

# Trophy Hunting Contracts: Unenforceable for Reasons of Public Policy

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## I. INTRODUCTION

Cecil the Lion. The name speaks for itself: famed alpha male lion lured outside a Zimbabwean national park to be shot for “sport” by American dentist Walter Palmer in the summer of 2015. Palmer reportedly shot Cecil with a crossbow, then stalked the lion for forty hours before finally killing and beheading it. Palmer reportedly paid over fifty thousand U.S. dollars to a local hunting guide and landowner for the hunt.<sup>1</sup>

In such “trophy hunting” agreements, wealthy individuals, typically from the Global North, pay locals such as guides or landowners, often in the Global South, to assist with the planned hunt of rare—if not outright threatened or endangered—species such as lions, polar bears, black rhinoceroses, and giraffes for a fee as a private contractual arrangement. In other cases, hunters obtain government permits to kill and import a rare animal. Allegedly, trophy hunts contribute to local economies and can help raise money and awareness for species conservation.<sup>2</sup> However, serious doubt has arisen about the effectiveness of trophy hunts on society’s ultimate goal—undisputed by trophy hunters—of

1. Harriet Alexander, *Cecil the Lion’s Killer Revealed as American Dentist*, TELEGRAPH (July 28, 2015), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/11767119/Cecil-the-lions-killer-revealed-as-American-dentist.html> [https://perma.cc/W8FA-GYM5]; Christina Capecchi & Katie Rogers, *Killer of Cecil the Lion Finds Out That He Is a Target Now, of Internet Vigilantism*, N.Y. TIMES (July 29, 2015), <http://www.nytimes.com/2015/07/29/world/africa/american-hunter-is-accused-of-killing-cecil-a-beloved-lion-in-zimbabwe.html> [https://perma.cc/UT8N-WRUM]; Lydia O’Connor, *Dentist Who Killed Cecil the Lion Writes Apology to Patients*, HUFFINGTON POST (July 20, 2015), [http://www.huffingtonpost.com/entry/dentist-who-killed-cecil-the-lion-apologizes-in-note-to-patients\\_us\\_55b90e2be4b0074ba5a72148](http://www.huffingtonpost.com/entry/dentist-who-killed-cecil-the-lion-apologizes-in-note-to-patients_us_55b90e2be4b0074ba5a72148) [https://perma.cc/5C6M-XBZ3].

2. The single largest source of trophy imports to the United States is Canada because it “offers iconic North American species such as black bears, grizzly bears, moose, and wolves.” *Exclusive: Hard Numbers Reveal Scale of America’s Trophy-Hunting Habit*, NAT’L GEOGRAPHIC (Feb. 6, 2016), <http://news.nationalgeographic.com/2016/02/160206-American-trophy-hunting-wildlife-conservation> [https://perma.cc/MPK8-PL9U]. However, because the issue of potential revenue-generation is particularly important to nations in the Global South, this Article focuses on trophy hunting carried out in those nations to a large extent, although not exclusively.

conserving rare species. The “shadowy subculture”<sup>3</sup> that trophy hunting has been said to be is one that attempts to make the unacceptable sound acceptable under the guise of euphemisms and questionable facts as will be demonstrated in this Article. While such discussions continue, more and more of the very last few specimens of several rare species are killed for, in effect, fun. As a society, we cannot allow trophy hunting of wild, rare animals to proceed given the uncertainty surrounding the effects of the practice and the reprehensibility of it to society.

Contracts that are considered “unsavory,” “undesirable,” “at war with the interests of society,” or “in conflict with the morals of the time” may be declared unenforceable for reasons of public policy *regardless* of whether or not any underlying legislation provides that the contractual conduct is illegal. Allowing wealthy individuals to kill some of the very last few specimens of rare species has become so distasteful to so many members of the general public that the time has come for courts to declare such contracts unenforceable for reasons of public policy. This Article demonstrates how this may be accomplished. The Article also examines the wildlife-protective capabilities of the public trust doctrine and the closely related state ownership of wildlife doctrine. These doctrines add further weight to the contractual argument, but also operate as stand-alone protective doctrines in lawsuits against government entities. To be able to present any of these arguments to a court of law, standing is a hurdle, but one that can be overcome. This Article highlights how this might be done.

I proceed as follows: By way of background, I present the public outcry surrounding the killing of Cecil as well as facts demonstrating how many people currently find the killing of rare species of animals for sport distasteful. This serves to exemplify how public opinion is shifting against the practice which, in turn, supports the common law argument that courts can and ought to invalidate private trophy hunting contracts.

Next, I briefly examine the species extinction problem and the related effects on the broader ecosystems in which the “trophy” animals find their habitats. I summarize some of the advantages and disadvantages of trophy hunting from economic,

3. Wayne Pacelle, *Cecil's Revenge*, HUFFINGTON POST (Jan. 22, 2016.), [http://www.huffingtonpost.com/wayne-pacelle/cecils-revenge\\_b\\_9054682.html](http://www.huffingtonpost.com/wayne-pacelle/cecils-revenge_b_9054682.html) [https://perma.cc/XD5W-7AR9].

developmental, and ethical points of view, recognizing the fact that trophy hunting is a multi-faceted and complex issue. However, I present some of the scientific findings and arguments on the issue precisely in order to demonstrate that doubt exists. Under the precautionary principle of law, great caution must be exercised in such situations.

I then set forth the regulatory and treaty schemes currently governing some, but unfortunately not all, rare species. Although the common law of contracts does not require that positive law prohibit a certain commercial practice for courts to find it unenforceable for reasons of public policy, I find that many people conflate these two issues. A brief explanation is thus in order.

In the main part of the article, I analyze why trophy hunting contracts may be declared unenforceable under existing contract law. Where contracts impede an established and viable interest of society at large, they may be declared unenforceable by the judiciary for reasons of public policy. Nowhere else is this doctrine currently more applicable than to the killing for "sport" of species that find themselves in the eleventh hour and fifty-ninth minute of planetary existence. I also briefly examine how the public trust doctrine and the closely related state ownership of wildlife doctrine cover the right of the general public to have their sovereign governments affirmatively protect rare species and thus, among other things, *not* continue to issue permits to hunt rare species. This argument could be asserted as a stand-alone argument in a separate case against a possible government party or add weight to the contractual unenforceability argument with government agencies added as defendants.

Standing may present a legal hurdle in this context as well as in so many others. Courts may declare contracts unenforceable if one of the actual contractual parties wishes to renege on his or her promise. Doing so is not at all uncommon in the contractual context and may well happen with trophy hunting as well. The actual contracting parties have standing *per se*. However, where both contractual parties wish to proceed with the promised action and where such action is not illegal under positive law, third parties will have to argue for a change of existing contract law in order to obtain standing. The issue in this context is whether third parties can seek to have a contract declared *unenforceable* under third party law where normally, parties seek to have the contractual

performances enforced. However, as third-party beneficiaries obtained standing without contractual privity years ago, so might contractual outsiders be able to persuade courts that they ought to have standing for the limited purpose of challenging the contractual validity of trophy hunting contracts given the overlapping interests of parties without strict contractual privity. Further, third parties might obtain standing in state court through lesser-known and relaxed state standards. New case law demonstrates that state standing is different from, and often less demanding than, federal standing in the context of environmental lawsuits.

In cases where courts are asked to resolve issues relating to trophy hunting contracts, they have both relevant precedent as well as sound modern reasons to declare trophy hunting contracts unenforceable because of urgent and major societal concerns that override the interest of individual contractual parties in the enforcement of such contracts. Doing so would serve several purposes. Crucially, it would deter the on-the-ground practice in future instances if a particular trophy animal has already been killed and the matter is solely one of payment. In cases of executory promises to render assistance with a future hunt, a lawsuit might save the individual targeted animal. Where both contracting parties wish to continue with the contract, third-party beneficiary law should be expanded to include the rights of a class of people that can demonstrate a clear interest in the survival of the animals or, in a somewhat “radical” argument, the rights of the particular wild animals *not* to be killed. Existing third-party contract law does not always require contractual privity. It ought not to here either. Established law does not need to be altered much to achieve the goal of allowing third parties to question the validity of a trophy hunting contract.

Further, trophy hunting is arguably a violation of the public trust doctrine and the state ownership of wildlife doctrine. Relying on these doctrines, plaintiffs may challenge actions taken by permit-issuing authorities for their insufficient regulatory protections of rare, wild animals. Thus, standing would arise through the existing substantive rights under these doctrines where government entities are parties to potential lawsuits. The doctrines are purposefully not examined in depth here as existing scholarship already does so very well. They are only presented as they add further weight to

increasing legal protections of rare animals whether under the common law or regulatory law.

Judicial action against trophy hunting, whether on contract law or public trust doctrine grounds, would bring more attention to the issue, including, in all likelihood, more probing studies of the alleged benefits and disadvantages of trophy hunting. Currently, trophy hunting proceeds on inconclusive scientific and financial presumptions. Such uncertainty is unacceptable in the case of species at the brink of extinction. Any doubt about whether or not to allow the sport killing of such animals must, under the precautionary principle of environmental law be resolved against doing so. Judicial action and more awareness of the issue could lead to better legislative and treaty protections at the national and international scales where the problem may be stemmed more effectively than through ad-hoc common law lawsuits relying on anachronistic legal rules. Until then, however, action from a multitude of angles *including* the common law tends to be beneficial to socio-legal developments in general. Contract law has helped shape societal norms of what is acceptable commercial behavior in many other contexts. It could very well provide the same positive results for critically endangered species. From this angle, the potential benefits of a slight amount of judicial action vastly outweigh any reasonable concerns about judicial activism.

## II. PUBLIC OUTCRY: THE “MORALS OF THE TIMES” ARGUMENT

Cecil’s case drew wide international media attention and sparked intense global outrage among not only animal enthusiasts and environmental conservationists, but also among the general population, politicians, and celebrities<sup>4</sup> to an extent not seen before, not even when TV personality Corey Knowlton paid \$350,000 for a permit to legally hunt and kill (or, in Knowlton’s words, to “experience”<sup>5</sup>) a black rhino in Namibia in 2014.<sup>6</sup>

4. Capecchi & Rogers, *supra* note 1; MSNBC, *Celebrities [sic] and Politicians Express Outrage over Death of #CecilTheLion*, STORIFY, <https://storify.com/MSNBC/celebrities-and-politicians-outraged-over-death-of-> [<https://perma.cc/GK7C-TT8X>] (last visited March 20, 2016).

5. Heather Saul, *Black Rhino Hunter Corey Knowlton Receives Death Threats After Winning Licence to Shoot Endangered Animal*, INDEPENDENT (Jan. 18, 2014), <http://www.independent.co.uk/news/world/americas/black-rhino-hunter-corey-knowlton-receives-death-threats-after-winning-licence-to-shoot-endangered-9069138.html> [<https://perma.cc/D9EK-8E2L>].

Hundreds of protesters gathered outside Palmer's dental office.<sup>7</sup> Protests were also held in cities around the country and, indeed, the world, protesting the slaying of Cecil and trophy hunting in general.<sup>8</sup> In California alone, rallies organized by just one organization were held in four different cities.<sup>9</sup> The message was to "condemn trophy hunting for damaging the preservation of endangered species."<sup>10</sup> When Safari Club International ("SCI")—an organization that promotes big game hunting, including trophy hunting—met in Orange County, California shortly after the killing of Cecil, its members were also met with protests and outrage.<sup>11</sup> In the heavy onslaught of criticism, Mr. Palmer went underground and remained so for some time, even after the U.S. Fish and Wildlife Service ("Service") asked him to report to the agency and to cooperate in its investigations of the matter.<sup>12</sup>

Minnesota Governor Mark Dayton called the killing of the lion "appalling."<sup>13</sup> Congresswoman Betty McCollum of Minnesota said that "[t]o bait and kill a threatened animal, like this African lion, for sport cannot be called hunting but rather a disgraceful display of callous cruelty."<sup>14</sup> TV show host Sharon Osbourne tweeted, "I hope that #WalterPalmer loses his home, his practice & his money. He has already lost his soul."<sup>15</sup> Late-night TV show host Jimmy

6. Ed Lavandera, *Texas Hunter Bags His Rhino on Controversial Hunt in Namibia*, CNN (May 21, 2015), <http://www.cnn.com/2015/05/19/africa/namibia-rhino-hunt/index.html> [https://perma.cc/NU2A-APJA].

7. *Hundreds Protest Cecil the Lion Killing at Dentist's Office*, USA TODAY (July 30, 2015), <http://www.usatoday.com/story/news/nation-now/2015/07/29/cecil-lion-killing-minnesota-protests-dentist-office/30858399> [https://perma.cc/G7DR-MDNT].

8. See, e.g., Cassia Pollock, *Local Groups Participate in Worldwide Rally Against Trophy Hunting*, TIMES SAN DIEGO (Feb. 6, 2016), <http://timesofsandiego.com/life/2016/02/06/local-groups-participate-in-worldwide-rally-against-trophy-hunting> [https://perma.cc/P7DT-QH6J].

9. *Id.*

10. *Id.*

11. David Whiting, *Battle over Cecil the Lion Flares in Orange County*, ORANGE COUNTY REG. (Aug. 25, 2015), <http://www.ocregister.com/articles/club-678880-cecil-genesis.html> [https://perma.cc/DZM6-NFE9]. Nonetheless, SCI members refuse to talk to nonmembers about the issue. *Id.*

12. Ed Payne, *Cecil the Lion Backlash: Where Is Dentist Walter Palmer*, CNN (July 30, 2015), <http://www.cnn.com/2015/07/30/us/walter-palmer-whereabouts> [https://perma.cc/7NVY-9GHP].

13. *Politicians Speak Out on the Death of Cecil the Lion*, CBS MINN. (July 29, 2015), <http://minnesota.cbslocal.com/2015/07/29/politicians-speak-out-on-the-death-of-cecil-the-lion> [https://perma.cc/YW6E-ZP4W].

14. *Id.*

15. MSNBC, *supra* note 4.

Kimmel ranted against Palmer and successfully urged viewers to donate to the wildlife conservation organization that had been tracking Cecil's activities and location.<sup>16</sup> One of the most profound statements about Palmer's actions was issued by a fashion model native to South Africa:

Seeing these animals alive in their natural habitat is such a blessing, you have to be so sick to want to kill such a majestic creature of God. You come to Africa with your dollars and Euros thinking you can buy power by taking advantage of Africa's poverty and paying people to help you kill an innocent creature. Disgusting!<sup>17</sup>

Americans have come to oppose hunting for sport to a very large extent. A recent poll shows that fifty-six percent of Americans oppose hunting animals for sport, and most Americans, eighty-six percent, consider big game hunting to be especially distasteful.<sup>18</sup> But should big game hunting be legally prohibited? More than six in ten residents, sixty-two percent, say the practice is wrong and should be legally banned, including thirty-four percent of hunters.<sup>19</sup> Another twenty-four percent of Americans and thirty-one percent of hunters say they disapprove of the practice but do not think it should be deemed illegal.<sup>20</sup> Eleven percent of adults nationally think the practice is acceptable.<sup>21</sup> Twenty-six percent of Americans think hunting in general should be prohibited.<sup>22</sup> As for Palmer's actions, forty-one percent of Americans believe that he acted unethically when he killed Cecil.<sup>23</sup>

Why so much opposition to trophy hunting at so many levels and from so many fronts? Is the general public becoming more concerned about the disappearance of rare species, or did the

16. Lesley Savage, *Jimmy Kimmel's Cecil the Lion Plea Leads to \$150,000 in Donations*, CBS (July 30, 2015), <http://www.cbsnews.com/news/jimmy-kimmel-cecil-the-lion-plea-leads-to-150000-in-donations> [https://perma.cc/L2A8-MJ3F].

17. Rebecca Rose, *Celebs Express Outrage over the Killing of Cecil the Lion*, COSMOPOLITAN (July 28, 2015), <http://www.cosmopolitan.com/politics/news/a44003/celebrities-express-their-outrage-over-the-killing-of-cecil-the-lion> [https://perma.cc/G355-2VR6].

18. *Americans Oppose Big Game Hunting . . . More Than Six in Ten Favor Legal Ban*, MARIST POLL (Nov. 24, 2015), <http://maristpoll.marist.edu/1124-americans-oppose-big-game-hunting-more-than-six-in-ten-favor-legal-ban> [https://perma.cc/LD6N-5KMR].

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*



media simply need another of the twenty-four-hour, non-stop, quickly fading news items that are popular among some major TV stations? In today's rapidly moving news world, some of the intense media focus on the topic did, as could be expected, shift to other issues. Such is the nature of modern news coverage. This, however, does not mean that the general public no longer finds the practice of trophy hunting reprehensible. Many people around the world still do, although a few do not. Meanwhile, the controversial practice of trophy hunting still continues, placing the right of the general public to enjoy the species in low-impact ways at risk.

### III. THE SPECIES EXTINCTION PROBLEM

Hunting of rare species is still allowed in many countries. For example, grizzly bears can still be hunted legally in Alaska and British Columbia although considered to be threatened in some of their ranges.<sup>24</sup> At the time of the killing, the U.S. Fish and Wildlife Service had proposed listing lions in southern and eastern Africa as threatened under the Endangered Species Act ("ESA"), but the listing had not been finalized.<sup>25</sup> Trophy hunting of African elephants is permitted in many African countries, including Namibia, South Africa, Botswana, Cameroon, Gabon, Mozambique, Zambia, and Zimbabwe.<sup>26</sup> African elephants are considered a "threatened" species under the ESA and "vulnerable" on the International Union for Conservation of Nature ("IUCN") Red List.<sup>27</sup> Although cheetahs are considered "endangered" under

24. John Zada, *Killing Canada's Grizzly Bears*, AL JAZEERA (Nov. 22, 2015), <http://www.aljazeera.com/indepth/features/2015/11/killing-canada-grizzly-bears-151122064118555.html> [<https://perma.cc/R7KB-CXSJ>].

25. Subsequently, a Service rule protecting two subspecies of lions under the ESA as threatened and endangered, respectively, took effect on January 22, 2016. Listing Two Lion Subspecies, 80 Fed. Reg. 80,000 (Dec. 23, 2015) (to be codified at 50 C.F.R. § 17.11(h)). Anyone wanting to import lion parts must now first obtain a permit from the Service, which will grant a permit for trophy imports "from countries with established conservation programs and well-managed lion populations." *Lions Are Now Protected Under the Endangered Species Act*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/endangered/what-we-do/lion.html> [<https://perma.cc/T8CN-QHNS>] (last updated Dec. 23, 2015). In addition to the new lion rule, the United States has suspended elephant trophy imports from Tanzania and Zimbabwe. Pacelle, *supra* note 3.

26. Susan Bird, *10 Endangered Species You Can Still Hunt*, CARE2 (July 18, 2013), <http://www.care2.com/causes/10-endangered-species-you-can-still-hunt.html> [<https://perma.cc/VZP3-H8BA>].

27. *African Elephants*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/international/animals/african-elephants.html> [<https://perma.cc/BNX3-HNVY>] (last visited Mar. 20,

the ESA, “vulnerable” by the IUCN across their range, and “critically endangered” by the IUCN in North Africa and Asia, they may be legally hunted in Botswana and Zimbabwe, and Namibia allows the killing of up to 150 cheetahs per year.<sup>28</sup> Some African nations such as Zimbabwe still allow the hunting of African lions and other rare animals both in the wild or in captivity.<sup>29</sup>

Many of the targeted animal species are highly endangered or threatened with extinction. Some of the animals are hunted in the wild, whereas others are bred, kept, and hunted in captivity (so-called “canned hunting”). The hunters either bring back parts of the animals as trophies—hence the popularized name for the practice—or undertake the hunt simply for the experience itself.<sup>30</sup> In “canned hunts,” hunters shoot rare species that have been bred in captivity for the very purpose of being shot upon reaching adulthood (having first been used in petting zoos while young).<sup>31</sup>

Despite the already low remaining numbers of many targeted species, American hunters have killed over five thousand African lions and imported parts of them as trophies over the past ten years.<sup>32</sup> “[B]etween 2005 and 2014, more than 1.2 million ‘trophies’ of over 1200 different kinds of animals were imported into the United States.”<sup>33</sup> Whether canned, legal, well managed, or not, the hunting of animals belonging to a species threatened with extinction is, to a large segment of the population, so appalling and disturbing at a deep moral and philosophical level that, under contract law and the public trust doctrine, such hunting should not

2016); *Loxodonta Africana*, IUCN RED LIST THREATENED SPECIES, <http://www.iucnredlist.org/details/12392/0> [<https://perma.cc/CK3E-FPA4>] (last visited Mar. 22, 2016).

28. Bird, *supra* note 26.

29. *Id.*

30. The Humane Society of the U.S. has defined trophy hunting as “killing wild animals for their body parts, such as head and hide, for display but not primarily for food or sustenance.” HUMANE SOC’Y OF THE U.S., TROPHY HUNTING BY THE NUMBERS: THE UNITED STATES’ ROLE IN GLOBAL TROPHY HUNTING 2 (2016). A PBS reporter has defined trophy hunting as “the sport of hunting wild game, generally with the intent to collect ‘trophies’—either an entire carcass, or body parts like the head, hide and legs—which are then taxidermied.” Daniel Costa-Roberts, *Why Did Cecil the Lion Die? What You Should Know About Trophy Hunting*, PBS NEWSHOUR (Aug. 1, 2015), <http://www.pbs.org/newshour/rundown/trophy-hunting-explained> [<https://perma.cc/T4RN-ZWMJ>].

31. See Patrick Barkham, ‘Canned Hunting’: The Lions Bred for Hunting, *GUARDIAN* (June 3, 2013), <http://www.theguardian.com/environment/2013/jun/03/canned-hunting-lions-bred-slaughter> [<https://perma.cc/L4KL-U4WT>].

32. Pacelle, *supra* note 3.

33. *Id.*

be permissible in modern society. Further, allowing *some* trophy hunting in *some* areas arguably just whets the appetite for the practice just as allowing some trade in ivory, for example, is thought to spur the demand for ivory from illegal sources and contribute to elephant extinction.<sup>34</sup> As with the ivory trade, outright bans may better serve the ultimate purpose: to end the demand for the product and thus the supply.

Extinction is a natural process, but today, the accelerated loss of many species is estimated by the IUCN to be between 1000 and 10,000 times more rapid than natural extinction rates,<sup>35</sup> with approximately 17,000 species currently threatened with extinction.<sup>36</sup> Even this number may be a gross underestimation, since “less than 3% of the world’s currently known 1.9 million described species have been assessed.”<sup>37</sup> “One in four mammals and one in eight bird species face a high risk of extinction in the near future.”<sup>38</sup> Similarly, “[o]ne in three amphibians and almost half of all tortoises and freshwater turtles are [considered] threatened.”<sup>39</sup> Included on this threatened list are various types of elephants, rhinoceroses, tigers, turtles, lemurs, leopards, polar bears, hippopotamuses, sharks, freshwater fish, gorillas, and orangutans—with many of these animals considered to be critically endangered.<sup>40</sup> Only 1400 of one of the two subspecies of African

34. Mary Rice, *The Case Against a Legal Ivory Trade: It Will Lead to More Killing of Elephants*, YALE ENV’T 360 (Oct. 13, 2014), [http://e360.yale.edu/feature/counterpoint\\_the\\_case\\_against\\_a\\_legal\\_ivory\\_trade\\_it\\_will\\_lead\\_to\\_more\\_killing\\_of\\_elephants/2815/](http://e360.yale.edu/feature/counterpoint_the_case_against_a_legal_ivory_trade_it_will_lead_to_more_killing_of_elephants/2815/) [<https://perma.cc/EUC4-8M43>].

35. INT’L UNION FOR CONSERVATION OF NATURE, SPECIES EXTINCTION—THE FACTS 1 (2007) [hereinafter SPECIES EXTINCTION]. The IUCN Red List of Threatened Species is “widely recognized as the most comprehensive, objective global approach for evaluating the conservation status of [all] plant and animal species” around the world. See *Overview of the IUCN Red List*, IUCN RED LIST THREATENED SPECIES, <http://www.iucnredlist.org/about/overview> [<https://perma.cc/76CU-UEUF>] (last visited Apr. 3, 2016).

36. SPECIES EXTINCTION, *supra* note 35, at 1.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Species Directory*, WORLD WILDLIFE FUND, [https://www.worldwildlife.org/species/directory?direction=desc&sort=extinction\\_status](https://www.worldwildlife.org/species/directory?direction=desc&sort=extinction_status) [<https://perma.cc/N24N-K4Z6>] (last visited Mar. 16, 2016). Threatened species are categorized as “Critically Endangered,” “Endangered,” or “Vulnerable.” INT’L UNION FOR CONSERVATION OF NATURE, IUCN RED LIST CATEGORIES AND CRITERIA: VERSION 3.1, at 4–5 (2d ed. 2012). Critically Endangered species are those “considered to be facing an extremely high risk of extinction in the wild”; Endangered species are those “considered to be facing a very high risk of extinction in the wild”; and Vulnerable species are those “considered to be facing a high risk of extinction in the wild.” *Id.* at 14–15.

lions—the *P. l. leo*—remain.<sup>41</sup> This subspecies is now listed as endangered under the ESA.<sup>42</sup> Of the other subspecies, the *P. l. melanochaita*, 17,000 to 19,000 remain.<sup>43</sup> Cecil belonged to this latter subspecies, which is now listed as threatened under the ESA.<sup>44</sup>

The list of almost-extinct, yet popular and treasured, species goes on. For example, the tiger population was first considered to be dangerously low in the 1990s when the population dwindled to just 5000–7000 tigers worldwide because of human hunting.<sup>45</sup> In 2014, the number of tigers reported in the wild was alarmingly reduced by over half, with fewer than 2500 mature tigers remaining.<sup>46</sup> Today, humans are killing tigers faster than they are destroying tiger habitats, resulting in a problematic “empty forest syndrome.”<sup>47</sup> No mammal group on earth, however, is more endangered than the lemur.<sup>48</sup> Despite local legal protections for them, lemurs are still being hunted for their meat, and about ninety percent of lemur species have been deemed highly vulnerable, endangered, or critically endangered.<sup>49</sup>

What has caused today’s elevated extinction threat? The phenomenon is caused almost entirely by humans.<sup>50</sup> Over the last 500 years, humans have been responsible for forcing 869 species into extinction in the wild.<sup>51</sup> The recent extinction rates are increasing and have reached levels unprecedented in human history.<sup>52</sup>

Many factors such as habitat loss, famine, unsustainable hunting, pollution, and climate change contribute to species extinction.

41. *Lions Are Now Protected Under the Endangered Species Act*, *supra* note 25.

42. *Id.*; Listing Two Lion Subspecies, 80 Fed. Reg. 80,000 (Dec. 23, 2015) (to be codified at 50 C.F.R. § 17.11(h)).

43. *Lions Are Now Protected Under the Endangered Species Act*, *supra* note 25.

44. *See id.*; Listing Two Lion Subspecies, 80 Fed. Reg. at 80,000.

45. Listing Two Lion Subspecies, 80 Fed. Reg. at 80,025.

46. J. GOODRICH ET AL., THE IUCN RED LIST OF THREATENED SPECIES: PANTHERA TIGRIS 1–2 (2015).

47. *Id.*

48. Michelle Douglass, *The Future of Madagascar’s Lemurs*, BBC (Feb. 27, 2015), <http://www.bbc.com/earth/story/20150226-what-hope-is-there-for-madagascars-threatened-lemurs> [https://perma.cc/3UGG-Z2FT].

49. *Id.*

50. SPECIES EXTINCTION, *supra* note 35.

51. *Id.*

52. Gerardo Ceballos et al., *Accelerated Modern Human-Induced Species Losses: Entering the Sixth Mass Extinction*, *SCI. ADVANCES*, June 19, 2015, at 1, 3–4.

Another recognized cause of the increased extinction rate is poaching, which is contributing to the killing of thousands of rare animals each year.<sup>53</sup> Poachers are, for example, considered to be the single biggest threat to the long-term survival of elephants,<sup>54</sup> many species of which are listed as endangered by the World Wildlife Federation.<sup>55</sup> Rhinoceroses are even closer to extinction due to poachers.<sup>56</sup> Western black rhinoceroses are already considered to have become extinct in 2011.<sup>57</sup> The rest of the African rhinoceros population may follow suit within the next twenty years if not sufficiently protected.<sup>58</sup> Resorting to drastic measures to try to protect rhinoceroses, officials in various African nations have attempted to implement drone surveillance and DNA database recordings.<sup>59</sup> However, even such programs have found little success due to the high value placed by some on rhinoceros horn, which is currently selling for a higher price per pound than gold, diamonds, or cocaine.<sup>60</sup>

To be sure, trophy hunting is not the same as poaching, although some question whether the former is, in fact, a disguise for the latter.<sup>61</sup> “In practice, however, the ‘sport’ hurts populations of threatened and endangered animals, encourages hunters and guides to break the law, engenders corruption and serves as a cover for poaching and other illegal activities.”<sup>62</sup> Additionally, the legality of trophy hunting contracts has been questioned:

Trophy hunters can pay more than \$100,000 for the “right” to kill a rhino and keep its horn under a government scheme that allows hunters to shoot one rhino a year with the proper permit. Many

53. Jessica Phelan, *6 Endangered Animals Poachers Are Hunting into Extinction*, USA TODAY (July 31, 2015), <http://www.usatoday.com/story/news/world/2015/07/31/globalpost-6-endangered-animals-poachers-hunting-into-extinction/30932385> [https://perma.cc/V6ZF-CDG7].

54. William J. Ripple et al., *Collapse of the World’s Largest Herbivores*, SCI. ADVANCES, May 1, 2015, at 3.

55. *Species Directory*, *supra* note 40.

56. Phelan, *supra* note 53.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Karen E. Lange, *The Vanishing* (Dec. 16, 2015), <http://www.humanesociety.org/news/magazines/2016/01-02/trophy-hunting-devastation.html>.

suspect it's open to abuse by people who've come for the horn, not the hunt. Either way, the rhino ends up dead.<sup>63</sup>

In a world where every single rare animal serves a purpose and could, because of the low numbers of the particular species, be of crucial importance to the survival of the species and to the ecosystem services the species serves,<sup>64</sup> trophy hunting of rare animals is of dubious value but obvious concern. When Cecil was killed, for example, initial reports mentioned his two dozen cubs being at high risk of being killed by male lions eager to take over Cecil's spot as the pride's alpha male.<sup>65</sup> Fortunately for the cubs, lions have a demonstrated familial understanding and Cecil's brother took over his role in protecting the cubs.<sup>66</sup> This time, two dozen cubs lived and are now able to contribute to the survival of the species, but that lucky situation is far from ensured in other cases. This also demonstrates the falsity of the argument brought forward by proponents of the practice that only older animals that no longer contribute to the gene pool are eradicated. That may have been the singular case with, for example, the highly publicized killing of a black rhino by TV personality Corey Knowlton. It is, however, demonstrably far from the case with many other trophy hunts that precisely, as was the case with Cecil, eradicate fully fertile and reproducing animals at the top of their hierarchies. Add to that the simple fact that humans tinkering with nature's evolutionary processes and animal presence has been a clear failure and still is. Consider the introduction of rabbits in Australia, cats in New Zealand, and pythons in the Everglades.<sup>67</sup> We often only come to realize the mistakes we made in this context

63. Phelan, *supra* note 53.

64. See, e.g., *What Is the Point in Preserving Endangered Species That Have No Practical Use to Humans, Apart from Their Aesthetic Appeal or Their Intellectual Interest to Biologists?*, SCI. AM. (Oct. 21, 1999), <http://www.scientificamerican.com/article/what-is-the-point-in-pres> [https://perma.cc/3J42-JCXX] ("Every organism, whether or not it has direct practical use to humans, has a functional role (or 'niche') in its habitat or ecosystem.")

65. David Millward, *Cecil's the Lion: Cubs Are Being Protected by His Brother*, TELEGRAPH (Aug. 1, 2015), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/11777473/Cecils-the-lion-cubs-are-being-protected-by-his-brother.html> [https://perma.cc/FY2B-AVXP].

66. *Id.*

67. See, e.g., *Everglades*, NAT'L PARK SERV., <https://www.nps.gov/ever/learn/nature/burmesepythonsintro.htm> [https://perma.cc/TR63-QPHP] (last visited June 24, 2016) (describing the harmful effects of accidentally and intentionally introduced pythons on endangered plants and animals in the Everglades).

when it is too late to remedy the human-induced problem. That is unacceptable when it comes to rare species.

The selective killing of alpha males is perpetuating the problem as it creates a gender imbalance that reduces reproduction in the remaining population.<sup>68</sup> With trophy hunting, large males are typically preferred. These are often alpha males. This human interference creates an “unnatural selection,” as it alters the population’s natural genetic structure and survival traits.<sup>69</sup> The decline of the number of alpha males causes sensitivity in the overall population density and has an effect on the genetic and phenotypic variation of the species, which in turn creates adverse consequences for male breeding success.<sup>70</sup> Mounting evidence suggests that activities such as commercial fishing and trophy hunting are leading to drastic evolutionary changes by causing “unnatural” or “artificial” selection processes as the “inevitable logic of Darwinian selection kicks in.”<sup>71</sup> For example, commercial fishing has led Atlantic cod that used to be several meters long to now measure around one meter.<sup>72</sup> This is because commercial fishing practices remove the bigger fish and their gene pool, allowing the gene for “smallness” to prosper.<sup>73</sup> Similarly,

[o]ur relentless pursuit of the biggest individuals is causing evolutionary change in another harvested species; big horn sheep . . . . Trophy hunters pay large sums to hunt these animals and they are after the biggest and most impressive males. Big males with big horns can fight successfully against other males and thereby mate with far more females than smaller males with less impressive horns. [However, trophy h]unters set up a strong selection pressure on these big males. Suddenly the advantages of being big (more mates, more offspring) are countered by a rather big disadvantage (being shot and mounted on a wall). . . . [H]unting is causing evolutionary changes in the genetic make-up of the population [of trophy-hunted species].<sup>74</sup>

68. See Fred W. Allendorf & Jeffrey J. Hard, *Human-Induced Evolution Caused by Unnatural Selection Through Harvest of Wild Animals*, 106 PROC. NAT’L ACAD. SCI. 9987, 9990 (2009).

69. *Id.* at 9987.

70. *Id.* at 9990–92.

71. Adam Hart, *Are Humans Driving Evolution in Animals?*, BBC NEWS (Feb. 2, 2016), <http://www.bbc.com/news/science-environment-35462335> [<https://perma.cc/R3F7-6MTJ>].

72. *Id.*

73. *Id.*

74. *Id.* As a consequence, big horn sheep horns have, for example, evolved to be as much as twenty-five percent smaller already. *Id.*

Tinkering with nature often has accidental evolutionary consequences, and “scientists are already devising evolutionarily sustainable management plans for harvested resources,” because “if we aren’t prudent in managing our unnatural selection pressures we will be paying a ‘Darwinian debt’ for generations to come.”<sup>75</sup> With something as arguably unnecessary as trophy hunting, the risk of this happening has simply become too great and should be stopped.

The overall decrease in biodiversity is also impacting the Earth’s ecosystem.<sup>76</sup> Biodiversity, or “the variety of species and their habitats,” plays a vital role in the ecosystem by providing natural services such as “nutrient and water cycling, soil formation and retention, resistance against invasive species, plant pollination, climate regulation and pollution control.”<sup>77</sup> Therefore, not only will the current environmental crisis cause a loss of biodiversity, but it will also affect the health and well-being of humans by impacting natural systems such as crop pollination, seed dispersal, and water purification.<sup>78</sup> Due to the shift in the ecosystem, experts predict that organisms will be destroyed at an accelerated rate, “initiating a mass extinction episode unparalleled for 65 million years.”<sup>79</sup>

Notably, some species are considered to be “keystone species” and thus have a greater influence on the ecosystem than others.<sup>80</sup> For example, a rhinoceros is a keystone species in Africa, and therefore countless other species depend on the rhinoceros.<sup>81</sup> A thirty-year study done at Kruger National Park determined that areas with the fewest rhinoceroses featured sixty to eighty percent less short grass, which is used as a marker to approximate plant diversity.<sup>82</sup> Specialists warn that if rhinoceroses disappear from

75. *Id.*

76. Ceballos et al., *supra* note 52.

77. SPECIES EXTINCTION, *supra* note 35.

78. *Id.*; Navjot S. Sodhi et al., *Causes and Consequences of Species Extinctions*, in THE PRINCETON GUIDE TO ECOLOGY 518–19 (Simon A. Levin et al. eds., 2009).

79. Ceballos et al., *supra* note 52.

80. Rachel Nuwer, *Here’s What Might Happen to Local Ecosystems if All the Rhinos Disappear*, SMITHSONIAN (Feb. 27, 2014), <http://www.smithsonianmag.com/articles/heres-what-might-happen-local-ecosystems-if-all-rhinos-disappear-180949896/?no-ist> [<https://perma.cc/NL6G-63Q4>].

81. *Id.*

82. *Id.*



Africa, the savannah will become a dramatically different and emptier place.<sup>83</sup>

The extinction of even just one species can affect the ecosystem on a much larger scale. This holds true in relation to lions as well as other “trophy” species. While this discussion is ongoing, trophy hunting continues. The lion, for example, is

one of the planet’s most beloved species and an irreplaceable part of our shared global heritage. If we want to ensure that healthy lion populations continue to roam the African savannas and forests of India, it’s up to all of us—not just the people of Africa and India—to take action.<sup>84</sup>

Americans account for almost ninety percent of the canned lion hunting industry,<sup>85</sup> demonstrating the need for action to be taken in this country as well as abroad.

#### IV. THE ADVANTAGES AND DISADVANTAGES OF TROPHY HUNTING

Is the intense controversy surrounding trophy hunting warranted? There is some dispute around the costs and benefits of the practice. On the one hand, the practice is alleged to create much needed revenue in the areas where the animals live. For example, in South Africa, which has the largest trophy hunting industry in Africa, trophy hunting generates revenues of \$100 million a year.<sup>86</sup> Trophy hunting generates more income per client than general tourism, and has potentially lower environmental impacts when comparing environmental disturbance, fossil fuel use, and habitat conversion.<sup>87</sup> Trophy hunting has thus been said to “create[] economic justification for wildlife as a land use in areas

83. *Id.*

84. *Lions Are Now Protected Under the Endangered Species Act*, *supra* note 25 (quoting Service Director Dan Ashe).

85. Darryl Fears, *Lions Are Actually Raised to Be Killed in South Africa. And American Hunters Love It.*, WASH. POST (Jan. 5, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/01/05/lions-are-actually-raised-to-be-killed-in-south-africa-and-american-hunters-love-it/> [https://perma.cc/2LDH-HWK2] (“According to [Humane Society International], almost nine of 10 lions shot in canned hunts are killed by Americans.”).

86. Peter A. Lindsey et al., *Trophy Hunting and Conservation in Africa: Problems and One Potential Solution*, 21 CONSERVATION BIOLOGY 880, 880 (2006).

87. *Id.* at 881.

that might otherwise be used for livestock or agriculture.”<sup>88</sup> If disallowed, the lack of trophy hunting may thus, in

extreme cases[,] . . . result in a conversion to less conservation-compatible land uses such as agriculture and pastoralism. In Kenya, where trophy hunting has been banned since 1977, . . . protected areas now lack the buffers that are provided by hunting blocks in many other African countries . . . .<sup>89</sup>

However, while wildlife populations in Kenya have dropped by sixty to seventy percent since the country’s hunting ban, it is “not possible to determine whether, or to what extent, the trophy hunting ban contributed to negative wildlife population trends.”<sup>90</sup> In fact, “[l]ack of scientific data on the ecological and economic impact of trophy hunting precludes objective assessment of its role as a conservation tool in Africa.”<sup>91</sup> Thus, the evidence that trophy hunting is beneficial is *not* clear, despite what some argue. Of course, proponents of the practice claim that trophy hunting adds to conservation efforts and creates more awareness of the need to protect endangered animals.<sup>92</sup>

88. *Id.*

89. Peter A. Lindsey et al., *The Trophy Hunting of African Lions: Scale, Current Management Practices and Factors Undermining Sustainability*, PLOS ONE, Sept. 2013, at 3.

90. *Id.*

91. Lindsey et al., *supra* note 86, at 880.

92. See, e.g., *Who We Are: Missions & Involvement*, SAFARI CLUB INT’L, <https://www.safariclub.org/who-we-are/missions-involvement> [https://perma.cc/JMS4-VLB9] (last visited March 14, 2016) (“Safari Club International is the leader in protecting the freedom to hunt and promoting wildlife conservation worldwide.”). When Corey Knowlton paid \$350,000 for the permission to kill a rare black rhinoceros in Namibia in 2014, he said that he was “‘hell-bent on protecting’ the animal and [that] the money from his successful bid to take part in the ‘conservation hunt’ [would] go to Namibian government efforts to protect the species—of which there are only an estimated 5,000 left in the world, nearly 2,000 of them in Namibia—and stop poaching.” Nick Logan, *Conservation Hunt? Corey Knowlton Paid \$350k to Kill Endangered Black Rhino*, GLOBAL NEWS (May 21, 2015), <http://globalnews.ca/news/2009963/conservation-hunt-cory-knowlton-paid-350k-to-kill-endangered-black-rhino> [https://perma.cc/WN3D-H2NP]. The Dallas Safari Club, where Knowlton bought his permit to kill the rhinoceros from the Namibian government at an auction, said that “the auction was done in the name of conservation, to save the threatened black rhinoceros” and that “[a]ll proceeds [would] be donated to the Namibian government and [would] be earmarked for conservation efforts.” Ed Lavandera, *Debate over Dallas Safari Club Auctioning Black Rhino Hunting Permit*, CNN (Jan. 12, 2014), <http://www.cnn.com/2014/01/10/us/black-rhino-hunting-permit/index.html> [https://perma.cc/87UZ-26VL].

Notably, many of the same studies that discuss the potential benefits of trophy hunting also cast serious doubt on these alleged benefits. For example, one study noted that “[t]rophy hunting has contributed to [lion] population declines outside (and inside some) protected areas in Tanzania, a country that holds between 30–50% of Africa’s lions,” and that there is “increasing evidence of negative ecological impacts associated with lion hunting.”<sup>93</sup> Although kill rates are “typically only 2–5% of male populations,”<sup>94</sup> it is often the largest animals that are killed, which has been proved to cause human-driven evolutions of the species, as described above.<sup>95</sup> Conservancies are more common where ecotourism, *not* trophy hunting, is more prevalent.<sup>96</sup> “While some researchers have claimed that trophy hunting is a \$200 million a year enterprise in Africa, . . . the figure is based largely on unpublished tallies by hunters’ associations.”<sup>97</sup> Recent assessments suggest that the figure is much smaller.<sup>98</sup> Further:

The number of jobs generated by trophy hunting across the continent of Africa has been put at around 15,000. Some researchers, however, point out that the jobs created by the industry are rather low considering how much land is used for the sport. For the 11 countries where big game hunting is most widely practiced, hunting preserves take up about 15 percent of national territory, but account for less than one percent of their respective country’s GDP. The earnings from tourism overall are up to six times the amount accrued from trophy hunting.<sup>99</sup>

Attempts to measure the value of rare species of animals in the wild frequently miss two important points: the “existence” and “intrinsic” values. The former comprises the notion that “economic value may accrue to individuals not actually ‘using’ wildlife,” but willing to “pay an option price to retain the possibility

93. Lindsey et al., *supra* note 89, at 1 (“Several studies have demonstrated that excessive trophy harvests have driven lion population declines.”).

94. See Lindsey et al., *supra* note 86.

95. See *supra* notes 68–75 and accompanying text.

96. See Lindsey et al., *supra* note 86, at 881–82.

97. Beenish Ahmed, *The Economic Case Against Trophy Hunting*, THINK PROGRESS (Aug. 3, 2015), <http://thinkprogress.org/world/2015/08/03/3687425/trophy-hunting> [https://perma.cc/JNG9-NT5X].

98. See *id.*; ECONOMISTS AT LARGE, *THE \$200 MILLION QUESTION: HOW MUCH DOES TROPHY HUNTING REALLY CONTRIBUTE TO AFRICAN COMMUNITIES?* (2013).

99. Ahmed, *supra* note 97.

of future use.”<sup>100</sup> People often value natural resources that they have no desire to ever actually use.<sup>101</sup> Motives for the existence value of natural resources include the “wish to leave an endowment or bequest to future generations”; “valu[ing] the knowledge that the resource is available for the enjoyment of others”; and the “belie[f] that natural resources have intrinsic value independent of any direct benefit or harm to humans.”<sup>102</sup> In fact,

[the] existence value [of wildlife] may be quite large relative to use values. When asked to divide [a research study] payment into use and existence value categories, respondents assigned only 7 percent to a current use or option category. Thirty-four percent was allocated to bequest value, and an intrinsic value category, “because animals have a right to exist independent of any benefit or harm to people,” received 48 percent.<sup>103</sup>

The intrinsic value theory holds that natural resources such as wildlife do not have to be “good *for* something, that is, have a use or a value for humans.”<sup>104</sup> Rather, there is “value in species independent of their use for humans,” although such value is “difficult to express and to prove.”<sup>105</sup>

Thus, while animals do present measurable monetary values to various industries and individuals, to a large segment of the global population, they also have inherent value by their very existence, albeit such values may not be measurable in a traditional monetary fashion as “use values.”<sup>106</sup> Existence and intrinsic values tend to get ignored or treated with skepticism, as if conventional monetary calculus is inherently better than other valuation methods. This is not the case. Since at least Plato, we have known ethics, aesthetics, and morals to be of significance to mankind in a host of contexts, including socio-legal developments. Non-Western traditions such as Buddhism similarly recognize the theory that the “oneness of life and its environment transcends the controversial and

100. Thomas H. Stevens et al., *Measuring the Existence Value of Wildlife: What Do CVM Estimates Really Show?*, 67 LAND ECON. 390, 390 (1991).

101. *Id.*

102. *Id.*

103. *Id.* at 399.

104. Barbara Paterson, *Ethics for Wildlife Conservation: Overcoming the Human-Nature Dualism*, 56 BIOSCIENCE 144, 145 (2006).

105. *Id.* at 146.

106. *See generally* Stevens et al., *supra* note 100.

[anthropocentric] man–nature dualism.”<sup>107</sup> Attempts to downplay or quash the importance of deeper human preferences serve no valuable function in today’s legal philosophy where moral and ethical components are in play, as they are here. At bottom, the “theoretical debate on whether nonhumans have value independent of humans is criticized by environmental pragmatists, who claim that while philosophers argue, the environment burns.”<sup>108</sup>

Further, as little as three percent of the revenue derived from trophy hunting may accrue to the local communities where the hunting occurs.<sup>109</sup> Trophy hunting and related commercial activities do, in contrast, generate a large source of income for organizations such as Safari Club International, which earned \$14.7 million from its annual convention and auction in 2014—“money it uses to fight,” not promote, “animal protection measures around the world.”<sup>110</sup> In fact, static prices in some host countries have led to increased kills just to sustain previous revenue levels.<sup>111</sup> Corruption presents another serious problem that may lead to overhunting; another problem is “the failure of governments and hunting operators to devolve adequate benefits to local communities, which reduces incentives for rural people to conserve wildlife.”<sup>112</sup> Experts conclude that there are numerous “challenges which need addressing to achieve sustainability” in trophy hunting.<sup>113</sup> As long as sustainability is not ensured, the practice should be discontinued for cautionary reasons.

In connection with its 2016 rule listing two lion subspecies under the ESA—*P. l. leo* as endangered, and *P. l. melanochaita* as threatened—the Service recognized the uncertainty that surrounds the viability of the practice of trophy hunting.<sup>114</sup> The agency stated that it had “revised the section [of the rule] on trophy hunting, providing additional information on the practices that *experts have*

107. Paterson, *supra* note 104, at 144–50.

108. *Id.* at 144.

109. See ECONOMISTS AT LARGE, THE \$200 MILLION QUESTION: HOW MUCH DOES TROPHY HUNTING REALLY CONTRIBUTE TO AFRICAN COMMUNITIES? (2013).

110. Pacelle, *supra* note 3.

111. Lindsey et al., *supra* note 86, at 881.

112. *Id.*

113. Lindsey et al., *supra* note 89, at 1.

114. Listing Two Lion Subspecies, 80 Fed. Reg. 80,000, 80,016–23 (Dec. 23, 2015) (to be codified at 50 C.F.R. § 17.11(h)) (discussing potential benefits and impacts of trophy hunting).

*identified as undermining the sustainability of trophy hunting.*<sup>115</sup> The Service also “expanded [its] assessment of the *level of threat* that trophy hunting presents to the species.”<sup>116</sup> Importantly, “[s]ome of the information [the Service] received indicated threats may be worse than previously indicated.”<sup>117</sup>

While this debate is continuing and necessary, highly endangered animals are still hunted for enjoyment by the very few. Until the alleged beneficial effects of trophy hunting are established, the practice is too risky, or potentially risky, to ecosystems. After the listing of African lions, for example, the number of trophies is expected to drop to twenty from 727 in 2014.<sup>118</sup> But twenty dead animals of a rare species is arguably still too many. Trophy hunting is both injurious to the interests of the public at large and in contravention of a well-established interest of society to protect rare species for the enjoyment of present and future generations. People who enjoy the very same animals as trophy hunters do, but for their intrinsic value as live animals of species worthy of protection and conservation for current and future generations, have their interests ignored as long as trophy hunting is allowed. However, legislative and executive action may not be necessary to protect the last few remaining animals of the affected species before it is too late. That time is rapidly approaching.

#### V. CITES GUIDELINES AND ESA REGULATIONS

As mentioned above, some nations allow the hunting of species listed at risk of extinction or as threatened under the IUCN Red List, on the appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), or, in the United States, on the ESA. In addition to the contracts issue of unenforceability, the hunting of rare species and the subsequent transportation of parts of such species across international borders may thus also be prohibited under national legislation as well as international treaty law. As the IUCN is a scientific evaluation tool only, the mere fact that a species is listed in one of the nine IUCN categories of threat does not confer any legal protections on the

115. *Id.* at 80,000 (emphasis added).

116. *Id.* at 80,001 (emphasis added).

117. *Id.*

118. Pacelle, *supra* note 3.

species.<sup>119</sup> Nations are encouraged to issue protections at the national or, in cooperation with other nations, international levels.

CITES governs international trade in animal or plant species and is an inter-governmental instrument. “The backbone of CITES is the permit system that facilitates international cooperation in conservation and trade monitoring of CITES-listed species. Permits are issued only if a country’s Management and Scientific Authorities determine that trade is legal and does not threaten the species’ survival.”<sup>120</sup> African lions (*P. l. melanochaita*), for example, are listed in Appendix II of CITES.<sup>121</sup> Appendix II includes species “not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival.”<sup>122</sup> Appendix II species may thus be traded internationally, but only if accompanied by appropriate permits issued by a national Management and Scientific Authority.<sup>123</sup> Appendix I includes species threatened with extinction. Trade in specimens of these species is permitted only “in exceptional circumstances.”<sup>124</sup>

The United States is a party to CITES,<sup>125</sup> and the U.S. Fish and Wildlife Service implements the provisions of the treaty under the ESA.<sup>126</sup> Under the ESA, species may be listed as either endangered or threatened. “Endangered” means that a species is “in danger of extinction throughout all or a significant portion of its range.”<sup>127</sup> “Threatened” means that a species is “likely to become endangered within the foreseeable future” regardless of the country where the

119. *Frequently Asked Questions*, IUCN RED LIST THREATENED SPECIES, <http://www.iucnredlist.org/info/faq> [<https://perma.cc/8H56-35G2>] (last visited Mar. 23, 2016).

120. U.S. FISH & WILDLIFE SERV., CITES 101: UNDERSTANDING APPENDICES, COPs AND PERMITS (2013).

121. *Lion*, CITES, <https://cites.org/eng/gallery/species/mammal/lion.html> [<https://perma.cc/D7SG-YCBF>] (last visited May 18, 2016).

122. *How CITES Works*, CITES, <https://www.cites.org/eng/disc/how.php> [<https://perma.cc/VC85-BRUF>] (last visited Dec. 27, 2015).

123. U.S. FISH & WILDLIFE SERV., CONSERVING THE NATURE OF AMERICA (2014).

124. *How CITES Works*, *supra* note 122.

125. CITES, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/international/cites> [<https://perma.cc/75L6-XSP7>] (last visited Mar. 23, 2016).

126. *Id.*

127. *Endangered Species Act: Overview*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/endangered/laws-policies> [<https://perma.cc/R4LD-8BFL>] (last updated Dec. 8, 2015).

species is found.<sup>128</sup> Species may be listed as either threatened or endangered because of several different factors, among them habitat destruction; overutilization for commercial, recreational, scientific, or educational purposes; and the inadequacy of existing regulatory mechanisms.<sup>129</sup>

The ESA protects endangered and threatened species and their habitats by prohibiting the “take” of listed animals and the interstate or international trade in listed plants and animals, including their parts and products, except when done by federal permit and depending on the type of listing.<sup>130</sup> “Take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>131</sup> With respect to endangered species, section 9 of the ESA makes it unlawful for any person subject to the jurisdiction of the United States to, among other things, “import any such species into, or export any such species from the United States, take any such species within the United States or the territorial sea of the United States, and possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of” the preceding rules or otherwise engage in interstate or international commerce in endangered species except by permit for certain limited conservation purposes.<sup>132</sup> For threatened species, permits may be issued for zoological, horticultural, or botanical exhibition, educational use, and “special purposes consistent with the purposes of the [ESA].”<sup>133</sup> Trophy hunting is among such “special

128. *Id.*; *Foreign Species: Overview*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/endangered/what-we-do/international-activities.html> [https://perma.cc/2CL9-CGPJ] (last updated Jan. 21, 2016).

129. 16 U.S.C. § 1533(a) (2012).

130. *Id.* §§ 1531–44.

131. *Id.* § 1532(19). Incidentally, the word “take” is considered by some to be a “euphemism reveal[ing] a culture of Orwellian doublespeak prevalent throughout the hunting world, meant to assuage critics and lure the conflicted curious.” Mallika Rao, *Here’s Why Walter Palmer Keeps Saying He ‘Took’ Cecil The Lion*, HUFFINGTON POST (Aug. 10, 2015), [http://www.huffingtonpost.com/entry/walter-palmer-lion-take-kill-word-choice\\_us\\_55b8e465e4b0a13f9d1aea2c](http://www.huffingtonpost.com/entry/walter-palmer-lion-take-kill-word-choice_us_55b8e465e4b0a13f9d1aea2c) [https://perma.cc/2QNM-YWHP].

132. *Id.* § 1538; *see also Listing and Critical Habitat: Overview*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/endangered/what-we-do/listing-overview.html> [https://perma.cc/RFQ9-97QC] (last updated Dec. 8, 2015).

133. 50 C.F.R. § 17.32 (2016); *see also* U.S. FISH & WILDLIFE SERV., FORM 3-200-20, FEDERAL FISH AND WILDLIFE PERMIT APPLICATION FORM (2014) [hereinafter FORM 3-200-20]; *Permits: Frequently Asked Questions*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/endangered/permits/faq.html> [https://perma.cc/4K7T-ZCWK] (last updated June 24, 2015).



purposes.” The U.S. Fish and Wildlife Service thus issues permits allowing the importation of sport-hunted trophies in its discretion.<sup>134</sup>

ESA protections apply to species found both in and outside the United States.<sup>135</sup> However, there is a presumption that the ESA has no extraterritorial effect.<sup>136</sup> Thus, unless the animal in question is listed under the ESA *and* potential action is brought against a party subject to United States jurisdiction, such as if the hunter attempts to import the trophies, the ESA will not apply to trophy hunting performed purely within another nation. In other words, American hunters can legally kill endangered animals *outside* the United States as long as they do not bring back any parts of the animal to the United States.<sup>137</sup>

This is precisely what transpired in the case of Cecil the lion: at least around the time of the killing, Mr. Palmer announced his intent *not* to bring back any part of the animal. If other hunters similarly shift their habits to *not* bring actual trophies into the United States, even a new listing under the ESA will not have an effect. This problem could be alleviated by something as simple as a Congressional amendment giving the ESA extraterritorial effect. This has, however, not happened yet and is unlikely to happen in the near future.

The vast majority of trophy hunters are from the United States.<sup>138</sup> If they seek to import their trophies, the ESA will apply. In the case of Cecil, the ESA would have applied to Mr. Palmer, an American citizen, had African lions been listed at the time and had he sought to bring part(s) of Cecil back to the United States.<sup>139</sup> That being said, the killing of Cecil nonetheless went against the spirit, if not the text at the time, of the ESA. Killing a rare animal mere months away from ESA listing was, arguably, an opportunistic violation of a norm that was rapidly crystallizing into hard law. For that reason and others, United States lawmakers quickly announced a bill

134. See FORM 3-200-20, *supra* note 133.

135. See, e.g., 16 U.S.C. § 1533 (2012).

136. See, e.g., Paul Boudreaux, *Biodiversity and a New “Best Case” for Applying the Environmental Statutes Extraterritorially*, 37 ENVTL. L. 1107, 1128 (2007) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 588 (1992)).

137. 16 U.S.C. § 1538 (2012); see also *Listing and Critical Habitat: Overview*, *supra* note 132.

138. See Fears, *supra* note 85 (“[I]n 2014, a total of 363 lion trophies from South Africa—85 percent—were imported to the United States.”).

139. See FORM 3-200-20, *supra* note 133.

aimed at stopping people from importing trophies obtained from hunting rare animals.<sup>140</sup> If adopted, the bill, Conserving Ecosystems by Ceasing the Importation of Large Animal Trophies Act (the “CECIL Act”), would make it illegal for hunters to bring into the United States parts of any species proposed or listed as threatened *or* endangered under the ESA.<sup>141</sup> The CECIL Act was introduced by Senator Bob Mendez, who described the legislation as “a necessary and prudent step that creates a disincentive for these senseless trophy killings and advances our commitment in leading the fight to combat global wildlife trafficking.”<sup>142</sup> However, more steps must be taken to ensure trophy hunting is eradicated and animals are protected.<sup>143</sup> In the meantime, other legal disciplines such as contracts and public trust common law may provide effective solutions.

In nations where rare animals are hunted, local governments can decide to issue hunting permits or simply allow hunting outright in spite of any listing on the ESA or any other legal provision foreign to them. If local hunting laws are violated, the authorities in the nations in question are free to prosecute the hunters whether they are from the United States or any other nation. Reports initially differed as to whether Mr. Palmer killed Cecil with or without the proper licenses, whether the animal was killed inside or outside national park land, and whether Palmer’s local assistants had obtained the required permits.<sup>144</sup> The Zimbabwean government

140. Dan Kedmey, *U.S. Lawmakers Draft ‘CECIL Act’ to Curb Trophy Hunters*, TIME (July 31, 2015), <http://time.com/3981032/cecil-lion-bill-trophy-hunters/> [https://perma.cc/N64S-X6VP] (reporting on the announcement of a bill to stop the importation of sport-hunted trophies less than one month after the death of Cecil the lion).

141. Conserving Ecosystems by Ceasing the Importation of Large (CECIL) Animal Trophies Act, S. 1918, 114th Cong. (2015); Michael Sainato, *CECIL Act Is First Step Toward Ending Trophy Hunting*, HILL (Sept. 1, 2015), <http://thehill.com/blogs/pundits-blog/energy-environment/252384-cecil-act-is-first-step-toward-ending-trophy-hunting> [https://perma.cc/55NR-UX2M].

142. Kedmey, *supra* note 140.

143. Sainato, *supra* note 141.

144. *See, e.g.*, Mary Bowerman, *Minnesota Dentist ‘Deeply’ Regrets ‘Taking’ Cecil the Lion*, USA TODAY (July 30, 2015), <http://www.usatoday.com/story/news/nation-now/2015/07/28/minnesota-dentist-walter-james-palmer-cecil-lion-africa/30785881> [https://perma.cc/BDJ2-6FBV] (reporting that Mr. Palmer lured Cecil off protected land with dead animal bait attached to a car; reporting that the Zimbabwean professional hunter did not have a hunting permit); Peter Holley, *‘It’s Destroyed Us,’ Says Cecil the Lion Hunting Guide*, WASH. POST (Oct. 17, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/10/17/its-destroyed-us-says-cecil-the-lion-hunting-guide> [https://perma.cc/BG5M-7NLS] (reporting conflicting accounts as to whether the lion was lured out of the national park; reporting

eventually charged the professional hunter helping Palmer with the failure to prevent an illegal hunt.<sup>145</sup> The government also charged the landowner whose land lies adjacent to the national park close to which Cecil was killed with allowing the lion hunt to occur on his farm without proper authority.<sup>146</sup> Palmer himself was not charged with any crime.<sup>147</sup> The potential extradition charges against Mr. Palmer were also dropped.<sup>148</sup> Prosecuting and extraditing Palmer was simply perceived by the Zimbabwean government to “be bad for business.”<sup>149</sup>

Subsequently, many major airlines issued announcements that they would ban African hunting trophies from their cargo if such trophies came from endangered species. For example, American Airlines stated that the airline would not transport buffalo, elephant, leopard, lion, or rhino trophies—known as the “Africa Big Five”—so often prized by international trophy hunters.<sup>150</sup> Airline transportation of trophies has been compared to providing a getaway vehicle for criminals,<sup>151</sup> an image that few airlines will be willing to project given today’s competitiveness in passenger and cargo transportation.

Laws should be enacted at the national and international levels prohibiting the killing of wild, rare animals. The invalidation of trophy hunting contracts under the common law would and should work to serve the same purpose. With our current knowledge, we simply cannot afford trophy hunting to contribute to species

allegations that the paperwork was in order); Elahe Izadi & Abby Ohlheiser, *As Anger Escalates over Lion’s Death, Zimbabwean Men Appear in Court*, WASH. POST (July 29, 2015), <https://www.washingtonpost.com/news/speaking-of-science/wp/2015/07/28/american-dentist-says-he-regrets-killing-cecil-the-lion-believed-zimbabwe-hunt-was-legal> [https://perma.cc/BDJ2-6FBV]; Vasudevan Sridharan, *Cecil the Lion Killing: 2 Men Due in Zimbabwe Court on Poaching Charges*, INT’L. BUS. TIMES (July 29, 2015), <http://www.ibtimes.co.uk/cecil-lion-killing-2-men-due-zimbabwe-court-1513129> [https://perma.cc/8GAG-QMCA] (reporting that necessary permits were not issued).

145. Farai Mutsaka, *Zimbabwe Seems to Cool Off on Extraditing Cecil’s Hunter*, ASSOCIATED PRESS (Sept. 7, 2015), <http://bigstory.ap.org/article/ba0bdebb872b4342a8d26f5b15d581a0/zimbabwe-seems-cool-extraditing-cecils-hunter> [https://perma.cc/FW6Z-JDNB].

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Daniel Goldstein, *Major U.S. Airlines Halt Carrying African Hunting Trophies After Cecil the Lion Killing*, MARKETWATCH (Aug. 4, 2015), <http://www.marketwatch.com/story/delta-air-lines-bans-animal-hunting-trophies-after-cecil-the-lion-shooting-2015-08-03> [https://perma.cc/DEY8-L2SM].

151. *Id.*

extinction any longer. Every animal and every species play crucial roles that must be protected.

#### VI. CONTRACTUAL UNENFORCEABILITY FOR REASONS OF PUBLIC POLICY

One aspect of the trophy hunting issue has, so far, gone largely unnoticed, namely the contractual viability and social desirability of what is, after all, a mere contract to kill. Although contracts are typically enforceable under notions of freedom of contract, there are limits to this doctrine. Contracts may be, and often are, held unenforceable for reasons of public policy where, for a “promise or other term of an agreement[,] . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”<sup>152</sup> Because there are very few remaining animals of certain species and a broad and seemingly intensifying global interest in preserving such species, contracts for the sport killing of rare animals should be held unenforceable under at least the American common law of contracts for reasons of public policy. Society has previously deemed contracts for gambling, prostitution, and a wide range of other “immoral” purposes unenforceable through both legislative and judicial action. Where a socially problematic situation is of such severity that only an effective end to one or more contributing factors can reverse the situation, mere commercial contracts that further the problem ought to be declared unenforceable for reasons of public policy. This has become the case with trophy hunting of endangered animals. The interest of the few in enforcing hunting contracts under notions of freedom of contract is outweighed by the interest of the very many in preserving the affected animal species and individual animals.

This approach is consistent with precautionary principles of ecological protection. If the current extinction trend affecting rare animals is reversed, the issue could be revisited in order to once again enforce trophy hunting contracts and allow for a certain degree of hunting. However, once the affected species are gone, the chance to take corrective action is forever gone. As a society, we can no longer afford to support the deliberate extinction of rare

152. RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (AM. LAW INST. 1981) [hereinafter RESTATEMENT].

animals for sport given the uncertainty surrounding the practice. In the words of recognized legal experts, trophy hunting contracts have, at bottom, become “unsavory.”<sup>153</sup> Using the judicial process to enforce such types of transactions is “inappropriate.”<sup>154</sup>

How do private contracts arise in the trophy hunting context? Trophy hunters typically need assistance to carry out the kill. Such assistance often comes from private parties such as a landowner or local hunting guides, as was the case with the Cecil hunt. Private contracts also exist between conference and hotel venue operators and trophy hunting promoters such as those among the Safari Club International, the Mandalay Bay Hotel and Casino, and the MGM Grand Hotel and Casino, where events have been held recently, and where they are scheduled through 2020.<sup>155</sup> Such venues may wish to cancel existing contracts due to controversy over trophy hunting. Where only private parties are involved, private contract law—statutory and common—will govern the subsequent breach and liability issue. This Article analyzes modern arguments for avoiding liability for contractual breach based on new societal norms. In addition to analyzing the pure contract law aspects of this issue, I analyze how courts may additionally or alternatively rely on the public trust doctrine to declare trophy hunting contracts unenforceable or to find that the practice violates public trust common law.

If suit is filed in an American court, American law will typically be applied absent choice-of-law provisions in the contract. Existing notions of American contract law allow courts to declare contracts unenforceable for reasons of public policy where, at bottom, a certain practice has become unacceptable to society at large. Below, I analyze the bases for doing so with particular focus on the parts of the doctrine that apply to trophy hunting contracts. I then examine cases exemplifying when the doctrine has been applied both successfully and unsuccessfully in order to demonstrate the extent and the limits of the doctrine. I then briefly compare existing American law to the limits posed under private

153. 5 RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 12:1 (4th ed. 1993) [hereinafter WILLISTON ON CONTRACTS].

154. *Id.*

155. *SCI Hunters' Convention to Be Held in Las Vegas*, OUTDOOR CHANNEL (June 25, 2013), <http://www.outdoorchannel.com/article.aspx?id=15588> [<https://perma.cc/TEL2-M595>].

international contract law. The latter is relevant because of the underlying international nature of the problem.

#### A. Contractual Unenforceability Under American Law

The Restatement (Second) of Contracts (the “Restatement”) declares that “[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable *or* the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”<sup>156</sup> In weighing the interest in the enforcement of a contractual promise, account is taken of the parties’ justified expectations, any forfeiture that would result if enforcement were denied, and any special public interest in the enforcement of the particular term.<sup>157</sup> In weighing a public policy *against* the enforcement of a term, judges take a hard look at the underlying purpose of the contract and the acceptability of such purpose by society in general.<sup>158</sup> Judges might also take into account the strength of that policy as manifested by legislation or judicial decisions and the likelihood that a refusal to enforce the term will further that policy.<sup>159</sup>

Although courts often continue to address which bargains may be held void for “illegality” or “unenforceable as against public policy,” the Restatement focuses solely on whether a particular term or promise is unenforceable on grounds of public policy rather than on the question of whether a particular bargain is “illegal” under positive law. In other words, bargains that comply with formal contractual requirements may still be unenforceable either by operation of express statutory prohibition *or* by operation of common law when the contract offends public policy.<sup>160</sup> Thus, “[c]ourts are not prohibited from deciding whether a contract is . . . against public policy simply because there is not a statute that specifically limits contract terms. . . . [Such a ruling] is an inherent equitable power of the court and does not require prior legislative action.”<sup>161</sup> Another court has said,

156. RESTATEMENT, *supra* note 152, § 178(1) (emphasis added).

157. *Id.* § 178(2).

158. *Id.* § 178 (cmt. b).

159. *Id.* § 178(3).

160. WILLISTON ON CONTRACTS, *supra* note 153, § 12:1.

161. State *ex rel.* King v. B & B Investment Group, Inc., 329 P.3d 658, 670 (N.M. 2014).

public policy can be enunciated by the Constitution, the legislature or the courts at any time and whether there is a prior expression or not the courts can refuse to enforce any contract which they deem to be contrary to the best interests of citizens as a matter of public policy.<sup>162</sup>

From where does the notion stem that contracts freely executed by willing parties may nonetheless be held unenforceable? Contract law scholars offer two reasons supporting unenforceability:

First, a refusal to enforce the promise may be an appropriate sanction to discourage undesirable conduct, either by the parties themselves or by others. Second, enforcement of the promise may be an inappropriate use of the judicial process in carrying out an unsavory transaction. The decision in a particular case will often turn on a delicate balancing of these considerations against those that favor supporting transactions freely entered into by the parties.<sup>163</sup>

Whether the content of public policy itself changes or whether novel rulings merely represent the application of established principles to new situations, “the courts have never been particularly inhibited in announcing ‘new’ policies as conditions seemed to warrant. Indeed, public policy is, by its nature, variable with time and place and, except in its broad pronouncements, relies *little* on stare decisis.”<sup>164</sup>

Courts have, however, not been entirely free from misgivings in the judicial adoption of new public policy. Many are “sensitive to the need to balance their views concerning what public policy demands with the need to fix their own limitations”<sup>165</sup> in order to avoid judicial activism.

Although the power of the courts to invalidate the bargains of parties on grounds of public policy is unquestioned and is clearly necessary, the impropriety of a transaction should be convincingly established in order to justify the exercise of the power. This is so because public

162. *Anaconda Fed. Credit Union, No. 4401 v. West*, 483 P.2d 909, 911 (Mont. 1971); *accord* *J.S. Alberici Const. Co. v. Mid-West Conveyor Co.*, 750 A.2d 518 (Del. Super. Ct. 2000).

163. WILLISTON ON CONTRACTS, *supra* note 153, § 12:1.

164. *Id.* § 12:2 (emphasis added).

165. *Id.*

policy also requires that parties of full age and competent understanding must have the greatest freedom of contracting.<sup>166</sup>

Nonetheless, courts have tended to heed the axiom that “whatever is injurious to the interests of the public is void, on the grounds of public policy.”<sup>167</sup> In other words, courts take the interests of members of the general public in the subject matter of a transaction very seriously, even if it impedes countervailing contractual expectations. In doing so, courts carefully scrutinize contemporary notions of what may be said to constitute public policy. Thus, “it may be said that any contract which conflicts with the morals of the times or contravenes any established interest of society is contrary to public policy.”<sup>168</sup> In the words of another court: “[A] contract provision is ‘against public policy’ . . . [if it is] at war with the interests of society or is in conflict with the morals of the time.”<sup>169</sup> The potential unenforceability of a contract because of public policy depends on the facts and circumstances of a particular case.<sup>170</sup>

Contract law is, of course, state-specific. Notions of what may be found to violate public policy may thus differ depending on the jurisdiction in question. In California, for example, “[t]hat is not lawful which: is 1. Contrary to an express provision of law; 2. Contrary to the policy of express law, though not expressly prohibited; or, 3. *Otherwise contrary to good morals.*”<sup>171</sup> This aligns with the instructions provided by the Restatement.

A wide variety of agreements have been found illegal and/or unenforceable wholly on the grounds of public policy. Such cases “run the gamut from those that restrain economic freedom to those that are nefarious and immoral. A declaration of illegality and unenforceability is principled upon a finding that the contract has a deleterious effect upon society as a whole.”<sup>172</sup> Courts have thus refused to enforce gambling and prostitution contracts, contracts that violated business and professional licensing

166. *Id.*

167. *Id.* § 12:2.

168. *Liggett v. Shriver*, 181 Iowa 260, 265 (1917); *accord Wunschel Law Firm, P.C. v. Clabaugh*, 291 N.W.2d 331, 335 (Iowa 1980).

169. *In re Estate of Feinberg*, 919 N.E.2d 888, 894 (Ill. 2009).

170. *Deines v. Vermeer Mfg. Co.*, 752 F. Supp. 989 (D. Kan. 1990).

171. CAL. CIV. CODE § 1667 (West 2016) (emphasis added).

172. *Fed. Land Bank of St. Louis v. Walker*, 571 N.E.2d 242, 244 (Ill. App. Ct. 1991).



requirements, promoted crime, interfered with voting rights or the administration of justice, encouraged divorce, violated “public morality,” or that were otherwise considered to be “immoral.”<sup>173</sup> Public policy has also been the announced rationale for striking down contracts or contract clauses on grounds of unconscionability, economic policy, paternalism, and unprofessional conduct.<sup>174</sup>

Courts have also invalidated contracts to protect the general public and individual employees against overreaching by corporations.<sup>175</sup> Divorce settlements and insurance policies have been declared unenforceable to protect minors against sexual misconduct by family members and teachers.<sup>176</sup> The same ought to be the case with trophy hunting.

The concept of “the rights of the many versus the rights of the few” lies at the heart of the doctrine allowing courts to declare contracts unenforceable notwithstanding the parties’ contractual intent. For example, where the Florida Supreme Court had occasion to refuse to enforce a purported waiver by a subcontractor of rights under a payment bond, the court firmly declared its power to find a contract contravening an established interest of society void as against public policy and determined that a payment bond requirement serves not only the interests of the individual subcontractor, but also society’s interest as a whole.<sup>177</sup> Similarly, in Washington State, where a property developer sought to have a restrictive covenant limiting the density of a residential area declared unenforceable for reasons of public policy although the developer had purchased the land in question with knowledge of the covenant, the court noted that “[t]he test of whether a contractual provision violates public policy is whether the contract as made has a tendency to evil, to be against the public good, or to

173. *Id.*; see also WILLISTON ON CONTRACTS, *supra* note 153, §§ 12:1–3; JEFFREY T. FERRIELL, UNDERSTANDING CONTRACTS § 12.02(A)(1)–(4) (2d ed. 2009).

174. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 22:1 (6th ed. 2009).

175. WILLISTON ON CONTRACTS, *supra* note 153, § 12:4; FERRIELL, *supra* note 173, §12.02(A)(2).

176. See, e.g., *Teti v. Huron Ins. Co.*, 914 F. Supp. 1132 (E.D. Pa. 1996); *Quiring v. Quiring*, 944 P.2d 695 (Idaho 1997); see also WILLISTON ON CONTRACTS, *supra* note 153, § 12:1.

177. *Am. Cas. Co. v. Coastal Caisson Drill Co.*, 542 So. 2d 957, 958 (Fla. 1989) (assessing public policy in reference to related statutory provisions and intent).

be injurious to the public.”<sup>178</sup> The court refused to set aside the density limitations because of, among other factors, the interest of the residents in preserving open space and considerations regarding future growth of the entire state.<sup>179</sup> The court emphasized the need to look towards future needs, noting that “influencing future planning decisions is more realistic than changing the decisions of bygone eras.”<sup>180</sup> The futures of entire species are at issue in the trophy hunting context, thus making this a relevant concern.

Concerns of “morality” have also factored into common law decisions regarding whether contracts are unenforceable on public policy grounds. Such cases have typically addressed the rights of private individuals to enter into contracts for gambling, drug trading, and prostitution. In one case, for example, a seller of a business sued the buyer to recover on a promissory note. When it turned out that the business manufactured various drug paraphernalia used to smoke marijuana and tobacco, the trial court concluded that a public policy against the manufacture of such paraphernalia was implicit in a relevant statute making the possession, use, and transfer of marijuana unlawful although the manufacture of drug paraphernalia was not itself illegal when the contract for the sale of the business was executed.<sup>181</sup> The contract was thus void.<sup>182</sup> The appellate court upheld the decision relying on the Restatement factors, noting that “[b]efore labeling a contract as being contrary to public policy, courts must carefully inquire into the nature of the conduct, the extent of public harm which may be involved, and the moral quality of the conduct of the parties in light of the prevailing standards of the community.”<sup>183</sup> The court also concluded that “it is immaterial that the business conducted . . . was not expressly prohibited by law when [the parties] made their agreement.”<sup>184</sup> Although potentially existing positive law provisions are, of course, relevant to the issue of unenforceability, their existence is not dispositive.

178. *Viking Props., Inc. v. Holm*, 118 P.3d 322, 329 (Wash. 2005) (internal quotation marks omitted).

179. *Id.* at 329–31.

180. *Id.* at 330.

181. *Bovard v. Am. Horse Enters.*, 247 Cal. Rptr. 340 (Ct. App. 1988).

182. *Id.*

183. *Id.* (internal quotation marks omitted).

184. *Id.*

Unenforceability on the grounds of public policy thus functions legally as a stand-alone issue, independent of express illegality.

Some courts have derived potential public policy against the enforcement of contractual promises on the basis of any possible “legislation *relevant* to that particular policy.”<sup>185</sup> In other words, legislation does not need to be *directly* on point in order to inform a court’s decision to void a contract.<sup>186</sup> Thus, in *Boardwalk Regency Corporation v. Travelers Express Company*, where a public policy against gambling in one state prohibited a payee from collecting on money orders that were paid to discharge a gambling debt lawfully incurred in another state, the court still declared the agreement unenforceable for reasons of public policy.<sup>187</sup> In addition to gambling contracts, almost all prostitution arrangements have been declared illegal under positive law in all states and thus unenforceable for reasons of public policy.<sup>188</sup>

Courts have also declared contracts unenforceable to protect minors. For example, in *Teti v. Huron Insurance Company*, where an insurance contract provided for the defense and indemnification of a public school teacher who was charged with having sexual intercourse with a student, the contract was void and unenforceable because it violated a defined and dominant public policy of the state.<sup>189</sup> Similarly, it has been stated that a bargain for the custody of a child for mere pecuniary gain would be unenforceable because of public policy.<sup>190</sup> So would be an agreement entered into between a husband and a wife in contemplation of divorce when the consideration for the husband’s agreement was that the wife would not report alleged sexual improprieties taken by the husband with the couple’s minor daughter.<sup>191</sup>

Protecting weaker societal constituents like minors could be analogized to protecting rare, wild animal species under contract

185. *Boardwalk Regency Corp. v. Travelers Express Co.*, 745 F. Supp. 1266, 1271 (E.D. Mich. 1990) (internal quotation marks omitted).

186. *See id.* (“The Court stated that ‘there being no statute barring enforcement of the claim asserted in this case, the question whether its enforcement would be in accord with public policy is for judicial decision.’”) (quoting *Miller v. Radikopf*, 228 N.W.2d 386, 387 (Mich. 1975)).

187. *Id.* at 1272.

188. *See WILLISTON ON CONTRACTS*, *supra* note 153, § 12:1.

189. *Teti v. Huron Ins. Co.*, 914 F. Supp. 1132, 1140–42 (E.D. Pa. 1996).

190. *See In re Shirk’s Estate*, 350 P.2d 1, 12 (Kan. 1960).

191. *Quiring v. Quiring*, 944 P.2d 695, 703 (Idaho 1997).

law. In the heavily anthropocentric world in which we live, a line is typically drawn between protecting humans and animals under contract law and other legal principles. However, under a broader ecocentric view, such line drawing is unwarranted. Courts may, to benefit future generations of human beings, consider rare animals to be worthy of legal protections under contract law on par with other weak parties. As demonstrated above, animals are already enjoying other legal protections—although arguably and demonstrably not sufficiently so for rare species—under positive law. In general, the law is constantly evolving. There are numerous urgent and good reasons why it should evolve in this area as well.

Research for this Article disclosed no hunting contracts that have been declared unenforceable on grounds of public policy. This is not surprising given the fact that hunting is, for the most part, a regulatory issue. Nonetheless, trophy hunting agreements typically diverge from the typical mold because of the need to contract with, among others, airlines to transport possible trophies across international borders, local guides, local landowners, or permit-issuing government entities. However, courts have often decided related issues of public policy in the context of hunting and land use issues. For example, in *Wooster v. Department of Fish and Game*, a hunter sought to have a hunting ban stemming from the grant of a conservation easement set aside, arguing that “a permanent ban on hunting ‘through a deed or contract’ is contrary to [public] policy and therefore illegal.”<sup>192</sup> The hunter cited to regulations “provid[ing] for the beneficial use . . . of wildlife by all citizens of the state” and “maintain[ing] diversified recreational uses of wildlife, including the sport of hunting.”<sup>193</sup> Finding that the hunter had focused on these provisions in isolation to try to “cobble together a public policy in favor of hunting,” the court found that the underlying regulations and public policy did the converse, namely “support[], rather than forbid[], the creation of areas where wildlife can be safe from depredation by hunters.”<sup>194</sup> Conservation concerns may thus be held equal to or more important than an asserted individual right to hunt.

192. *Wooster v. Dep’t of Fish & Game*, 151 Cal. Rptr. 3d 340, 349 (Ct. App. 2013).

193. *Id.* (ellipses in original).

194. *Id.*

When it comes to trophy hunting of threatened and endangered species, increasing and intensifying public global outrage after each of the recent well-publicized hunting cases shows that, modernly, the general public considers the trophy hunting of rare animals to have a “deleterious effect upon society as a whole” or to be “unsavory,” “undesirable,” “nefarious,” “at war with the interests of society,” or “in conflict with the morals of the time,” to use both judicial and Restatement phraseology.<sup>195</sup> In other words, trophy hunting contracts have become so distasteful to so many people around the world that they ought to and can be declared unenforceable for reasons of public policy even though some people—hunting advocates—would prefer their continued enforcement. Perhaps more importantly, when considering what is at stake for society at large, the protection of species that are on the brink of extinction must weigh heavier than the interest of the few individuals hunting for sport. Society cannot consider species protection sufficiently important for as much national and international regulatory action as has been implemented, yet at the same time allow the individual killing of animals at the brink of extinction. Doing so flies in the face of common sense as well as the recommendations of numerous wildlife and ecosystem experts. Extinction is forever. Every single rare animal is, as the situation stands, worthy of protections at many scales and from many angles. Should the populations of currently endangered or threatened species be reconstructed, the legality and desirability of trophy and other types of hunting of such species could be reconsidered. But finite natural resources do not allow the luxury of allowing trophy hunting.

Declaring trophy hunting contracts unenforceable for reasons of public policy is not a “tyranny of the majority” situation by which the majority gets to decide over the minority simply by making up the majority, whether or *not* the ultimate decision is a sound one. Reliable studies, including those conducted by the U.S. Fish and Wildlife Service, express serious concern over the practice of trophy hunting.<sup>196</sup> Such data should be heeded.

195. *In re Estate of Feinberg*, 919 N.E.2d 888 (Ill. 2009); *Fed. Land Bank of St. Louis v. Walker*, 571 N.E.2d 242, 244 (Ill. App. Ct. 1991); 5 WILLISTON ON CONTRACTS, *supra* note 153, §§ 12:1–2.

196. Listing Two Lion Subspecies, 80 Fed. Reg. 80,000 (Dec. 23, 2015) (to be codified at 50 C.F.R. § 17.11(h)).

Considerable weight should be given to the fact that so many people take the time and effort to vehemently protest the killing of rare animals for sport. They arguably do so because vocalizing outrage online or in relevant fora is the easiest and arguably only immediately effective way for the general public to indicate its stance on the issue. Traditional steps such as petitioning one's elected representatives for action and voting for the candidates that share one's outlook on this issue exist. However, they are, for good reason, perceived to be ineffective for lack of personal time, legislative resources and time, prioritization issues, and other restraints. Public protests have led to positive and necessary legal change in many arenas over time such as interracial marriage, gay marriage, racial segregation, logging of old growth trees as well as other environmental protections, and voting rights to others than white, male landowners. Similarly, public protests have the potential to lead to positive change when it comes to hunting rare species if both legislators and the judiciary act within their respective spheres of authority for the benefit of *all* of society and not just the select few. When it comes to saving endangered species, any means possible must be considered seriously before it is too late to do so. That includes contracts as well as other common law concepts such as the public trust doctrine. In general, members of the general public do not have an opportunity to prevent a trophy hunter from executing a contract with another private party in carrying out the planned kill. This is where common law causes of action may prove to be helpful in reaching the societal goal of saving endangered species in time.

Critics may point out that where trophy hunting is not illegal under positive law, hunters' conduct should not be curbed through contract law. Parties are, in general, free to contract as they wish to the extent that the law is not violated. But as demonstrated above, contracts may, in fact, be declared unenforceable even if *not* violating any underlying positive law. Recall that doing so is an inherent equitable power of the courts that does not require any prior legislative action.<sup>197</sup> Second, even though notions of positive law may not be violated by trophy hunting, notions of natural law may very well be.

197. See *supra* notes 160–162 and accompanying text.

Natural law is the theory of jurisprudence that contends that law has its origin and justification in absolute standards of right and wrong.<sup>198</sup> It thus encompasses the broader notion that “law” may also be seen as taking the form of behavioral, ethical, or social norms, in other words, of “universal principles of morality and justice.”<sup>199</sup> The concept of natural law relates closely to the ecosystem and environmental law discourse. The question has been raised whether natural law supports an ecocentric view of society or whether the purpose of such law is, more narrowly, only to support *human* existence and thus not the environment or animals.<sup>200</sup> Traditional natural law took the starting point that human “goods” such as life, knowledge, friendship, practical reason, play, religion, and aesthetic experience were mainly pursued for anthropocentric reasons.<sup>201</sup> Thus, an ecocentric approach to environmental protection was only sometimes seen as justified under this doctrine.<sup>202</sup> Action was considered to be taken to benefit humankind, not the environment.<sup>203</sup> In modern times, however, actions are supportable for ethical and thus natural law reasons simply because they are “good,” albeit not necessarily “good for” human beings.<sup>204</sup> For example, endangered species may be preserved out of a realization that the planet and its future generations of humans and non-humans will be better off for doing so.<sup>205</sup> That is precisely what is at issue with trophy hunting: even if some may not agree with the notion that each rare animal has an intrinsic, aesthetic value that is worth protecting, even trophy hunters share the view that a species as such is worth protecting for not only ecosystem reasons, but also for the joy of future

198. Myanna Dellinger, *An Unstoppable Tide: Creating Environmental and Human Rights Law from the Bottom Up*, 15 OR. REV. INT'L L. 63, 67 (2013).

199. *Id.*

200. See, e.g., Andrew Brennan & Yeuk-Sze Lo, *Environmental Ethics*, STAN. ENCYCLOPEDIA PHIL. (July 21, 2015), <http://plato.stanford.edu/entries/ethics-environmental/> [<https://perma.cc/XR42-3RLM>] (noting that there have been numerous assessments of anthropocentric versus ecocentric analyses to environmental ethics).

201. Dellinger, *supra* note 198, at 68.

202. *Id.*

203. *Id.*

204. *Id.*

205. See, e.g., *What Is the Point in Preserving Endangered Species That Have No Practical Use to Humans, Apart From Their Aesthetic Appeal or Their Intellectual Interest to Biologists?*, SCI. AM. (Oct. 21, 1999), <http://www.scientificamerican.com/article/what-is-the-point-in-pres> [<https://perma.cc/VMN2-HW2E>].

generations of humans.<sup>206</sup> In short, broader notions of what “the law” is have come to support the unenforceability of trophy hunting contracts. Such contracts also violate natural law.

Times change when it comes to what society considers acceptable or “immoral.” For example, prostitution was once seen as so inherently immoral that most state legislatures outlawed it.<sup>207</sup> Currently, Nevada is the only U.S. jurisdiction to allow legal prostitution in some counties and in the form of regulated brothels.<sup>208</sup> At the federal level, the Mann Act, which prohibits bringing females across state borders for sexual purposes, was enacted to stem the perceived problem of prostitution and early-day human trafficking.<sup>209</sup> Today, every state but Hawaii has sex trafficking laws.<sup>210</sup> Even though prostitution may still be illegal in most states, yesteryear’s attitudes towards sex work have changed dramatically in recent times.<sup>211</sup> Where, at one time, sex work was broadly considered immoral and unacceptable, now many people in the United States no longer consider this to be the case.<sup>212</sup> For example, although prostitution is not illegal in Germany, it had always been regarded as immoral. But not anymore, according to a

206. See *Who We Are: Missions & Involvement*, *supra* note 92.

207. See, e.g., Melissa Gira Grant, *When Prostitution Wasn't a Crime: The Fascinating History of Sex Work in America*, ALTERNET (Feb. 18, 2013), <http://www.alternet.org/news-amp-politics/when-prostitution-wasnt-crime-fascinating-history-sex-work-america> [https://perma.cc/SSW4-9HF3] (providing a history of the legality of sex work in the United States).

208. See John M. Glionna & Javier Panzar, *In Nevada, There Is Little Love Left for Brothels*, L.A. TIMES (Oct. 14, 2015), <http://www.latimes.com/nation/la-na-nevada-brothel-20151014-story.html> [https://perma.cc/R6C3-ZL6N].

209. See 18 U.S.C. §§ 2421–24 (2012).

210. Rebecca Beitsch, *More States Separate Prostitution, Sex Trafficking*, PEW CHARITABLE TRUSTS (Oct. 21, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/10/21/more-states-separate-prostitution-sex-trafficking> [https://perma.cc/EVE6-8GB3].

211. On the effect of changing attitudes toward sexual morality and its impact on contract law, compare *Wilcox v. Trautz*, 693 N.E.2d 141 (Mass. 1998), and *In re Estate of Roccamonte*, 808 A.2d 838 (N.J. 2002), with *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979), and *County of Dane v. Norman*, 497 N.W.2d 714 (Wis. 1993).

212. One informal poll found that out of all of the respondents, nearly half (forty-eight percent) definitely or probably thought that prostitution should be illegal, but thirty-eight percent believed it should be definitely or probably legalized, and thirteen percent were unsure. See *Polling the Political Debate on the Legalization of Prostitution*, YOUNGOV (Mar. 23, 2012), <https://today.yougov.com/news/2012/03/23/legalization-of-prostitution> [https://perma.cc/M7LN-YUAE]; see also *About Poll: Should Prostitution Be Legal?*, ABOUT.COM, [http://atheism.about.com/gi/pages/poll.htm?poll\\_id=0607390613&linkback=](http://atheism.about.com/gi/pages/poll.htm?poll_id=0607390613&linkback=) [https://perma.cc/68DT-GFEU] (last visited Mar. 14, 2016) (finding sixty-three percent of respondents believed that “prostitution should be legal, but regulated”).



Berlin court: in 2000, Judge Percy Maclean found that the profession is now “broadly accepted, as long as it was freely entered into without force.”<sup>213</sup> The German government is considering making contracts between prostitutes and their clients “enforceable by law to reduce the chance of exploitation.”<sup>214</sup>

Similarly, where one time trophy hunting has been considered acceptable when not violating positive law, modern trends demonstrate that society’s attitude toward trophy hunting has changed. Today, killing rare species for sport violates societal notions of what is “right” and what is “wrong” for very many, if not most, people. This is *not* simply a philosophical issue. It is, at bottom, an issue of what society considers acceptable as the subject of a mere financial deal between, typically, one highly privileged party and one less so. While, in general, parties are free to contract as they wish, there are limits to this belief system. One obviously cannot do everything one wishes to do simply because one can afford to do so. In capitalist economies, money tends to shift naturally towards beneficial uses. But money also shifts towards criminal and other unethical uses if such transactions are not halted. Both courts and legislatures play a role in preventing this. This role encompasses taking a much closer view at highly questionable trophy hunting contracts, at least until more convincing evidence is produced establishing the long-term benefits of such contracts.

To be sure, there are also firm, established limits to the notion that courts may declare contracts unenforceable on the grounds of public policy. First and foremost among them is the judicial preference for contractual enforcement and the hesitance towards judicial activism.<sup>215</sup> In their own words, “[c]ourts should be cautious in holding contracts void on the ground that the contract is contrary to public policy; to be void as against public policy, the contract should be quite clearly repugnant to the public

213. Rob Broomby, *Berlin Prostitution No Longer Immoral*, BBC NEWS (Dec. 28, 2000), <http://news.bbc.co.uk/2/hi/europe/1090523.stm> [<https://perma.cc/2QC6-YF7J>].

214. *Id.*

215. See WILLISTON ON CONTRACTS, *supra* note 153, § 12:3 (“Courts are increasingly sensitive to the need to balance their views concerning what public policy demands with the need to fix their own limitations, and generally, whenever it is possible, the courts will interpret a contract so as to uphold it.”); *accord* First Ala. Bank of Montgomery v. First State Ins. Co., 899 F.2d 1045, 1084–88 (11th Cir. 1990) (Tjoflat, C.J., concurring in part and dissenting in part) (discussing the limitations of public policy).

conscience.”<sup>216</sup> “The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests.”<sup>217</sup> Avoidance of contracts on public policy grounds requires a showing of “legal precedents, governmental practice, or obvious ethical or moral standards”<sup>218</sup> and not on the “personal predilections of the majority of the deciding tribunal.”<sup>219</sup> A viable concern in this context is thus that courts may refrain from taking judicial action because of the existence of the congressional mechanisms available through the ESA and, at the international level, CITES. But as noted, contracts may be declared unenforceable for reasons of public policy whether *or not* any underlying positive law framework exists.

Courts have upheld contracts despite public policy concerns in many situations, such as insurance contracts whereby the insurer must cover punitive damages awarded against an insured party; contracts for compensation by professionals such as real estate brokers and doctors required to be licensed in one state, but actually licensed in another; and employment contracts.<sup>220</sup> However, in many of those cases, the outcomes were grounded less upon public policy concerns and more on the statutory language in question, the different purposes underlying such language, and the situation at hand. In virtually all the cases, the courts carefully weighed the existence and extent of the actual harm to the individual parties as well as society at large. Absent a showing that harm had occurred, a bargain was not declared void.

These considerations are key to the question of whether trophy hunting contracts should be held unenforceable. First, the statutory and treaty language is clear on its purpose with regard to rare species: their extinction must be avoided.<sup>221</sup> In the case of

216. SFI Ltd. P’ship 8 v. Carroll, 851 N.W.2d 82, 92 (Neb. 2014).

217. Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 356–57 (1931).

218. Tayar v. Camelback Ski Corp., 47 A.3d 1190, 1199 (Pa. 2012) (citing Williams v. GEICO Gov’t Emps. Ins. Co., 32 A.3d 1195, 1200 (Pa. 2011)).

219. DeFrain v. State Farm Mut. Auto. Ins. Co., 817 N.W.2d 504, 512 (Mich. 2012).

220. See, e.g., WILLISTON ON CONTRACTS, *supra* note 153, § 12:3.

221. The ESA reads, in relevant part:

The Congress finds and declares that . . . other . . . species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction. . . . These species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people . . .

Cecil, that is clear from the proposed ESA listing of African lions. In the case of other species, however, positive law may not be right around the corner as in the lion example, but the goal of preventing species extinction is very commonly agreed upon by both hunters and anti-hunters alike. Modern-day protections must cover hunting in addition to other underlying and traditionally recognized causes of extinction. Second, trophy hunting contracts present risks to society at large as they may contribute to species extinction. Although the extinction of a species is likely irreversible, the contributing factors are, with sufficient governmental and private good will, preventable. Trophy hunting arguably stands in the foreground of such preventable causes.

Although “[c]ourts often find, on close inspection, that the penalty of nonenforcement of contracts is far in excess of the benefit to the public of nonenforcement,”<sup>222</sup> the converse is true with the enforcement of trophy hunting contracts. In these cases, *nonenforcement* is of minor practical concern, albeit perhaps of theoretical significance to some. Society’s interest in saving the very last few of species that are at the brink of extinction must be said to outweigh the benefit of contract enforcement.

The proponents of trophy hunting will emphasize their oft-repeated argument that they too are interested in species

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.

16 U.S.C. § 1531 (2012); *see also* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (“The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.”); *accord* *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (“Recognizing that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come [and] . . . [c]onvinced of the urgency of taking appropriate measures to this end, [the CITES parties agree that] . . . [t]rade in specimens of . . . species [threatened with extinction] must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances . . . [and that] all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival.”); *What Is CITES?*, CITES, <https://www.cites.org/eng/disc/what.php> [<https://perma.cc/6RBK-CD66>] (last visited Mar. 14, 2016) (describing how the aim of CITES is similarly “to ensure that international trade in specimens of wild animals and plants does not threaten their survival.”).

222. *Smithy Braedon Co. v. Hadid*, 825 F.2d 787 (4th Cir. 1987).

conservation and that trophy hunting contributes to conservation efforts. However, serious doubt even at the government scale exists as to whether trophy hunting helps or actually hurts the ultimate conservation goals. For example, the U.S. Fish and Wildlife Service has recently recognized the uncertainty of the alleged benefits of trophy hunting:

The Service found that sport-hunting, if well managed, *may provide* a benefit to the subspecies. *Well-managed* conservation programs use trophy hunting revenues to sustain lion conservation, research and anti-poaching activities. However, the Service found that not all trophy hunting programs are scientifically based or managed in a sustainable way. So in addition to protecting both lion subspecies under the ESA, we created a permitting mechanism to support and strengthen the accountability of conservation programs in other nations. This rule will allow for the importation of the threatened *Panthera leo melanochaita*, including sport-hunted trophies, from countries with established conservation programs and well-managed lion populations.<sup>223</sup>

An argument may thus be made that if trophy hunting programs are well managed, trophy hunting may continually be allowed in such areas. But not all alleged conservation programs are well managed, as specialists have recognized.<sup>224</sup> “May provide” is far from the desired certainty that the programs will be beneficial. As the Cecil case demonstrates, the line between programs that are “well managed” or not too easily becomes blurred or disregarded. Mr. Palmer sought to excuse his actions by maintaining ignorance of the facts, claiming, among other things, that he “thought the hunt was legal” and “had no idea that that the lion [he] took was a known, local favorite, was collared and part of a study until the end of the hunt.”<sup>225</sup>

Doubts about the sustainability of trophy hunting warrant holding trophy hunting contracts to be unenforceable for public policy reasons and *not* vice versa. This is especially important in order to give effect to the precautionary principle of environmental

223. *Lions Are Now Protected Under the Endangered Species Act*, *supra* note 25 (emphasis added).

224. *See generally* Lindsey et al., *supra* note 89.

225. *Cecil the Lion: Walter Palmer ‘Thought Hunt was Legal,’* SCOTSMAN (July 29, 2015), <http://www.scotsman.com/news/environment/cecil-the-lion-walter-palmer-thought-hunt-was-legal-1-3843599> [<https://perma.cc/VW7K-VAQK>].

law contained in article 15 of the Rio Declaration, adopted by consensus of the more than 170 nations, including the United States, at the 1992 United Nations Conference on Environment and Development.<sup>226</sup> Under the precautionary principle of law,

when human activities may lead to morally unacceptable harm that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that harm. Morally unacceptable harm refers to harm to humans or the environment that is . . . serious and effectively irreversible, or inequitable to present or future generations, or imposed without adequate consideration of the human rights of those affected.<sup>227</sup>

This principle is highly relevant to species protection as well. Individual animals are known to serve a function to their own species, to ecosystems in general and thus to ecosystem services to human beings, and, simply but importantly, to the “environment” in general. The parties to the Rio Declaration were concerned about threats to the environment from numerous fronts. In the years since Rio and even Rio +20, species conservation has remained and arguably even gained importance. Trophy hunting is one of those areas of law and policy where precaution is highly warranted. It is an example of not forgetting the forest for the trees: where doubt exists, societies must err on the side of caution. Under the doctrine of *pacta sunt servanda*, nations must adhere to the agreements that they have voluntarily entered into. Although common law judges may be said to only serve a small role in relation to the greater issue of species protection in general, their role and voices nonetheless count as one of several steps to be taken towards the ultimate goal of protecting rare species before it may be too late to do so.

#### B. Third-Party Beneficiary Law

Because of the difficulty of obtaining standing, which will be analyzed further below, the ideal litigation posture would be for a party to be declared having a legal interest in the actual contract

226. See U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I) (Aug. 12, 1992).

227. WORLD COMM'N ON THE ETHICS OF SCI. KNOWLEDGE, THE PRECAUTIONARY PRINCIPLE 14 (2005), <http://unesdoc.unesco.org/images/0013/001395/139578e.pdf> [https://perma.cc/E7S4-GRXW].

rather than in the litigation resulting from the contract. This is so because there may never be any litigation based on the contract when the hunting parties decide to proceed with their mutual promises. In such a case, standing arguments would not even come into play under contract law.

Under modern jurisprudence, however, it is not always only the contracting parties who may challenge the validity or provisions of a contract: third-party beneficiaries may bring suit as well. Just as contract law governing third-party standing moved away from requiring strict party privity<sup>228</sup> to allowing intended third-party beneficiaries to bring suit,<sup>229</sup> so could contract law in the area of endangered species be expanded to allow third parties to bring suit where they have an interest in the subject matter of the contract. This would be a novel application of the law, and should be narrowly framed to maintain consistency with the gate-keeping function that the law of standing serves. Qualifying factors might include, for example, whether the third party's interest is also of sufficient and urgent importance to society in general and whether the party's injury could be redressed in other ways. In the case of trophy hunting contracts, this is currently not the case. Thus, third parties could be a yet-to-be-defined class of persons who would benefit from the non-performance of the contract.

Might third-party contract law come to encompass the animal to be killed? This would, granted, take some judicial courage and willingness, but as with other areas of contract law, initial hesitation often does turn into new law when warranted. It would be here. Further, third-party law would not have to be altered all that much to encompass rare species subject to trophy hunting contracts as intended third-party beneficiaries. Rare animals, to some extent, already fit the definition of intended third-party beneficiaries under existing law. The Restatement states that "a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the

228. The necessity of privity of contract between two individuals for an action based on contract law was, for a long time, viewed as a fundamental tenet of the common law. *See* FERRIELL *supra* note 173, § 18.01(B) (citing *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.* [1915] AC 847 (HL) 853 (appeal taken from Eng.)).

229. Exceptions to the general rule requiring the plaintiff to be in privity of contract with the promisor eventually crystallized into contract law now allowing intended, but not incidental, beneficiaries to bring suit. *See id.* § 18.02.

promisee intends to give the beneficiary the benefit of the promised performance.”<sup>230</sup> With trophy hunting contracts, Cecil is certainly to receive something under the contract: a bullet. If “benefit” is treated broadly as it is in contract consideration cases and considered either a benefit *or* a detriment,<sup>231</sup> the detriment to Cecil is to be killed, the very objective of the contract. Alternatively, as the trophy hunting industry argues, the species in general will receive the benefit of greater protections through trophy hunting. Either way, a benefit or a detriment can already be identified under contract law in the trophy hunting context. Further, the possibility that at contract execution, the parties may not know exactly which particular animal is to be killed is not a problem. Under the Restatement, “[i]t is not essential to the creation of a right in an intended beneficiary that he[or she] be identified when a contract containing the promise is made.”<sup>232</sup>

Ideally, of course, injunctive relief would be obtained to avoid the kill. The Restatement provides the clear guidance that “[a] beneficiary who has not previously assented to the promise for his benefit may in a reasonable time after learning of its existence and terms render any duty to himself inoperative from the beginning by disclaimer.”<sup>233</sup> Further, the Restatement declares that “[w]here specific performance is otherwise an appropriate remedy, either the promisee or the beneficiary may maintain a suit for specific enforcement of a duty owed to an intended beneficiary.”<sup>234</sup> That specific enforcement should be the duty owed to Cecil under, for example, principles of natural law *not* to be shot<sup>235</sup> as well as the duty to the general public to not kill rare species. These rights belong to *everyone* and not just a select few hunters.

The real issue is thus whether third parties can seek to have a contract declared *unenforceable* under third party law where normally, parties seek to have the contractual performances

230. RESTATEMENT, *supra* note 152, § 302.

231. *See, e.g.*, Hamer v. Sidway, 27 N.E. 256, 257 (N.Y. 1891) (holding that consideration may consist in either some right, interest, profit, or benefit to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other). It is immaterial whether the consideration does in fact benefit the promisee or a third party or is of substantial value to anyone. *Id.* Refraining from something that one is entitled to do is a sufficient detriment to create an enforceable contract. *Id.*

232. RESTATEMENT, *supra* note 152, § 308.

233. *Id.* § 306.

234. *Id.* § 307.

235. Dellinger, *supra* note 198, at 67.

enforced. As the Restatement already speaks of rendering some contractual duties “inoperative,” this is not unthinkable. Moreover, courts have, in the contracts context, held that a duty of care runs to third persons in connection with, for example, security contracts.<sup>236</sup> When it comes to trophy hunting contracts, third parties could thus argue that a duty of care similarly runs to them to help ensure that rare animals are not rendered extinct and that trophy hunting should thus be declared unenforceable. Further weight can be added to this argument via the precautionary principle and the public trust doctrine analyzed in Parts VI and VII herein.

In short, if the “Cecils” of the future can be made intended third-party beneficiaries of the hunter-assistant contracts, standing will lie and substantive rights may be asserted as just described. Although this argument is tempting, it is, however, still more realistic to expect judges to hold that *people*, not animals, would have to be the third parties at issue. But *if* suit was brought asserting the interests of the animals, who would do so since the animal itself obviously cannot file suit? Guardians ad litem or special masters would have to be appointed for the animals. Notably, some courts have already done so albeit in other legal contexts. For example, Professor Rebecca Huss was appointed to “represent the interests of the animal victims in the Michael Vick/Bad Newz Kennels prosecution.”<sup>237</sup>

For years, animal law advocates had attempted to posit arguments for the appointment of guardians ad litem, so that humans could directly represent the interests of animals. Thus, it was with great relish that [the animal law community] witnessed the U.S. Attorney requesting the appointment of a guardian/special master in the lawsuit that resulted in the court-ordered forfeiture by Michael Vick of the dogs he had abused.<sup>238</sup>

With an issue of even broader importance to society such as the survival of rare animal species, U.S. courts have legal precedent to

236. PERILLO, *supra* note 174, §17.3.

237. Joyce Tischler, *A Brief History of Animal Law, Part II (1985–2011)*, 5 STAN. J. ANIMAL L. & POL'Y 27, 56–57 (2012) (citing Rebecca J. Huss, *Lessons Learned: Acting as Guardian/Special Master in the Bad Newz Kennels Case*, 15 ANIMAL L. 69 (2008)); Alexis C. Fox, *Using Special Masters to Advance the Goals of Animal Protection Laws*, 15 ANIMAL L. 87 (2008)).

238. Joyce Tischler, *Building Our Future*, 15 ANIMAL L. 7, 12–13 (2008).



appoint guardians ad litem both for the individual animals to be killed as well as their species in general. With some change of the interpretation of existing law, these animals might one day be considered third party beneficiaries. Even if courts never came to see the issue this way, *people* certainly currently have a strong third-party interest in the survival of endangered species.<sup>239</sup> That could reasonably enable third parties to have courts declare certain contracts unenforceable, and not just, as is typically the case, enforceable. Third-party contract law could and should develop to encompass this notion.

### C. International Contract and Trade Law

In private international law, contracts are governed by the Convention on the International Sale of Goods (“CISG” or the “Convention”) if the places of business of the contractual parties are located in countries that have ratified the Convention.<sup>240</sup> The CISG may be inapplicable to international trophy hunting contracts executed between private parties or a private party and a government entity, because the CISG applies only to purely commercial transactions.<sup>241</sup> Even if the CISG applied, parties are free to opt out from its provisions.<sup>242</sup> Perhaps most importantly, the Convention is not “concerned with . . . the validity of the contract or of any of its provisions.”<sup>243</sup>

In contrast, the UNIDROIT Principles of International Commercial Contracts (the “Principles”) provide some guidance on whether contracts may be declared unenforceable by a judiciary. As a threshold matter, the Principles set forth general rules for international commercial contracts.<sup>244</sup> They may be applied

239. *See supra* Section VI.B.

240. United Nations Convention on Contracts for the International Sale of Goods art. I, *adopted* Apr. 11, 1980, S. TREATY DOC. NO. 98-9, 1489 U.N.T.S. 3.

241. *See id.* (“This Convention applies to contracts of sale of goods between parties whose *places of business* are in different States” (emphasis added)). A private hunter does not have a “place of business.” A government body is, by definition, not in business and thus also is not a commercial party for purposes of the CISG.

242. *Id.* at art. VI (“The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”).

243. *Id.* at art. IV.

244. INT’L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS pmb. (2010) [hereinafter UNIDROIT PRINCIPLES].

when the parties have agreed that their contract be governed by them, . . . when the parties have agreed that their contract be governed by general principles of law, . . . [or] when the parties have not chosen any law to govern their contract . . . . They may [also] be used to interpret or supplement domestic law.<sup>245</sup>

Article 3.3.1 of the Principles addresses contractual illegality: where a contract violates a “mandatory rule of national, international or supranational law, the effects of the violation are those prescribed by the mandatory rule.”<sup>246</sup> Where a possible mandatory rule does not expressly prescribe the effects of a violation of a contract, the parties “have the right to exercise such remedies under the contract as in the circumstances are reasonable.”<sup>247</sup> The Principles highlight the fact that “[d]espite its paramount importance . . . *freedom of contract is not without limit.*”<sup>248</sup> Whereas “only mandatory rules, whether of national, international or supranational origin . . . are relevant” to an analysis of whether a contract infringes a rule of law, the Principles also make it clear that “*unwritten general principles of public policy* which are applicable in accordance with the relevant rules of private international law” fall under this categorization.<sup>249</sup> When deciding the remedies for a contractual illegality, courts are instructed to bear in mind that “[g]iven the great variety of mandatory rules . . . ranging from regulations of a merely technical nature to prohibitions *for the purpose of preventing grave social harm* . . . [the] list of criteria [given] to determine the contractual remedies available in the circumstances, if any, . . . is not exhaustive.”<sup>250</sup> In this context, “[a]mong the most important factors to be taken into consideration is the purpose of the mandatory rule and whether the attaining of its purpose would or would not be affected by granting at least one of the parties a remedy under the contract.”<sup>251</sup>

The official illustrations shed valuable light on the intended effects of the UNIDROIT article on contractual illegality. For example, where an IT contractor of one country enters into an

245. *Id.*

246. *Id.* at art. 3.3.1(2).

247. *Id.*

248. *Id.* at art. 3.3.1, cmt. 1 (emphasis added).

249. *Id.* at cmt. 2 (emphasis added).

250. *Id.* at cmt. 6 (emphasis added).

251. *Id.*

agreement to pay a high-ranking officer of a company in another country in order to induce an offer to award the IT contractor a lucrative contract, the contract violates principles of public policy although bribery in the private sector is not prohibited by statute in any of the countries, but is (naturally) considered contrary to public policy in both countries.<sup>252</sup> Similarly, where there is no statutory regulation prohibiting collusive bidding in public tendering proceedings, but collusive bidding is considered contrary to public policy, a collusive bidding agreement for the procurement of construction contracts violates the principle of public policy and thus also the UNIDROIT Principles.<sup>253</sup> Contracts may, further, under the Principles, infringe mandatory rules by their performance. For example, where a retailer in one country enters into an agreement with a toy manufacturer in another country, and the retailer knew or ought to have known that the toys ordered would be manufactured by child laborers, the manufacture agreement violates principles of public policy by its performance.<sup>254</sup> Notably, this may also be the case where a certain rule is adopted *after* the execution of the contract, but before its performance, such as where an international embargo is imposed on the importation of a certain type of equipment into a given nation, but where the parties nonetheless proceed with the transaction.<sup>255</sup>

Thus, trophy hunting contracts may, under private international law, be avoided by one of the contracting parties where national or international statutory law protects the animal species or where treaty or statutory provisions prohibit trade in or transportation of parts of the animal.<sup>256</sup> However, even where no positive law expressly prohibits hunting of the species, existing notions of public policy arguably warrant a court not upholding a contract, should one of the parties seek avoidance.

What is important in the contractual context is the reasonable expectation of the parties. Because of existing and emerging provisions under regulations such as those of CITES and the ESA, and, perhaps even more importantly, because of changing societal notions of what is acceptable commercial behavior in relation to

252. See UNIDROIT PRINCIPLES, *supra* note 244, at art. 3.3.1, cmt. 3, illus. 2.

253. *Id.* at illus. 4.

254. *Id.* at illus. 5.

255. *Id.* at illus. 6.

256. Such conduct may then also constitute a criminal violation, which is outside the scope of this Article.

rare species, parties must currently be said to be on reasonable notice that a contract for the sport killing of rare animals may well be declared unenforceable under U.S. common law as well as private international law. Granted, where parties wish to proceed with the relevant contract, notions of standing may prevent a third party from having the contract declared unenforceable or illegal under UNIDROIT. But if a party sought to avoid the contract, courts may, under both the UNIDROIT Principles as well as under U.S. common law, declare the contract illegal or unenforceable. Either outcome would leave the other contractual party without remedy against the breaching party.

Because of the rarity of some animals that are still hunted for sport under questionable economic and scientific reasoning,<sup>257</sup> modern courts ought to declare trophy hunting contracts unenforceable for reasons of public policy in order to prevent the grave harm that will result if the affected species go extinct because of trophy hunting combined with other factors, including habitat loss, poaching, and past hunting. The socially desirable effects of this would, most importantly, be to save rare animals of species in circumstances where even a few individuals may be necessary to the survival of the species and to broader ecosystem interchanges. Further, a positive effect of an interim discontinuation of trophy hunting would be to allow relevant parties—NGOs and government agencies alike—to obtain a better understanding of whether trophy hunting can be carried out in a sustainable way and whether it truly does help conservation efforts.<sup>258</sup> When the effects of declaring contracts unenforceable for reasons of public policy are clear, courts are more likely to do so.

257. See, e.g., Lindsey et al., *supra* note 86, at 881; Lindsey et al., *supra* note 89, at 4–5; see also Listing Two Lion Subspecies, 80 Fed. Reg. 80,000 (Dec. 23, 2015) (to be codified at 50 C.F.R. § 17.11(h)); *Trophy Hunting in Africa: You Kill It, You Carry It*, ECONOMIST (May 15, 2015), <http://www.economist.com/blogs/gulliver/2015/05/trophy-hunting-africa> [<https://perma.cc/DHY3-QZG9>].

258. A study conducted in the year since Cecil's death by the House Natural Resources Committee shows that "there is little evidence . . . that the practice has benefited hunted species' survival." Press Release, House Comm. on Nat. Res., *New Analysis: Wildlife Trophy Hunting Often Doesn't Bring Species Conservation Benefits Claimed by Promoters* (June 13, 2016), <https://democrats-naturalresources.house.gov/media/press-releases/new-analysis-wildlife-trophy-hunting-often-doesnt-bring-species-conservation-benefits-claimed-by-promoters> [<https://perma.cc/M39K-3FJK>]. Additional studies may support these findings, further discrediting the claim that trophy hunting contributes to species conservation.

A causal connection exists between hunting very rare animals and the risk of their extinction.<sup>259</sup> It follows that if rare animals are killed more frequently, the overall species is put at a greater risk of extinction. Even if, as is the case, some studies show that very limited trophy hunting may help conservation efforts, the precautionary principle of environmental law should be followed. Nowhere does this stand out clearer than in the case of trophy hunting of rare species. Arguing that some conservation specialists consider trophy hunting to be sustainable misses the point. That is precisely where the precautionary principle calls for nations to err on the side of caution. Courts would thus not be out of bounds in declaring trophy hunting contracts unenforceable under international contract law.

Restrictions on trophy hunting also finds support in international trade law. A recent “watershed case” issued by the World Trade Organization (“WTO”) “reveal[s] that the WTO appreciates the growing worldwide awareness that animal welfare is an ethical concern that may in certain cases trump free trade” and, notably, that public morals can and should be considered as well.<sup>260</sup> The case involved an EU regulation that prohibited placing any seal products from any countries on the internal market.<sup>261</sup> The prohibition was passed as a result of the EU Parliament’s careful consideration of the EU citizens’ moral concerns surrounding the slaughter and scientific evidence regarding the inhumane hunting methods used to kill seals.<sup>262</sup> The WTO Panel found that the EU measure fell within the ambit of “public morals” under article XX(a) of General Agreement on Tariffs and Trade (“GATT”) and that the “public morals” in connection with seal hunting is a legitimate objective pursuant to the Agreement on Technical

259. See, e.g., Lindsey et al., *supra* note 86; Lindsey et al., *supra* note 89.

260. Andrew Lurić & Maria Kalinina, *Protecting Animals in International Trade: A Study of the Recent Successes at the WTO and in Free Trade Agreements*, 30 AM. U. INT’L L. REV. 431, 434, 444, 449 (2015).

261. Council Regulation 1007/2009, arts. 2(3), 3(1), 2009 O.J. (L286) 36, 38 (EC) (defining “placing on the market” as “introducing onto the Community market, thereby making available to third parties, in exchange for payment” and allowing seal products to be placed on the market only when they are a product of an indigenous hunt).

262. See *id.* ¶¶ 4–5, 11 (discussing “serious concerns by members of the public” about “the animal welfare aspects of the killing and skinning of seals” and concluding that it is not feasible to hunt seals in a humane way).

Barriers to Trade.<sup>263</sup> The Panel acknowledged that “animal welfare is an issue of ethical or moral nature” and that “animal welfare is a matter of ethical responsibility for human beings in general.”<sup>264</sup> The WTO Appellate Body agreed with the Panel decision.<sup>265</sup> It even found that the measure did not go far enough in achieving its objectives.<sup>266</sup> The explicit recognition of the importance of animal welfare by the WTO is considered unprecedented.<sup>267</sup> Since the WTO has now recognized that animal welfare is an ethical concern to be considered and that the protection of public moral concerns in relation to animal welfare is a legitimate objective that can justify trade restrictions, countries have a broader basis upon which to legislate in this field.<sup>268</sup> Further, there is now clear case precedent for taking animal welfare issues into account in the trade regime as well as in national courts.

WTO concerns for the animals themselves could support arguments that the remaining populations suffer from the loss of their alpha leaders as well as potential extinction, which is a broader animal welfare issue of great public concern. With lions, for example, other males have been known to destroy entire an entire generation of cubs in order to be able to insert their own genes into the gene pool and eradicate the genes of the deceased leaders.<sup>269</sup> That is a harsh anthropogenically induced and, arguably, unnecessary result caused by trophy hunting because it has the above-mentioned negative effects on the gene pool in general. Evolution supports the reproduction by alpha animals. Trophy hunting tinkers with that at the risk of worsening the species. Further, although the WTO has been subject to some warranted criticism of the effects of GATT and WTO rules on species and the environment in general, WTO cases and other documentation does support species and environmental

263. Panel Reports, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 7.419–.427, WTO Doc. WT/DS400/R, WT/DS401/R (Nov. 25, 2013).

264. *Id.* ¶ 7.409.

265. Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R (adopted Jun. 18, 2014).

266. *Id.* ¶¶ 5.181–.182 (noting that the measure did not prevent all seal products from entering the market).

267. Lurić & Kalinina, *supra* note 260, at 444 (2016).

268. *Id.*

269. See Anna-Louise Taylor, *Why Infanticide Can Benefit Animals*, BBC (May 21, 2012), <http://www.bbc.co.uk/nature/18035811> [https://perma.cc/272W-LQ4T].

protections. This relates to international trophy hunting and trophy import/export agreements too, to the extent, of course, that the WTO is implicated in the first place.<sup>270</sup> Perhaps most importantly, the WTO case demonstrates that at least trade tribunals may take the public outcry surrounding animal cases into consideration. “As society’s abhorrence of the systematic mistreatment of animals in industry rises to the level of a public moral concern, citizens will increasingly pressure their governments to ensure that animals are treated humanely by these industries.”<sup>271</sup> Trophy hunting is an industry as well and may thus be affected by this case. With the seemingly increasing public sentiment against trophy hunting, both legislatures *and* courts now have grounds on which to rely for weighing the interests of both the public and the affected animals against the typical trade protection interests and purely monetary arguments.

Next, this Article analyzes whether other potential legal avenues exist for the prevention of sport hunting of threatened or endangered species. They do.

#### VII. THE PUBLIC TRUST DOCTRINE AND STATE OWNERSHIP OF WILDLIFE DOCTRINE

The public trust doctrine and the closely related state ownership of wildlife doctrine may also serve to create greater legal protections of rare species. It is outside the scope of this Article to analyze these doctrines in depth here. It is also unnecessary as much great scholarship and many cases have already done so.<sup>272</sup>

270. See, e.g., Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998) (“In reaching these conclusions, we wish to underscore what we have *not* decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.”).

271. Lurié & Kalinina, *supra* note 260, at 444.

272. See, e.g., Michael Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 713–20 (2005); Mary C. Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43,

However, as both doctrines operate as stand-alone arguments in suits against government entities for insufficient species protection and add further weight to the contractual doctrine of unenforceability where government entities might be added as co-defendants in private contractual lawsuits, they are relevant and will thus be examined briefly below.

#### A. The Public Trust Doctrine

The public trust doctrine dates to early Roman law. Its roots in American jurisprudence can be traced to the early nineteenth century.<sup>273</sup> Under the public trust doctrine, states hold certain natural resources in trust for the benefit of the citizenry at large. The state owns and manages these resources for the benefit of designated beneficiaries, who in turn enjoy equitable ownership of the property. As trustees, the states retain legal ownership of the resources at all times, but at the same time, they have fiduciary obligations to the beneficiaries in terms of preserving natural resources.<sup>274</sup> Present and future generations are the trust beneficiaries.<sup>275</sup> Inherent in the notion of sovereign ownership of a natural resource is not only the right to regulate the resource use, but also the affirmative duty to protect it for present and future generations.<sup>276</sup> The benefit accrues to the general public and not just private individuals.<sup>277</sup>

In the United States, individual states have broadly incorporated the public trust doctrine in constitutions, statutes, and the common law, although the applications of the doctrine in the state systems vary.<sup>278</sup> Additionally, the doctrine is a universal concept and is applied in the legal systems of many countries besides the United States. For example, the doctrine is embedded in Article 237 of the Ugandan Constitution, which states that the government “shall hold in trust for the people to protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any

65–77 (2009); *see generally* MARY C. WOOD, NATURE’S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE (2014).

273. Michael Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 UTAH L. REV. 1437, 1457 (2013).

274. *Id.* at 1442.

275. *Id.*

276. *Id.* at 1437.

277. *Id.* at 1460.

278. *Id.* at 1439.



land to be reserved for ecological and touristic purposes for the common good of all citizens.”<sup>279</sup> The doctrine forms part of the constitutions of Kenya, Nigeria, Ecuador, and the Philippines just as it plays a key role in court decisions in India, Pakistan, and beyond.<sup>280</sup> In South Africa, the Public Trust Doctrine forms part of the Bill of Rights which declares that “[e]veryone has the right . . . to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that . . . promote conservation . . . and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”<sup>281</sup>

In “the most celebrated public trust case in American law,”<sup>282</sup> *Illinois Central Railroad v. Illinois*, the U.S. Supreme Court expressly adopted the public trust doctrine. The Court held that the state owned submerged lake lands in trust for the people and was thus unable to alienate the lands without providing a clear benefit to the general public.<sup>283</sup> Justice Field further located the public trust doctrine in the notion that states enjoy sovereign ownership of natural resources.<sup>284</sup> Cases following *Illinois Central* have declared public trust protections of an increasing number of natural resources in response to changing social and legal circumstances.<sup>285</sup> For example, state courts have extended protection to the dry sand area of beaches used for public recreational purposes, wildlife habitats connected to navigable waters, sand and gravel in water beds, state parks, drinking water, groundwater, artificial waters, inland wetlands, marine life, and, notably, wildlife itself.<sup>286</sup> Such extensions indicate that courts are increasingly likely to view the

279. CONST. OF THE REPUBLIC OF UGANDA, 1995, art. 237(2)(a).

280. Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. DAVIS L. REV. 741, 760–88 (2012).

281. S. AFR. CONST., 1996, ch. 2.

282. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489 (1970).

283. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 437, 455–56 (1892).

284. *Id.*; see also *Geer v. Connecticut*, 161 U.S. 519, 527–28 (1896).

285. Blumm & Paulsen, *supra* note 273, at 1450.

286. *Id.*; see also *Pullen v. Ulmer*, 923 P.2d 54, 61 (Alaska 1996) (concluding that the public trust doctrine applies to salmon and other fish); *Wade v. Kramer*, 459 N.E.2d 1025 (Ill. App. Ct. 1984).

doctrine as inclusive of important natural resources other than navigable waterways.<sup>287</sup>

Nonetheless, the doctrine is still thought to apply mostly to navigable waters and related land resources and not as much to wildlife.<sup>288</sup> Further, “[w]hile the public trust doctrine has developed dramatically in the water context, the same cannot be said of the doctrine’s applicability to fish and wildlife resources.”<sup>289</sup> Thus, wildlife may enjoy greater protections if pled under the related doctrine of state sovereign ownership of wildlife rather than the public trust doctrine because courts may find that the public trust doctrine only covers wildlife resources indirectly, if at all. This may be a distinction without a difference, as will be explained next.

### B. State Sovereign Ownership of Wildlife Doctrine

The notion that sovereign states own wildlife also stems from the Roman civil law tradition.<sup>290</sup> It gained widespread recognition in the United States in the early nineteenth century.<sup>291</sup> The U.S. Supreme Court confirmed the doctrine in *Geer v. Connecticut* in 1896.<sup>292</sup> The concept is still alive and well: at least forty-eight states claim sovereign ownership of wild animals.<sup>293</sup> Some courts note that “[t]he ‘ownership’ language must be understood as no more than a nineteenth-century legal fiction,” but they nonetheless emphasize “the importance to its people that a State have power to preserve and regulate the exploitation of an important resource,” including wildlife.<sup>294</sup> Despite some confusion about the continued viability of *Geer* and differing views on the best legal terminology to use, state protection of wildlife in a sovereign capacity is still overwhelmingly the majority view.<sup>295</sup> That being said,

[s]ome courts have interpreted sovereