, <http://news.nationalgeographic.com/2016/01/160122-Swaziland-Elephants-Import-US-Zoos/>.

¹⁴³ See Kane, *supra* note __.

¹⁴⁴ <http://www.peta.org/issues/animals-in-entertainment/zoos/get-elephants-zoos/>

Increase federal funding of foreign conservation

The African Elephant Conservation Act of 1988 and Asian Elephant Conservation Act of 2012 established funds to provide assistance to the respective elephant species in both African and Asian countries for research and conservation projects.¹⁴⁵ Because these statutes lack enforcement mechanisms, they are currently of little use.¹⁴⁶ In 2014, both the African and Asian elephant funds were appropriated \$1.4 million each by Congress.¹⁴⁷ The following table illustrates the progress made in 2015 by both funds:

African Elephant Conservation Fund 2015¹⁴⁸	
Total Number of Grants Awarded	17
Total Funds Distributed Through Grants	\$1,798,623
Total Partner Contributions Leveraged by Grants	\$3,087,300
Total Number of Countries that Received Program Support	13
Asian Elephant Conservation Fund 2015¹⁴⁹	
Total Number of Grants Awarded	33
Total Funds Distributed Through Grants	\$1,759,070
Total Partner Contributions Leveraged by Grants	\$1,994,195
Total Number of Countries that Received Program Support	7*
*Not including regional projects	

¹⁴⁵ *Multinational Species Conservation Acts*, U.S. Fish & Wildlife Service: International Affairs, last visited April 16, 2016, <http://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/multinational-species-conservation-acts.html>.

¹⁴⁶ See Haas, *Enhancement of Survival*, *supra* note 78, at 964.

¹⁴⁷ *African Elephant Conservation Fund*, U.S. Fish & Wildlife Service, last visited April 16, 2016, <http://www.fws.gov/international/wildlife-without-borders/african-elephant-conservation-fund.html>; *Asian Elephant Conservation Fund*, U.S. Fish & Wildlife Service, last visited April 16, 2016, <http://www.fws.gov/international/wildlife-without-borders/asian-elephant-conservation-fund.html>.

¹⁴⁸ See *African Elephant Conservation Fund*, FWS.org.

¹⁴⁹ See *Asian Elephant Conservation Fund*, FWS.org.

In the past decade, Western zoos have spent or committed about \$500 million to improve exhibits for just over 200 individual elephants.¹⁵⁰ These amounts are worrying because they are “staggering compared to what it would take to conserve these animals better in the wild.”¹⁵¹

The money spent housing elephants in zoos could do much more good going to projects funded by these two funds.¹⁵² Congress should appropriate more money, if available, to these funds so that elephants can be better protected in their natural habitats. Some zoos are private, but some are tax-payer funded.¹⁵³ The money it takes to fund an elephant exhibit – for example, the \$53 million expansion to the Oregon Zoo exhibit – should instead be used for conservation projects in the elephants’ homelands.

Litigation to release currently captive elephants to sanctuaries

Litigation on behalf of elephants can be instituted in two contexts: first, suits can be brought pursuant to the Endangered Species Act; and second, *habeas corpus* petitions can be filed with the end goal of releasing elephants from their “prisons.” In *Animal Legal Defense Fund v. Glickman*, the U.S. Court of Appeals for the District of Columbia Circuit found standing in such a suit where the plaintiff claimed injury from seeing a primate living in inhumane conditions at a zoo.¹⁵⁴ If animal welfare organizations were to bring suit on elephants’ behalf, they would likely have standing to sue under this precedent. These suits are brought claiming an injury to humans, though, and not the animals – the ones actually being harmed.

¹⁵⁰ See Bauers, *supra* note 129.

¹⁵¹ *Id.*

¹⁵² See Fennell, *supra* note 43.

¹⁵³ Keith Wade, *It’s a Jungle Out There! What We Can Learn from the Privatization of Zoos*, Foundation for Economic Education, Aug. 1, 1998, <https://fee.org/articles/its-a-jungle-out-there-what-we-can-learn-from-the-privatization-of-zoos/>.

¹⁵⁴ 154 F.3d 426 (D.C.Cir. 1998)

The other type of lawsuit that can be brought would recognize that the injury is to the animal, not to humans. The Nonhuman Rights Project (“NhRP”) is relying on *habeas corpus* to fight for the rights of captive primates, currently, and the strategy could easily apply to elephants.¹⁵⁵ Steve Wise is the founder of NhRP, and argues that self-aware, autonomous nonhuman animals deserve to be recognized as having certain fundamental rights.¹⁵⁶ His lawsuits demand four actions from American courts: first, that the courts declare that nonhuman animal plaintiffs are common law “persons” who possess the capacity for fundamental rights such as bodily integrity and bodily liberty; second, that the violation of their rights be halted; third, that a guardian ad litem be appointed to represent the plaintiff-animals’ interests; and fourth, that the plaintiff be transferred back to the wild, or, if that is not possible or feasible, that the plaintiff be transferred to a place of rehabilitation or a sanctuary.¹⁵⁷

VI. CONCLUSION

“You need look no further than National Geographic’s own articles and films documenting elephants’ large, extended families, intricate web of social relationships, and wide-ranging movement in vast home ranges, to see that life in captivity cannot satisfy their most basic needs.”¹⁵⁸

Given the information about housing these gentle giants, ending the importation of elephants is clearly not only the right thing to do, it is also the easiest. Morality and the law both support the notion that keeping elephants in zoos is immoral and violates federal law. Ending their importation, releasing currently captive elephants, increasing funding for international

¹⁵⁵ <http://www.nonhumanrightsproject.org/2013/03/23/how-we-go-about-filing-our-cases-2/>

¹⁵⁶ <http://www.nonhumanrightsproject.org>

¹⁵⁷ *How We Go About Filing Our Cases*, NhRP, March 23, 2013,

<http://www.nonhumanrightsproject.org/2013/03/23/how-we-go-about-filing-our-cases-2/>

¹⁵⁸ See Stewart, *supra* note 115.

conservation, and taking legal action on captive elephants' behalves are all steps that should immediately be taken to address this issue.

When Lawrence Anthony accepted his herd of elephants on Thula Thula on short notice, he intentionally kept human interaction with the elephants to a bare minimum.¹⁵⁹ Besides ensuring the elephants did not escape the barriers of the reserve, he did not allow significant human interaction with them unless a baby needed to be rescued, because it was important to provide as a natural a habitat as possible to make the elephants comfortable.¹⁶⁰ Another reason for the distance was that too much interaction with humans dilutes the feral qualities demanded in the wilderness, which would result in the elephants being ill-equipped in a wild habitat.¹⁶¹ Over the years, as new generations of elephants were born on the reserve, Mr. Anthony's interactions with the herd grew fewer and farther between, as the older elephants started teaching the younger elephants to stay away from the outside barrier, and other things that Mr. Anthony had taught them.¹⁶² At the end of his book, Mr. Anthony says that sometimes the older elephants would still briefly approach him, but the younger elephants always ignored him. At first, he sounded sad about this, stating, "I am an outsider. The relationships I had with their grandmothers will never be repeated."¹⁶³ Then, his tone changes. "That's the way it should be. They are going to grow up just as I wanted my original group to. Wild."¹⁶⁴

¹⁵⁹ See Anthony, *The Elephant Whisperer*.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

Fearsome and Fragile:
The Paradox Challenging Shark Conservation Law

Erin Brady
University of Texas
School of Law
Class of 2016

Fearsome and Fragile: The Paradox Challenging Shark Conservation Law

Introduction

Long before man or law existed, sharks were swimming through the Earth's oceans. For most of their existence, sharks reigned as the sea's apex predators and had little need for protection from anything. In the last century, humans have increasingly crossed into the sharks' domain, and in the process have undermined their supremacy in the sea. Today, humans are the greatest threat to sharks' survival as human activity, primarily overfishing, has caused a steep decline in shark populations.

This paper seeks to provide a comprehensive look at the web of laws governing shark conservation as well as the individuals and organizations trying to use and create shark conservation legislation. Part one will examine how legal systems have been used to protect sharks historically and where the law stands today. Part two will explore how the unique nature of sharks influences their treatment under the law. Finally, part three will consider how the law might be used more effectively to protect sharks in the future.

I. Shark conservation law continues to evolve in the United States and abroad.

Because sharks are found in oceans, and occasionally rivers, across the globe, a wide system of laws have developed to help conserve and protect them. The United States has both federal and state laws related to shark conservation, and many other countries have also enacted laws to protect sharks in their waters. In addition to domestic legislation, and in some cases the motivation behind it, there is important international law aiding the dwindling shark population.

- a. The dual approach to shark conservation legislation in the United States has led to a number of new laws, but also some conflict.**

i. In the United States, shark conservation law grew from regulation of federal fisheries to legislation specifically protecting sharks.

The Magnuson-Stevens Fishery Conservation and Management Act, originally called the U.S. Fisheries Conservation and Management Act of 1976, was the first federal law passed to govern federal fisheries. The primary motivation behind the law was a significant increase in foreign fishing in U.S. waters.¹ The law greatly increased federal management authority over fisheries by increasing federal jurisdiction from 12 miles off the coast to 200 miles,² and it also instituted mandatory conservation and management measures for federal fisheries.³ It stressed that the 200-mile conservation zone was limited to the purposes of conservation and management of fishery resources.⁴ In March 1983, this limitation was seemingly dismissed when President Reagan declared the 200-mile zone an Exclusive Economic Zone (EEZ).⁵

Some conservationists have criticized the Magnuson-Stevens Act. Critics feel that it has not done enough to prevent overfishing because although it ousted foreign competition, domestic fishers are still permitted to deplete the resources.⁶ There are no blanket bans on fishing particular species under the law, instead it prevents overfishing by limiting catch numbers to the optimum sustainable levels.⁷ The idea behind this approach is that fish are a valuable commodity, both for purposes of food production and recreational activities. Therefore, the optimum yield is meant to be the greatest amount of fish that can be caught while sustaining the

¹ Wilder, *supra* note 1, at 91, 156.

² ROBERT JAY WILDER, LISTENING TO THE SEA 81 (Bert A. Rockman ed., 1998).

³ *Shark Conservation in the United States and Abroad*, NOAA FISHERIES (last visited Apr. 17, 2016) http://www.nmfs.noaa.gov/stories/2013/07/7_15_13shark_conservation_us_and_abroad.html.

⁴ Fishery Conservation and Management Act, 16 U.S.C. §1801 (1976).

⁵ Wilder, *supra* note 1, at 81.

⁶ *Id.* at 156.

⁷ *Id.* at 95.

resource for future use.⁸ In this way, the law seems to be more about economics than conservation. Nevertheless, its passage was an important first step for shark conservation.

The Shark Finning Prohibition Act (SFPA), which amended the Magnuson-Stevens Act, was passed in 2000. Its purpose is “to eliminate the wasteful and unsportsmanlike practice of shark finning.”⁹ Shark finning is the practice of removing the fins of a shark and dumping the rest of the shark’s body back into the sea, often while it is still alive. Prior to the law’s enactment, finning had already been prohibited in the federal waters of the Atlantic, the Gulf of Mexico, and the Caribbean, but the SFPA extended this ban to the Pacific.¹⁰ Additionally, the SFPA required the Secretary of Commerce to begin international negotiations to learn more about finning abroad and to encourage other nations to adopt similar laws.¹¹

In 2010, the U.S. again aimed to improve shark’s legal protections by passing the Shark Conservation Act (SCA). The SCA amended the High Seas Driftnet Fishing Moratorium Protection Act and the Magnuson-Stevens Act. The law strengthened the finning prohibition of the SFPA by outlawing the removal of shark fins at sea even if the carcass was not thrown overboard.¹² The SCA also closed a loophole that had hindered the effectiveness of the SFPA. The loophole had been solidified by the case *United States v. Approximately 64,695 Pounds of Shark Fin*, in which the court held that the prohibition on possessing shark fins at sea only applied to fishing vessels.¹³ The decision meant that fishers could use a process reminiscent of a money laundering scheme to turn seemingly illegally obtained fins into legal catch. To do so, a

⁸ *Id.*

⁹ Shark Finning Prohibition Act, 16 U.S.C. § 1822 (2000).

¹⁰ Jacqueline Baker, *Plight of an Ocean Predator: The Shark Conservation Act of 2010 and the Future of Shark Conservation Legislation in the United States*, 38 *Environ. L. & Pol’y J.* 67, 14 (2014).

¹¹ Shark Finning Prohibition Act, 16 U.S.C. § 1822 (2000).

¹² *Id.* at 16.

¹³ *Id.* at 19.

fishing vessel would meet a cargo vessel at sea, receive fins from the cargo vessel, and then bring the fins to shore for sale. Because the law only applied to fishing vessels and did not outlaw the transfer of fins from one vessel to another, fishers using this method could continue to support the finning trade without violating the law.

ii. Sharks in U.S. waters also benefit from a federally-created safe haven, the national marine sanctuary system.

National marine sanctuaries are another component in the federal government's efforts to conserve and protect marine life. The National Marine Sanctuaries Act was passed in 1972 to create marine sanctuaries in U.S. waters.¹⁴ The purpose of these sanctuaries is to protect marine species and culturally significant resources, and they are valued for the research and tourism opportunities they provide. To date, 13 sanctuaries have been created under the law.

Of these national sanctuaries, two are particularly important for great white shark conservation: the Greater Farallones National Marine Sanctuary and the Monterey Bay National Marine Sanctuary. The waters of the Farallones sanctuary shelter a globally significant white shark population¹⁵, and the Monterey Bay sanctuary is the largest in the national system and has prime great white shark habitat.¹⁶ The sanctuaries were officially designated in 1981 and 1992 respectively.¹⁷ Both are located off the California coast. While tourism is a valued element of the national sanctuary system, both the Farallones and Monterey Bay sanctuaries prohibit visitors

¹⁴ *Greater Farallones National Marine Sanctuary—About Us*, NOAA NATIONAL MARINE SANCTUARIES (last updated Feb. 12, 2016), <http://farallones.noaa.gov/about/>.

¹⁵ *Id.*

¹⁶ *Monterey Bay National Marine Sanctuary 2009 Condition Report*, NOAA NATIONAL MARINE SANCTUARIES (last updated Sept. 29, 2015), <http://sanctuaries.noaa.gov/science/condition/mbnms/>.

¹⁷ *National Marine Sanctuaries History Timeline*, NOAA NATIONAL MARINE SANCTUARIES (last updated Oct. 5, 2015), <http://sanctuaries.noaa.gov/about/history/>.

from purposefully attracting great white sharks to their boats.¹⁸ Additionally, in the Farallones sanctuary, vessels may not approach within 164 feet of great white sharks.¹⁹ These measures were instituted to prevent human activity from interfering with the sharks' natural behavior.

iii. In the last two decades, many states have passed laws prohibiting shark finning.

States have also played an active role in shark conservation, with a particular focus on the issue of finning. The states have gone beyond adopting their own finning prohibitions; they have also banned the sale of shark fins. Hawaii was the first state to adopt such a law, which is not surprising given the cultural importance of sharks in native Hawaiian culture.²⁰ In the following years, California, Delaware, Illinois, Maryland, Massachusetts, New York, Oregon, Texas, and Washington have all passed laws banning finning and the sale of shark fins.²¹ Some states have drafted their finning laws to address the demand for shark fin soup. Restaurants are prohibited from possessing shark fins in Hawaii and California, and Washington prohibits the possession of shark fins for the purpose of consumption.²² High demand for the expensive soup has been a major factor behind the rise in finning in recent years. It is considered a delicacy by many and became a status symbol often served at weddings and business functions, particularly in the

¹⁸ *Status of Great White Sharks in US Waters and Protection*, SHARKSTEWARDS.ORG (last updated Apr. 16, 2016), <http://sharkstewards.org/scienceeducation/status-of-great-white-sharks-in-us-waters-and-protection/>.

¹⁹ *Id.*

²⁰ Baker, *supra* note 9, at 6.

²¹ *National Laws, multi-lateral agreements, regional and global regulations on shark protection and shark finning*, HUMANE SOCIETY INTERNATIONAL (last updated Sept. 2015), http://www.hsi.org/assets/pdfs/shark_finning_regs_2014.pdf.

²² Baker, *supra* note 9, at 32.

Asian community.²³ Hong Kong is the top trading hub for shark fins²⁴, but there has also been a substantial market for fins in the U.S.²⁵

In addition to their finning law, California has taken action to specifically protect the great white shark. Since 1994, the state has prohibited the commercial or recreational taking of great white sharks in California waters.²⁶

iv. The expanding state shark conservation legislation sparked a reaction from the federal government.

Stringent state laws on finning have clashed with federal shark finning legislation. The conflict came to a head when the National Oceanic and Atmospheric Administration (NOAA) proposed a rule stating that the SCA preempted state finning legislation.²⁷ The following language in the proposed rule was the source of the controversy: “State and territorial statutes that address shark fins are preempted if they are inconsistent with the Magnuson-Stevens Act as amended by the Shark Conservation Act of 2010, regulations under this part, and applicable federal fishery management plans and regulations.”²⁸ Supporters of the state laws feared that the

²³ Lauren Smith, *Shark fin soup: a dangerous delicacy for humans and sharks alike*, THE GUARDIAN (Mar. 10, 2016), <https://www.theguardian.com/science/blog/2016/mar/10/shark-fin-soup-a-dangerous-delicacy-for-humans-and-sharks-alike>.

²⁴ Joshua S. Reichert & John E. Scanlon, *Protecting Sharks, Enforcing CITES: A Global Effort*, A brief from the Pew Charitable Trusts, Aug. 2015, at 9.

²⁵ Alan Boyle, *How Shark Fin Soup is Turning Sour, and Why That’s Sweet for Us Humans*, NBCNEWS.COM (July 17, 2014, 2:30 PM), <http://www.nbcnews.com/storyline/sharkwatch/how-shark-fin-soup-turning-sour-why-thats-sweet-us-n158476>.

²⁶ *Status of Great White Sharks in US Waters and Protection*, SHARKSTEWARDS.ORG (last updated Apr. 16, 2016), <http://sharkstewards.org/scienceeducation/status-of-great-white-sharks-in-us-waters-and-protection/>.

²⁷ *Shark Conservation in the United States and Abroad*, NOAA FISHERIES (last visited Apr. 17, 2016), http://www.nmfs.noaa.gov/stories/2013/07/7_15_13shark_conservation_us_and_abroad.html; Carrie A. Laliberte, *Cutting the Fins off of Federal Shark Laws: A Cooperative Federalism Approach to Shark Finning Legislation*, 46 Ariz. St. L.J. 979, 982 (2014).

²⁸ Implementation of the Shark Conservation Act of 2010, 78 Fed. Reg. 25685 (May 2, 2013).

rule would undercut the state bans on shark fin sales.²⁹ NOAA was concerned that the state bans would interfere with the management of federal fisheries.³⁰ NOAA interpreted the SCA's purpose to be eliminating the practice of shark finning, not banning all trade in shark fins.³¹ The rule was proposed in 2013, but by early 2014 NOAA had decided to back away from challenging the state laws.³² This change of direction resulted from discussions between NOAA and the states, in which NOAA was assured that the state laws would not interfere with legal fishing.³³

b. Like the U.S., foreign countries have used statutes and sanctuaries to protect sharks.

Canada was the first country to adopt a domestic regulation concerning shark finning. In 1994, Canada's Department of Fisheries and Oceans issued regulations banning finning in Canadian waters.³⁴ Since then, more than 40 countries have implemented domestic regulations on finning, and more than 20 countries have banned shark fishing in their waters.³⁵

Designating their waters as shark sanctuaries is another way coastal and island nations have acted to protect sharks. Generally, establishing a shark sanctuary means that all commercial shark fishing, retention of sharks caught as bycatch, and possession, trade or sale of shark

²⁹ January Jones & Andrew Sharpless, *NOAA Could Undermine State Shark Fin Bans*, THE HUFFINGTON POST (last updated Jan. 25, 2014), http://www.huffingtonpost.com/january-jones/noaa-shark-fin-ban_b_4337841.html.

³⁰ Implementation of the Shark Conservation Act of 2010, 78 Fed. Reg. 25685 (May 2, 2013).

³¹ *Id.*

³² Suzanne Goldenberg, *US retreats from bid to overturn shark fin bans*, THE GUARDIAN (Feb. 5, 2014, 4:17 AM), <http://www.theguardian.com/environment/2014/feb/05/us-retreats-shark-fin-ban>.

³³ *Id.*

³⁴ Baker, *supra* note 9, at 13; *Shark Finning*, ANIMAL JUSTICE (last visited Apr. 13, 2016), <http://www.animaljustice.ca/issues/shark-finning/>.

³⁵ *National Laws, multi-lateral agreements, regional and global regulations on shark protection and shark finning*, HUMANE SOCIETY INTERNATIONAL (last updated Sept. 2015), http://www.hsi.org/assets/pdfs/shark_finning_regs_2014.pdf.

products are prohibited activities in the nation's EEZ.³⁶ In 2009, Palau was the first country to establish a shark sanctuary. Eleven more sanctuaries have been established since then, and today more than 5.96 million square miles of ocean waters are protected as shark sanctuaries.³⁷ Aside from acknowledging the growing public support for shark conservation, countries have been motivated to create sanctuaries after realizing the economic value of sharks. Palau is one example. The country's robust shark-diving industry likely influenced its decision to create a shark sanctuary. This belief was supported by a 2011 study, which determined that one reef shark in Palau's waters was worth \$1.9 million over its lifetime, whereas a reef shark sold at market was only worth \$108.³⁸ For many countries, protecting sharks is good business.

In 2015, a group of nations in the western Pacific Ocean took a new approach when they established a regional sanctuary.³⁹ The regional sanctuary was completed when the Federated States of Micronesia passed legislation establishing a shark sanctuary in their EEZ.⁴⁰ The action was revolutionary because it linked together the protected waters of Palau, the Marshall Islands, and the U.S. territories of Guam and the Commonwealth of the Northern Marianas Islands.⁴¹ Sharks can now swim throughout the waters of these nations without leaving the safety a sanctuary offers. Because many species of sharks are highly mobile and travel through vast

³⁶ *Shark Sanctuaries Around the World*, A fact sheet from the Pew Charitable Trusts, Mar. 2016, at 1.

³⁷ *Id.*

³⁸ Joshua S. Reichert & John E. Scanlon, *Protecting Sharks, Enforcing CITES: A Global Effort*, A brief from the Pew Charitable Trusts, Aug. 2015, at 19.

³⁹ *Shark Sanctuaries Around the World*, A fact sheet from the Pew Charitable Trusts, Mar. 2016, at 1.

⁴⁰ Press Release, The Pew Charitable Trusts, Pew Commends Federated States of Micronesia Action to Protect Sharks, <http://www.pewtrusts.org/en/about/news-room/press-releases/2015/03/02/pew-commends-federated-states-of-micronesia-action-to-protect-sharks> (Mar. 2, 2015).

⁴¹ *Id.*

expanses of ocean, this type of contiguous sanctuary system is vitally important to ensuring effective protection.

c. Two key conventions have lead the way in international shark conservation.

The United Nation’s Conferences on the Law of the Sea (UNCLOS I, II, and III) were fundamental in the development of the international law of the sea, which primarily derives from customary law and treaties.⁴² In 1958, UNCLOS I adopted 4 conventions, including the Convention on Fishing and Conservation of the Living Resources of the High Seas,⁴³ but conservation wasn’t a significant issue until UNCLOS III. A series of environmental disasters involving oil tankers preceding UNCLOS III played a large role in society’s increased interest in the protection of the marine environment.⁴⁴ By far the most extensive conference, UNCLOS III spanned 11 sessions held between 1973 and 1982.⁴⁵ A key feature of the final convention was recognition of the 200-mile EEZ. UNCLOS III gave coastal states sovereign rights in the EEZ regarding natural resources and certain economic activities as well as jurisdiction over marine science research and environmental protection.⁴⁶ Despite taking an active role in UNCLOS III, the U.S. has never ratified the convention.⁴⁷ Nevertheless, the UNCLOS III convention has been

⁴² YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA* 9 (2d ed. 2015).

⁴³ *Id.* at 22.

⁴⁴ *Id.* at 25.

⁴⁵ *Id.* at 26.

⁴⁶ *United Nations Convention on the Law of the Sea of 10 December 1982*, Overview and full text, UN.ORG, (last visited Apr. 15, 2016), http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm.

⁴⁷ Losif Sorokin, *The UN Convention on the Law of the Sea: Why the U.S. Hasn’t Ratified It and Where It Stands Today*, TRAVAUX: THE BERKELEY JOURNAL OF INTERNATIONAL LAW BLOG (Mar. 30, 2015), <http://berkeleytravaux.com/un-convention-law-sea-u-s-hasnt-ratified-stands-today/>.

joined by 167 countries, and it is the preeminent regime governing all matters concerning the law of the sea.⁴⁸

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) has had an important impact on shark conservation. CITES regulates the trade of wild animals and plants to prevent species from being over-exploited.⁴⁹ Cooperation between countries is vitally important for shark conservation because often the shark fin trade crosses international borders. CITES functions by providing different levels of protection to specifically listed species. The first sharks to gain CITES protection were the whale shark and the basking shark, which were added to the list in 2003.⁵⁰ Today, the CITES list includes approximately 5,600 animal species.⁵¹ The U.S. was the first country to join CITES, and today the agreement has 181 parties.⁵² The U.S.'s recognition of the CITES agreement is codified by the Lacey Act, which makes it illegal to import, export, sell, acquire, or purchase any fish, animal, or plant protected by state or international law.⁵³

⁴⁸ *United Nations Convention on the Law of the Sea of 10 December 1982*, Overview and full text, UN.ORG (last visited Apr. 15, 2016), http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm; *Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 02 January 2015*, UN.ORG (last updated Mar. 15, 2016), http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea.

⁴⁹ *What is CITES?*, CITES.ORG (last visited Apr. 16, 2016), <https://www.cites.org/eng/disc/what.php>.

⁵⁰ *Sharks and manta rays*, CITES.ORG (last visited Apr. 16, 2016), <https://www.cites.org/eng/prog/shark/more.php>.

⁵¹ *The CITES species*, CITES.ORG (last visited Apr. 16, 2016), <https://www.cites.org/eng/disc/species.php>.

⁵² *List of Contracting Parties*, CITES.ORG (last visited Apr. 17, 2016), <https://www.cites.org/eng/disc/parties/chronolo.php>.

⁵³ *Status of Great White Sharks in US Waters and Protection*, SHARKSTEWARDS.ORG (last updated Apr. 16, 2016), <http://sharkstewards.org/scienceeducation/status-of-great-white-sharks-in-us-waters-and-protection/>.

CITES has become even more important to shark conservation because five shark species were added to its protection list in March 2013. The porbeagle, oceanic whitetip, scalloped hammerhead, smooth hammerhead, and great hammerhead are now protected species.⁵⁴ Listed species may still be legally traded, but only to the extent that it does not put too great a strain on their numbers in the wild.⁵⁵ Many countries have taken an active role in implementing the new protections, and CITES workshops have been held to teach enforcement techniques to local officials, including how to identify protected species and their parts.⁵⁶ At these workshops, participating countries also discuss which species of sharks can no longer be traded without causing serious detriment to their wild populations. The Pacific region workshop, in which all the Oceania CITES parties participated, determined that the oceanic whitetip shark should be fully protected.⁵⁷

d. Shark conservation legislation is still developing today, and a close look at the Texas finning statute shows there's room for improvement.

Currently, not all coastal states in the U.S. have adopted laws addressing finning, but the anti-finning movement is ongoing.⁵⁸ It's also worth noting that finning laws are not limited to the coastal states. Inland states with a market for shark fins may also wish to pass such legislation, like Illinois has done. While the Pacific states have unanimously adopted finning legislation, the Atlantic and Gulf states have moved at a slower pace. Florida considered a finning bill in 2012,

⁵⁴ Joshua S. Reichert & John E. Scanlon, *Protecting Sharks, Enforcing CITES: A Global Effort*, A brief from the Pew Charitable Trusts, Aug. 2015, at 1.

⁵⁵ *How CITES works*, CITES.ORG (last visited Apr. 16, 2016), <https://www.cites.org/eng/disc/how.php>.

⁵⁶ *Id.* at 5.

⁵⁷ *Id.* at 7.

⁵⁸ Amanda Keledjian, *Texas Just Banned Sales of Shark Fin, Will Other States Follow?*, LIVESCIENCE.COM (June 25, 2015, 12:28 PM), <http://www.livescience.com/51343-texas-bans-shark-fin.html>.

but they have yet to pass a prohibition.⁵⁹ Texas is the most recent state to take action. The state's finning law was passed in 2015 and will go into effect on July 1, 2016. A close examination of the Texas statute reveals some of the strengths and weaknesses of state finning legislation.

Like similar laws in other states, the Texas statute takes a broader approach to eliminating finning than the SFPA. While the SFPA prohibits the act of finning, the Texas statute goes further by also prohibiting the sale or purchase of illegally obtained fins.⁶⁰ This increased coverage will hinder the sale of illegally obtained fins that make it off the boat without being detected by officials. The Texas statute also takes a strong stance against the consumption of illegally obtained fins. It requires that all seized fins be held as evidence and then destroyed. Generally, when the Texas Parks and Wildlife Department seizes a catch, it is sold for market value or donated as food. The strict destruction policy may be due to the abhorrence many people feel about shark finning. The statute's statement of intent does refer to finning as a "heinous practice".⁶¹

There is concern that an exception in the Texas statute could make it difficult to enforce.⁶²

The problematic provision of §66.2161⁶³ is as follows:

(f) A person may possess a shark fin if:

- 1) the person holds the appropriate state or federal license or permit authorizing the taking or landing of a shark for recreational or commercial purposes;

⁵⁹ Melissa McCart, *Florida Backs Away From Shark Fin Ban*, BROWARD PALM BEACH NEW TIMES (Mar. 14, 2012, 12:51 PM) <http://www.browardpalmbeach.com/restaurants/florida-backs-away-from-shark-fin-ban-6401896>.

⁶⁰ Shark Finning Prohibition Act, 16 U.S.C. § 1822 (2000); Tex. Parks & Wild. Code § 66.2161(2016).

⁶¹ H.B. 1579 Analysis, 84th Leg., Reg. Sess. (Tex. 2015).

⁶² E-mail from Kerry Spears, Staff Attorney, Texas Parks and Wildlife Department, to author (Apr. 12, 2016)(on file with author)(reflects the personal opinion of Ms. Spears and does not necessarily reflect the opinion of the Texas Parks and Wildlife Department).

⁶³ Tex. Parks & Wild. Code § 66.2161(2016).

- 2) the shark fin is taken from a shark that the person has taken or landed; and
- 3) the shark fin is taken in a manner consistent with the person's license.

The problem with this exception is the use of the language "taken or landed". Requiring that the shark be taken or landed does not make clear that the fins may only be removed after the shark has been brought to shore. This ambiguity presents a challenge to wardens trying to enforce the law because it seems to allow the removal of fins while sharks are still onboard a boat.⁶⁴ Enforcement would be much more straightforward if the law required that the entire shark carcass be brought to shore before the fins could be removed. The exception also requires that fins be taken in a manner consistent with the fisher's license. However, Texas fishing licenses do not include any information about how fins may be removed. Only the law controls how fins may be removed. Clearly, the language used in finning laws must be precise to avoid ambiguity problems.

II. The inherent nature and human perception of sharks are both important factors in the development of legal protections.

a. There are multiple causes behind the falling shark population, and the loss of sharks may lead to damaging environmental changes.

It's well established that shark populations are in steep decline⁶⁵, blue shark numbers in the Central Pacific Ocean are estimated to have dropped by 87%.⁶⁶ This figure is not out of the ordinary among shark species, and destructive human behavior is the primary cause of the population dip. While pollution and habitat loss both have a negative impact on sharks,

⁶⁴ Spears, *supra* note 62.

⁶⁵ David Shiffman, *Predatory Fish Have Declined by Two Thirds in the 20th Century*, SCIENTIFIC AMERICAN (Oct. 20, 2014), <http://www.scientificamerican.com/article/predatory-fish-have-declined-by-two-thirds-in-the-20th-century/>.

⁶⁶ *Population Declines for Shark Species Prevalent in the Shark Fin Trade*, SHARK SAVERS (2012), http://www.sharksavers.org/files/1513/3046/1974/Shark_Declines-SFT_Species_Shark_Savers.pdf.

overfishing has by far caused the greatest harm.⁶⁷ Commercial fishing is motivated by consumer demand for shark products.⁶⁸ The high demand for shark fin soup in particular led to the explosion in finning, but sharks are also sought for the oil in their livers, known as squalene oil, which is most commonly used in cosmetic products like lip gloss and skin cream.⁶⁹ There are two notable factors besides overfishing that also inhibit recovery efforts.

First, shark's biological characteristics leave them particularly vulnerable to exploitation. Many shark species grow slowly and take years to reach full maturity.⁷⁰ Slow development means it can take years before sharks begin to reproduce, and even then most shark species produce relatively few young. The whitetip reef shark for example, has a 13 month gestation period and usually births no more than five pups.⁷¹ Low reproduction rates make it impossible to compensate for the number of sharks that are killed each year.

Second, many shark species are migratory, traveling great distances to find food and to breed. Their wandering nature means sharks pass through many territorial waters, which limits the effect of domestic laws. Migratory birds have posed a similar challenge when it comes to legislative protection, and the U.S. responded by passing the Migratory Bird Act of 1918. The law prohibits anyone from taking, possessing, importing, exporting, transporting, selling, or

⁶⁷ Christine A. Ward-Paige ET AL., *Large-Scale Absence of Sharks on Reefs in the Greater-Caribbean: A Footprint of Human Pressures*, PLOS.ORG (Aug. 5, 2010), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0011968>.

⁶⁸ *Sharks-Overview*, WORLDWILDLIFE.ORG (last visited Apr. 17, 2016), <https://www.worldwildlife.org/species/shark>.

⁶⁹ Gibson, *supra* note 59, at 36.

⁷⁰ Dan Stone, *100 Million Sharks Killed Every Year, Study Shows on Eve of International Conference on Shark Protection*, NATIONALGEOGRAPHIC.COM (Mar. 1, 2013), <http://voices.nationalgeographic.com/2013/03/01/100-million-sharks-killed-every-year-study-shows-on-eve-of-international-conference-on-shark-protection/>.

⁷¹ ANDREA GIBSON, *Sharks* 143 (2002).

purchasing any migratory bird, or the parts, nests, or eggs of such a bird.⁷² The law is especially beneficial for migratory birds because it's the result of international cooperation; it implements treaties the U.S. made with Canada, Mexico, Japan, and Russia.⁷³ Under the treaties, birds known to migrate between the U.S. and the treaty nation are protected in both countries.⁷⁴ This type of reciprocal protection is necessary to truly protect migratory species, including sharks.

Sharks are in a vulnerable position, but if their numbers fall too low humans may bear the consequences. The ocean environment suffers without sharks because their loss causes ecological cascades.⁷⁵ An ecological cascade is a “shift in the balance of populations in an ecosystem occasioned by marked depletion in one species, usually as a result of human action.”⁷⁶ In many ocean ecosystems, sharks are at the top of the food chain, which means they are largely responsible for maintaining the area's health by keeping their prey population at optimum levels. Scientists have found that when sharks disappear, species like rays become overabundant and deplete seagrass beds.⁷⁷ The ripple effect continues to harm other species that live in the beds or

⁷² *Migratory Bird Treaty Act-Birds Protected*, FWS.GOV (last updated Sept. 16, 2015), <http://www.fws.gov/birds/policies-and-regulations/laws-legislations/migratory-bird-treaty-act.php>.

⁷³ *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service-Migratory Bird Treaty Act of 1918*, FWS.GOV (last visited Apr. 19, 2016), <https://www.fws.gov/laws/lawsdigest/migtrea.html>.

⁷⁴ *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service-Treaties*, FWS.GOV (last visited Apr. 19, 2016), <http://www.fws.gov/laws/lawsdigest/treaty.html>.

⁷⁵ E. Griffin ET AL., *Predators as Prey: Why Healthy Oceans Need Sharks* 3 (July 2008), http://oceana.org/sites/default/files/reports/Predators_as_Prey_FINAL_FINAL1.pdf.

⁷⁶ Definition, *ecological cascade*, OXFORDDICTIONARIES.COM (last visited Apr. 17, 2016), http://www.oxforddictionaries.com/us/definition/american_english/ecological-cascade.

⁷⁷ *Effects of Shark Decline*, CENSUS OF MARINE LIFE (last visited Apr. 16, 2016), http://www.coml.org/discoveries/trends/shark_decline_effects.

use them as nursery grounds, and humans feel the effects when the numbers of economically valuable resources like shellfish dwindle.⁷⁸

b. Public relations can be used as a powerful tool to advance shark conservation legislation.

Public opinion plays a crucial part in shark conservation as legal action is more likely to occur when there's public support behind it. Grassroots campaigning can be a deciding factor when it comes to determining what species make the Endangered Species List.⁷⁹ Currently, only one shark species is on the list, the scalloped hammerhead.⁸⁰ Sharks are not without advocates, and there are a number of conservation groups supporting their cause.⁸¹ Still, more support from the general public might lead to increased protective legislation, but sharks' bad reputation may be holding them back. Despite the fact that humans kill more than 100 million sharks each year, sharks are most likely to make the news in the rare case of a shark attack.⁸² These types of horror stories reinforce sharks' notoriety. Educating people so they can understand that humans pose a much greater danger to sharks than the other way around is vital to gaining public support for conservation.

⁷⁸ *Id.*

⁷⁹ *U.S. Fish and Wildlife Service to List the Southwestern Alaska Sea Otters Under the Endangered Species Act*, DEFENDERSOFWILDLIFE.ORG (Aug. 9, 2015), <http://www.defenders.org/press-release/us-fish-and-wildlife-service-list-southwestern-alaska-sea-otters-under-endangered>.

⁸⁰ *Listed Vertebrate Animals*, ECOS ENVIRONMENTAL CONSERVATION ONLINE SYSTEM (last visited Apr. 19, 2016), https://ecos.fws.gov/tess_public/reports/ad-hoc-species-report?kingdom=V&status=E&status=T&status=EmE&status=EmT&status=SAE&status=SAT&mapstatus=1&fleadreg=on&fstatus=on&finvpop=on&header>Listed+Vertebrate+Animals.

⁸¹ *Stop Shark Finning-Links*, STOPSHARKFINNING.NET (last visited Apr. 15, 2016), <http://www.stopsharkfinning.net/links/>.

⁸² Dan Stone, *100 Million Sharks Killed Every Year, Study Shows on Eve of International Conference on Shark Protection*, NATIONALGEOGRAPHIC.COM (Mar. 1, 2013), <http://voices.nationalgeographic.com/2013/03/01/100-million-sharks-killed-every-year-study-shows-on-eve-of-international-conference-on-shark-protection/>.

i. Aquariums help alleviate the fear of sharks through education.

Aquariums have a unique ability to educate the public about sharks because they offer people of all ages the chance to observe sharks up close. Not everyone can dive with sharks in the wild, but most people can make their way to an aquarium. Giving people the opportunity to have a personal experience with sharks can do a lot to lessen the fear factor. The value of aquariums has not gone unnoticed by those working to save sharks. In fact, the Governor of Illinois signed the state's anti-finning law in front of the Shedd Aquarium's shark exhibit.⁸³

Some aquariums have active research departments that study sharks, and they can influence public opinion by sharing their findings. The Monterey Bay Aquarium regularly shares their shark research through social media.⁸⁴ Since 2002, the aquarium has extensively studied great white sharks in the Eastern Pacific Ocean.⁸⁵ Aquarium researchers have learned new details about the lives of great whites by tracking them with electronic tags, identifying and observing individual species, and carrying out genetic analyses of blood and tissue samples.⁸⁶ The aquarium's great white program even gave people the rare opportunity to see a great white shark in person. In 2004, the aquarium cared for a juvenile great white that had accidentally been caught in a commercial fishing net.⁸⁷ The shark stayed in the aquarium's largest tank for 198 days

⁸³ *Historic Shark Conservation Legislation Signed into Law at Shedd Aquarium*, SHEDDAQUARIUM.ORG (July 3, 2012), <http://www.sheddaquarium.org/blog/2012/July/Historic-shark-conservation-legislation-signed-into-law-at-Shedd-Aquarium/>.

⁸⁴ *Monterey Bay Aquarium Newsroom*, MONTEREYBAYAQUARIUM.ORG (last visited Apr. 17, 2016), <https://newsroom.montereybayaquarium.org/>.

⁸⁵ *Sharks*, MONTEREYBAYAQUARIUM.ORG (last visited Apr. 15, 2016), <http://www.montereybayaquarium.org/conservation-and-science/our-priorities/thriving-ocean-wildlife/sharks>.

⁸⁶ *Id.*

⁸⁷ Leonard Ho, *Monterey Bay Aquarium to Suspend Collection/Display of Great White Sharks*, ADVANCEDAQUARIST.COM (June 24, 2013, 8:00 AM), <http://www.advancedaquarist.com/blog/monterey-bay-aquarium-to-suspend-collection-display-of-great-white-sharks>.

before it was safely released back into the wild.⁸⁸ It's the only aquarium in the world that has ever displayed a great white for longer than 16 days.⁸⁹ Great whites usually do not thrive in captivity, and after several less successful attempts, the aquarium has halted efforts to put great whites on display.

ii. Public awareness alerts people to the plight of sharks and their need for legal protection.

The public support sharks have garnered has led to significant advances in the anti-finning movement. Many people had no idea what finning was until conservation groups began protesting it. Because the demand for shark fin soup was the driving factor behind finning, activists realized that the best way to fight finning was to push for a shark fin soup boycott. Taking a cue from the increased public condemnation of finning, many companies have stopped serving shark fin soup altogether, and some airlines and shipping companies refuse to transport shark fins.⁹⁰ Conservation groups continue to spread the word about restaurants and hotels still serving shark fin soup.⁹¹ Late last year, the online food delivery service GrubHub announced it would no longer allow restaurants to sell shark fins through its service.⁹²

iii. Social stigma may be holding back shark conservation legislation.

Sharks are not the only animals that have to fight social stigma. Pit bulls have developed a strong reputation as dangerous dogs, and many people believe every pit bull should be treated accordingly. Even dogs without any pit bull DNA can be harmed by negative attitudes toward the breed. Dogs mistakenly labeled as pit bulls stay at shelters longer than pit bull look-alikes

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *International Shark Finning Bans and Policies*, ANIMAL WELFARE INSTITUTE (last visited Apr. 18, 2016), <https://awionline.org/content/international-shark-finning-bans-and-policies>.

⁹¹ *Id.*

⁹² Press Release, Oceana, GrubHub to Ban Sale of Shark Fin Products (Dec. 16, 2015), <http://usa.oceana.org/press-releases/grubhub-ban-sale-shark-fin-products>.

without the pit bull label.⁹³ Sharks also have a mistaken identity problem. Many sharks have been killed in the wake of attacks by hunters claiming to be searching for the attacker.⁹⁴ As sharks are a mobile species, it's highly unlikely the attacking shark would remain in the area long enough to be caught.⁹⁵ Many of these innocent sharks weren't even aggressive species. Strong legal protection would prevent this type of reactionary killing.

Furthermore, it would be unreasonable to exclude shark species that are potentially aggressive from conservation efforts. Dog breeds including pit bulls, Rottweilers, and German shepherds have been targeted by strict laws due to the rise of breed specific legislation.⁹⁶ They have been singled out because they are considered more aggressive than other breeds. However, opponents argue targeted laws are unreasonable because most dog attacks are the result of the individual treatment of the animal involved rather than their genetic make-up.⁹⁷ Leaving an entire species unprotected because of very rare attacks on human beings would be similarly unreasonable.

III. There is still room for shark conservation law to grow in the future.

a. Conservation groups will continue to move shark conservation legislation forward.

⁹³ Tibi Puiu, *Dogs labeled as 'pit bull' wait three times longer to be adopted*, ZMESCIENCE.COM (Mar. 24, 2016), <http://www.zmescience.com/science/pit-bull-label/>.

⁹⁴ Christine Mai-Due, *'Aggressive' sharks could be killed in North Carolina after Sunday's attacks. Bad idea, experts say*, LATIMES.COM (June 15, 2015, 4:06 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-shark-attack-patrol-20150615-story.html>.

⁹⁵ *Id.*

⁹⁶ Linda S. Weiss, *Breed-Specific Legislation in the United States*, MICHIGAN STATE UNIVERSITY ANIMAL LEGAL & HISTORICAL CENTER (2001), <https://www.animallaw.info/article/breed-specific-legislation-united-states>.

⁹⁷ Ledy VanKavage, *BSL: Why Breed-Specific Legislation is all Bark and Fiscal Bite*, BESTFRIENDS.ORG (last visited Apr. 17, 2016), <http://bestfriends.org/resources/pit-bull-terriers/bsl-why-breed-specific-legislation-all-bark-and-fiscal-bite>.

Conservation groups have worked to enact laws for the protection of wildlife from the earliest days of the conservation movement; the National Audubon Society was a strong force behind the passage of the Migratory Bird Act in 1918.⁹⁸ Keeping with this tradition, lobbying by conservation groups will continue to be instrumental in advancing the legal protection of sharks. Organizations like Oceana, the Pew Charitable Trusts, and the Environmental Defense Fund have developed long-term plans to improve shark conservation legislation and are likely to be active in its future development.

Oceana is an international foundation established in 2001, and the Pew Charitable Trusts was one of its founders. Its purpose is to protect and restore oceans by disseminating specific, science-based campaigns with set deadlines and clear goals.⁹⁹ The organization also uses the law to better ocean conservation. In 2002, the Ocean Law Project, also a Pew initiative, merged into Oceana and became the legal branch of the organization.¹⁰⁰

Oceana is currently campaigning to reduce bycatch in U.S. waters.¹⁰¹ Bycatch is the incidental catch of non-target species, like sharks that are caught in nets meant to capture fish like snapper.¹⁰² On October 27, 2015, Oceana filed a lawsuit against the federal government to stop the overfishing of dusky sharks.¹⁰³ Oceana claimed that the federal government was in

⁹⁸ Martha Harbison, *The Migratory Bird Treaty Act, Explained*, AUDUBON.ORG (May 22, 2015), <http://www.audubon.org/news/the-migratory-bird-treaty-act-explained>.

⁹⁹ *About Us*, OCEANA.ORG (last visited Apr. 14, 2016), <http://usa.oceana.org/about-oceana/about-us>.

¹⁰⁰ *Id.*

¹⁰¹ *Reducing Bycatch on U.S. Waters*, OCEANA.ORG (last visited Apr. 15, 2016), <http://usa.oceana.org/our-campaigns/bycatch/campaign>.

¹⁰² *Saving Dusky Sharks in the Gulf of Mexico and Atlantic*, EARTHJUSTICE.ORG (last visited Apr. 19, 2016), <http://earthjustice.org/cases/2015/saving-dusky-sharks-in-the-gulf-of-mexico-and-atlantic>.

¹⁰³ Press Release, Oceana, *Oceana Launches Lawsuit Against Federal Government to Save Dusky Sharks in Gulf of Mexico and Atlantic* (Oct. 27, 2015), <http://usa.oceana.org/press->

violation of the Magnuson-Stevens Act because although the National Marine Fisheries Service instituted a ban on the intentional fishing of dusky sharks, it did not take action to prevent the species from being taken as bycatch.¹⁰⁴ As of this writing, the case is still ongoing.¹⁰⁵

Aside from its part in establishing Oceana, the Pew Charitable Trusts does its own advocating for international shark conservation. Pew works to influence nations and treaty organizations to make shark conservation part of high seas fisheries regulations.¹⁰⁶ The organization has done extensive work to aid the implementation of the new CITES shark protections by facilitating workshops to educate enforcement officials.¹⁰⁷ Pew also promotes the creation of shark sanctuaries around the world.¹⁰⁸

Last, the Environmental Defense Fund (EDF) is actively working to encourage shark conservation in Cuba, where there has been a renewed interest in sharks in recent years.¹⁰⁹ The focus of EDF's work in Cuba is to help the country get more involved in international shark conservation law. In 1999, the Food and Agriculture Organization of the United Nations Committee on Fisheries endorsed the International Plan of Action for the Conservation and

releases/oceana-launches-lawsuit-against-federal-government-save-dusky-sharks-gulf-mexico-and.

¹⁰⁴ *Id.*

¹⁰⁵ *Oceana, Inc. v. Pritzker et al*, PLAINSITE.ORG (last visited Apr. 19, 2016), <http://www.plainsite.org/dockets/2o8xu7car/district-of-columbia-district-court/oceana-inc-v-pritzker-et-al/>.

¹⁰⁶ *Global Shark Conservation*, PEWTRUSTS.ORG (last visited Apr. 18, 2016), <http://www.pewtrusts.org/en/projects/global-shark-conservation>.

¹⁰⁷ Joshua S. Reichert & John E. Scanlon, *Protecting Sharks, Enforcing CITES: A Global Effort*, A brief from the Pew Charitable Trusts, Aug. 2015, at 5.

¹⁰⁸ *Shark Sanctuaries Around the World*, A fact sheet from the Pew Charitable Trusts, Mar. 2016, at 1.

¹⁰⁹ Hayley Rutger, *New Protection for Cuba's Sharks*, MOTE.ORG (Oct. 28, 2015), <https://mote.org/news/article/new-protection-for-cubas-sharks>.

Management of Sharks.¹¹⁰ This plan asked each member nation to voluntarily create a national plan of action. A national plan of action is a policy framework meant to guide a country's regulatory and management actions. In 2015, EDF provided assistance to the Cuban government as it developed its national plan.¹¹¹ The U.S. and Mexico already had their own plans, and completion of Cuba's plan has led to improved cooperation between these countries. The U.S. and Cuba have even started collaborating on environmental issues.¹¹² The U.S.-Cuba-Mexico Trinational Initiative for Marine Science Conservation in the Gulf of Mexico and Western Caribbean is also working to advance collaboration between these countries.¹¹³

b. New laws may be required to ensure responsible shark tourism.

As greater interest in sharks results in an increased human presence in their habitat, more laws requiring responsible tourism will likely be necessary. Tourism can be positive for sharks because it raises awareness and goodwill as well as encourages locals to protect their economically valuable sharks. But, it's important to make sure that sharks are not disturbed by this human contact. The benefits of shark tourism would be meaningless if it causes sharks distress or forces them to avoid their normal habitats.

Areas with a high volume of shark tourism may choose to adopt rules similar to those of the California sanctuaries, such as limits on how close sharks may be approached and bans on using

¹¹⁰ Final United States National Plan of Action for the Conservation and Management of Sharks, NOAA.GOV (last visited Apr. 20, 2016), <http://www.nmfs.noaa.gov/sfa/Final%20NPOA.February.2001.htm>.

¹¹¹ *Restoring Shark Populations in Cuban Waters*, EDF.ORG (last visited Apr. 18, 2016), <https://www.edf.org/oceans/restoring-shark-populations-cuban-waters>.

¹¹² Jeff Tollefson, *Cuba forges links with United States to save sharks*, NATURE.COM (Oct. 21, 2015), <http://www.nature.com/news/cuba-forges-links-with-united-states-to-save-sharks-1.18604>.

¹¹³ *Trinational Initiative for Marine Science and Conservation in the Gulf of Mexico and Western Caribbean*, TRINATIONALINITIATIVE.ORG (last visited Apr. 19, 2016), <http://www.trinationalinitiative.org/>.

chum to attract sharks. Laws prohibiting individuals from feeding sharks may be especially important. When humans provide sharks with food, there is a risk that they will begin to seek humans out as a food source. In 2010, five shark attacks occurred in less than two weeks at Sharm el-Sheikh, an Egyptian Red Sea resort.¹¹⁴ One theory about the cause of the attacks was that sharks were being hand fed in the area, which led the animals to associate humans with food.¹¹⁵ It's impossible to know precisely what motivates a shark attack, but any human activity that increases the likelihood of an attack will set back conservation efforts.

c. International cooperation will lead to more effective protection.

Further international cooperation will do the most to continue progress in shark conservation. The regional shark sanctuary in Micronesia shows that countries can work together on this issue. With more and more countries taking steps to protect sharks in their waters, connecting these actions will make the greatest impact. A 2008 study of sharks in the Mediterranean Sea might encourage the coastal nations of that region to improve their cooperation. The study estimated that shark populations in the Mediterranean have declined by 97 percent in the last 200 years.¹¹⁶ Creating a regional sanctuary like Micronesia or collaborating on research like the U.S., Mexico, and Cuba have done could help to address this decline.

d. Experience will help improve legislation.

Finally, states and countries will likely review and amend existing legislation to eliminate loopholes detected after enactment of laws or to expand their protection. Many finning prohibitions have been passed in the last decade, but some experts worry unscrupulous fishers

¹¹⁴ Abigail Hauslohner, *The Red Sea Shark Attacks: Jaws Revisited*, TIME.COM (Dec. 10, 2010), <http://content.time.com/time/world/article/0,8599,2036285,00.html>.

¹¹⁵ *Id.*

¹¹⁶ Josh Clark, *Top 10 Shark Conservation Projects*, DISCOVERY.COM (last visited Apr. 19, 2016), <http://www.discovery.com/tv-shows/shark-week/lists/10-reporting-the-danger-sharks-face-in-scholarly-journals/>.

are finding ways around the laws. In some areas, shark finning has evolved into shark spining, which means the body meat of a shark is cut away but the fins are left attached to the spine by strips of skin.¹¹⁷ Shark spining is not expressly prohibited by the finning laws because it did not exist at the time the laws were drafted. Because shark spining is likely to be considered as inhumane as finning, states may wish to amend or draft new laws that expressly prohibit the practice.

Conclusion

Using the law to reverse the global trend of declining wildlife populations is a challenging task, but sharks are particularly difficult to protect. Their slow development cycle puts them at a disadvantage when it comes to recovery, and their migratory behavior exposes them to many jurisdictions. Growing human interest in the welfare of sharks has led to an influx of shark conservation legislation in the last two decades. These actions are already making a difference, but truly effective and enduring shark conservation will require increased international collaboration. Additionally, legislation must create protected marine areas and institute and maintain sustainable fishing practices. Shark sanctuaries scattered across the globe will be of little benefit to sharks if overfishing continues in other areas of the ocean. If these two aspects of shark conservation legislation are carefully balanced, humans and sharks should be able to coexist to the advantage of both.

¹¹⁷ Baker, *supra* note 9, at 23.

“Protecting The Defenseless”

By Domenick Napoletano, Esq.

“The greatness of a nation and its moral progress can be judged by the way its animals are treated.”

With these poignant words, echoed by Mahatma Gandhi, former Kings County Supreme Court Justice Virginia E. Yancey and her husband, retired federal agent Mike Kops, took up the challenge in 2005 to open, and to this day run, the Love and Hope Animal Sanctuary, in Delaware county New York. For anyone who presently has, or who has lost a pet, I trust that this article, whose subject matter is near and dear to my heart, inspires the best, in all who read it, to treat the defenseless of God’s creation with care and respect.

Dognapping is the latest criminal trend running rampant, not only here in the United States, but across the globe. Six years ago on Christmas day seven-year-old Mia Bendrat was finally reunited with her beloved Marley, a Cavalier King Charles Spaniel. Marley was stolen while tied up outside a store in Washington Heights, where Mia and her mom had stopped to pick up groceries for Christmas dinner. It was thanks to a quick thinking Good Samaritan that the thief was apprehended, after she sensed the selling a dog in Union Square to be a tad suspicious. Ultimately, the dog proved to be Marley and Mia and Marley were back together again.

I was much surprised to find that this type of thievery has a history in New York, dating back to the 1800’s when it was common place. The culprits did not prowl the streets by night or by disguise, but, instead, plied their crime openly and notoriously. The culprits were, in fact, the prelude to today’s animal control officer. The dog catchers of the late 1800’s were often, and in most cases rightfully, vilified for the pretext under which they operated. They seized the economic penalties that pet owners faced for keeping their dogs unleashed, un-collared, un-muzzled, or any combination thereof. Dog catchers would often

conduct “raids,” or in some cases coax dogs from inside their homes, and literally steal them. Later they would pocket the \$2.00 impound fee, from the pet owner that arrived at the pound to claim their pets release. If they were not so lucky to get there in time, their pets were euthanized.

I was pleased to discover that, as was the case with Marley’s abduction, some pet owners of the 1800’s also had their vindication. On September 13 1880, the Brooklyn Daily Eagle reported in the case of John Fee, a dog catcher, who having been charged and found guilty of stealing a pet, was sentenced for his crime. Justice Goetting (who I later learned was also a dog lover), in handing down his sentence, remarked, “Dog catchers should be prosecuted more than they are. There is too much dog stealing of late. I believe dog catchers are thieves every one of them” and with those words he sent Fee to jail for twenty-nine days.

Unlike yesteryear’s dog catchers, who saw pets as a means to personally profit financial, today’s animal control officers profess an altruistic calling and are devoted to “rescue, care for, and finding loving homes for homeless and abandoned animals in NYC.” Today’s Animal Care & Control of NYC is, according to their web site, “the largest animal organization in the northeast, rescuing more than 30,000 animals each year.”

Thanks to present day awareness, and people’s sensibilities, we have come a long way in how our pets are protected from those who prey on them and legislation runs the gamut. From the creation of legislation embodied in New York’s Agriculture and Markets Law § 350 et. seq. “Overdriving, Torturing and Injuring Animals” § 353, a misdemeanor, to “Aggravated Cruelty to Animals popularly known as “Buster’s Law,” § 353-a a felony. Also, in 2010 Nassau County District Attorney Kathleen Rice announced the creation of The Animal Cruelty Unit. The unit’s mission according to District Attorney Rice is to “protect pets and defenseless animals, this newly created unit will give a voice to the

victims of animal abuse, and send the message that the abuse and neglect of animals is not tolerated in Nassau County,” Rice said. “The Animal Cruelty Unit will do everything possible to ensure that those who endanger pets and other animals will face the full brunt of the criminal justice system.”

Laws protecting pet owners and naturally, by extension, their pets have also been adopted. In New York City for example § 27-2009.1 (b) of the New York City Administrative Code commonly known as the Pet Law provides:

“Where a tenant in a multiple dwelling openly and notoriously for a period of three months or more following taking possession of the unit harbors, or has harbored a household pet or pets . . . and the owner or his or her agent has knowledge of this fact, and such owner fails within this three-month period to commence a summary proceeding or action to enforce the lease provision prohibiting the keeping of such household companion animal, such lease provision shall be deemed waived. . . .”. Subsection (c) goes on to provide that “it shall be unlawful for an owner or his or her agent, by express terms or otherwise, to restrict a tenant’s rights as provided in this section. Any such restriction shall be unenforceable and deemed void as against public policy”.

The applicability of the Pet Law in cooperative apartment ownership cases was discussed by the Court in *Corlear Gardens Housing Co., Inc. v. Ramos*, 126 Misc.2d 416, 481 N.Y.S.2d 577 (Sup. Ct. Bronx Co., 1984), which by applying the Pet Law retroactively, reasoned “the law must necessarily affect, *inter alia*, the rights and obligations of parties under leases executed ... prior to its date of passage”, and in doing so stated that there was no reason to exclude cooperative owner-shareholders and tenants from the *Pet Law*”.

In applying the above protection to condominium ownership situations the Appellate Division Second Department In *Board of Managers v. Lamontanero*,

206 A.D.2d 340, 616 N.Y.S.2d 744 (2 Dept.,1994), stated: “The legal status of the occupant of a multiple dwelling unit (i.e., whether he pays rent, owns cooperative shares, or is the owner in fee simple of a condominium unit) is not relevant to the purposes of the statute, which include preventing abuses in the enforcement of covenants prohibiting the harboring of household pets and preventing the retaliatory eviction of pet owners for reasons unrelated to the creation of nuisance. “We generally conclude that it would be pernicious to create an exception for condominiums from the generally beneficial requirements of Article 27 of the Administrative Code [the Pet Law]. In addition to substantive harms, an exception for condominiums could lead to anomalies such as permitting the tenant of a condominium owner to invoke the above protection.”

However, in *Board of Managers of the Parkchester North Condominium v. Nicholas Quiles*, 234 A.D.2d 130, 651 N.Y.S.2d 36 (1st Dept., 1996) the Appellate Division, First Department, held that the Pet Law was not applicable to condominiums, reasoning that, by its terms, the Pet Law only applies where there is a landlord-tenant relationship and this is not true of condominiums. The court noted that the law refers only to “covenants contained in multiple dwelling leases and that condominiums are a form of fee ownership.” In its decision the First Department went on to expressly state its disagreement with the Court in *Lamontaner, supra*, by stating “We disagree with the Second Department that condominiums should be deemed covered by the Pet Law because not explicitly excluded.” The lesson here is that if you’re a pet owner its better to own a condominium in the Second Department, which is, apparently, a much friendlier bench to pets and their owners.

As for the elderly, and those who suffer from emotional or physical disabilities, Federal, State and City legislation is there to protect them, as well, against landlords, and cooperative and condominium boards determined to separate them from a loving and devoted pet. In New York City, the *New York Civil Rights Law § 47* provides that “no person shall be denied admittance to

and/or the equal use of and enjoyment of any public facility solely because said person is a person with a disability and is accompanied by a guide dog, hearing dog, or a service dog.” This applies to housing and includes service dogs for a wide range of physical, mental, and medical impairments.

Under the federal Fair Housing Act 42 USC §3604 people with disabilities have been successful in arguing that, in certain circumstances, landlords must allow them to have a companion animal, who provides them with emotional support, as a reasonable accommodation. An excellent discussion on this topic can be found in “Discrimination: The Emotional Support Pet, as a Reasonable Accommodation, under Federal Law” by Karen Copeland, Esq., in *Landlord-Tenant Practice Reporter*, Vol. I, Issue 1, December 1999. In these situations, the companion animal does not have to be qualified as a guide dog, hearing dog, or other type of service animal. Disabilities do not necessarily have to be physical and may include such conditions as depression. Therefore, if a companion animal is determined to be medically necessary, by your health care provider, a court may hold that the pet must be permitted to live in your home with you.

I started this article by conveying how personally near and dear this topic is to my heart. The loves of my life, besides my immediate family is my calico Bella. While she can both be rambunctious at times, she lights up my morning, as I go out the door to work, and reminds me of what is really important when I come home from a hard day. The meaning and intensity of the relationships we have with our pets was never so evident then when the light was dimmed, several years ago, on my tortoise shell calico Mimi. She travelled with me daily to and from work. After her loss, which I still feel today, Justice Virginia E. Yancey, yes the very same Judge Yancey who has devoted herself to giving her love and care to God’s little ones, referred me to a web site for solitude that site is RainbowBridge.com. The site contains a very special poem, which I have reproduced here with permission, of RainbowBridge.com, and which I hope will resonate in the hearts of all pet lovers. It reads as follows:

Just this side of heaven is a place called Rainbow Bridge. When an animal dies that has been especially close to someone here, that pet goes to Rainbow Bridge.

There are meadows and hills for all of our special friends so they can run and play together. There is plenty of food, water and sunshine, and our friends are warm and comfortable.

All the animals who had been ill and old are restored to health and vigor. Those who were hurt or maimed are made whole and strong again, just as we remember them in our dreams of days and times gone by. The animals are happy and content, except for one small thing; they each miss someone very special to them, who had to be left behind.

They all run and play together, but the day comes when one suddenly stops and looks into the distance. His bright eyes are intent. His eager body quivers. Suddenly he begins to run from the group, flying over the green grass, his legs carrying him faster and faster.

You have been spotted, and when you and your special friend finally meet, you cling together in joyous reunion, never to be parted again. The happy kisses rain upon your face; your hands again caress the beloved head, and you look once more into the trusting eyes of your pet, so long gone from your life but never absent from your heart.

Then you cross Rainbow Bridge together....

Author unknown...

Should humane education be included in your child's school curriculum?

By Ashlee K. Cartwright, Esq.

November 18, 2015

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Are you aware that there are state laws requiring humane education be taught in your child's school? The list of states is too short, in my opinion, but at least some states have recognized the importance of teaching our children about kindness and compassion to all living beings.

What exactly is humane education? There are three prominent non-profits that promote humane education, and each defines humane education in a slightly different way. The National Humane Education Society (NHES) says humane education, "teaches people how to accept and fulfill their responsibilities to companion animals, such as cats and dogs, and all forms of animal life. It explains the consequences of irresponsible behavior and encourages people to see the value of all living things." The mission of Humane Education Advocates Reaching Teachers (HEART), another nonprofit dedicated to humane education, is "to foster compassion and respect for all living beings and the environment by educating youth and teachers in Humane Education." The Institute for Humane Education (IHES) says, "Humane education is a lens, body of knowledge, and set of tools and strategies for teaching about human rights, animal protection, environmental stewardship, and cultural issues as interconnected and integral dimensions of a just, healthy society. Humane education not only instills the desire and capacity to live with compassion, integrity, and wisdom, but also provides the knowledge and tools to put our values into action in meaningful, far-reaching ways so that we can find solutions that work for all."

Like the interpretation of humane education, the laws addressing humane education are not uniform and all have their nuances [Note: there is no federal law on humane education]. Some laws are very detailed and specifically mention the treatment of animals. Other laws are broad and apply their moral and humane education curriculum requirements to more than animals. Some laws are mandatory and others are voluntary. However, whether compulsory or not, most of these humane education laws do have not an enforcement mechanism, which means there really isn't much you can do, legally, if they are not being followed by your school.

The following is a list of states that currently address humane education in their laws and statutes. [Note: I did not include any references to dissection or vivisection. The excerpts below focus solely on humane education and humane treatment of animals.]

- **California** (California Codes, Education Code, Title 1, Division 1, Part 1, Chapter 2: Educational Equality, Article 5: Hate Violence Prevention Act, 233.5(a)
 - "Each teacher shall endeavor to impress upon the minds of the pupils the principles of morality, truth, justice, patriotism, and a true comprehension of the rights, duties, and dignity of American citizenship, and the meaning of equality and human dignity, including the promotion of harmonious relations, kindness toward domestic pets and the humane treatment of living creatures, to teach them to avoid idleness, profanity,

and falsehood, and to instruct them in manners and morals and the principles of a free government."

- **Florida** (Florida State Statutes, Title XLVIII: Education Code, Chapter 1003: Public K-12 Education, Section 42: Required instruction)
 - "(2) Members of the instructional staff of the public schools, subject to the rules of the State Board of Education and the district school board, shall teach efficiently and faithfully, using the books and materials required that meet the highest standards for professionalism and historic accuracy, following the prescribed courses of study, and employing approved methods of instruction, the following: (k) Kindness to animals"
- **Illinois** (Illinois Compiled Statutes, Education Code, Chapter 105: Schools, 5: School Code, Article 27 Section 15: Moral and humane education)
 - "In institute programs. The superintendent of each region and city shall include once each year moral and humane education in the program of the teachers' institute which is held under his supervision."
- **Maine** (Maine Statutes, Title 20: Education, Chapter 111: Religion and Morals, Section 1221: Teaching of virtue and morality)
 - "Instructors of youth in public or private institutions shall use their best endeavors to impress on the minds of the children and youth committed to their care and instruction the principles of morality and justice and a sacred regard for truth; love of country, humanity and a universal benevolence; the great principles of humanity as illustrated by kindness to birds and animals and regard for all factors which contribute to the well-being of man; industry and frugality; chastity, moderation and temperance; and all other virtues which ornament human society; and to lead those under their care, as their ages and capacities admit, into a particular understanding of the tendency of such virtues to preserve and perfect a republican constitution, secure the blessings of liberty and to promote their future happiness."
- **Massachusetts** (Massachusetts General Law, Chapter 272: Crimes Against Chastity, Morality, Decency, and Good Order, Section 80G: Experiments on vertebrates; vivisection, dissection of animals; care.)
 - "Live animals used as class pets or for purposes not prohibited in paragraphs one and two hereof in such schools shall be housed or cared for in a safe and humane manner. Said animals shall not remain in school over periods when such schools are not in session, unless adequate care is provided at all times."
- **New Hampshire** (New Hampshire Revised Statutes, Title 62: Criminal Code, Chapter 644: Breaches of the Peace and Related Offenses, Section 8-c: Animal Use in Science Classes and Science Fairs)

- "VII. Any live animal kept in any elementary or secondary school shall be housed and cared for in a humane and safe manner and shall be the personal responsibility of the teacher or other adult supervisor of the project or study."
- **New Jersey** (New Jersey Permanent Statutes, Title 18A: Education, 35-4.1: Course of study in principles of humanity)
 - "Each board of education may teach, by special courses or by emphasis in appropriate places of the curriculum, in a manner adapted to the ages and capabilities of the pupils in the several grades and departments, the principles of humanity as the same apply to kindness and avoidance of cruelty to animals and birds, both wild and domesticated."
- **New York** - (New York Education Law, Section 809: Instruction in the humane treatment of animals)
 - "1. The officer, board or commission authorized or required to prescribe courses of instruction shall cause instruction to be given in every elementary school under state control or supported wholly or partly by public money of the state, in the humane treatment and protection of animals and the importance of the part they play in the economy of nature as well as the necessity of controlling the proliferation of animals which are subsequently abandoned and caused to suffer extreme cruelty. Such instruction shall be for such period of time during each school year as the board of regents may prescribe and may be joined with work in literature, reading, language, nature study or ethnology. Such weekly instruction may be divided into two or more periods. A school district shall not be entitled to participate in the public school money on account of any school or the attendance at any school subject to the provisions of this section, if the instruction required hereby is not given therein. 2. Study and care of live animals. Any school which cares for or uses animals for study shall ensure that each animal in such school be afforded the following: appropriate quarters; sufficient space for the normal behavior and postural requirements of the species; proper ventilation, lighting, and temperature control; adequate food and clean drinking water; and quarters which shall be cleaned on a regular basis and located in an area where undue stress and disturbance are minimized."
- **Oregon** (Oregon Revised Statutes, Volume 9: Education and Culture, Chapter 336: Conduct of Schools Generally, Section 336.067: Instruction in ethics and morality)
 - "(1) In public schools special emphasis shall be given to instruction in: (d) Humane treatment of animals."
- **Pennsylvania** (Public School Code, Article XV: Terms and Courses of Study, Section 15-1514: Humane education)

- "Instruction in humane education shall be given to all pupils up to and including the fourth grade, and need not exceed half an hour each week during the whole school term. No cruel experiment on any living creature shall be permitted in any public school of this Commonwealth."
- **Washington** (Revised Code of Washington, Title 28A: Common School Provisions, Chapter 230: Compulsory School Provisions, Section 020: Common School Curriculum)
 - "All common schools shall give instruction in reading, handwriting, orthography, written and mental arithmetic, geography, the history of the United States, English grammar, physiology and hygiene with special reference to the effects of alcohol and drug abuse on the human system, science with special reference to the environment, and such other studies as may be prescribed by rule of the superintendent of public instruction. All teachers shall stress the importance of the cultivation of manners, the fundamental principles of honesty, honor, industry and economy, the minimum requisites for good health including the beneficial effect of physical exercise and methods to prevent exposure to and transmission of sexually transmitted diseases, and the worth of kindness to all living creatures and the land. The prevention of child abuse may be offered as part of the curriculum in the common schools."

Louisiana used to have a humane education law on the books (Title 17, Section 266), but it was repealed in 2013. I was unable to find an updated version in their current laws. I am hoping that it was repealed because it used archaic terminology, mainly "dumb animals" to refer to non-human animals. It also appears that North Dakota's humane education law (Title 15: Education, Section 38-11) no longer exists.

One of the best places for children to begin their exploration into the scope of humane education is in elementary school. The IHES aptly declares that humane education is the only educational movement that recognizes that animals should be included in the effort to create a more peaceful and just world. While this makes a whole lot of sense to parents and children involved in animal advocacy, there are thousands of parents and children out there who have yet to make this realization.

Keep in mind that even if your state is not listed above, that doesn't necessarily mean that your school district does not provide humane education. To find out what instruction your school gives on the topic, it is best to speak with your child's teacher and/or principal. If they are unable to give you the answer you want, you can check out the websites listed below for more information about humane education and to see what other options you have if your school does not include humane education in their curriculum. Also, don't let the fact that many of the laws listed above do not have enforcement mechanisms in place. If you live in one of these states and you believe your school district is not following the applicable law or statute, contact the appropriate school staff and administrators to see if there is something that can be done about it. Perhaps you can help coordinate a humane educator visiting your child's classroom to provide a humane education lesson!

Institute for Humane Education: <https://humaneeducation.org>

HEART <https://teachhumane.org>

National Humane Education Society <https://nhes.org>



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ANIMAL LAW APP

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Also available at:

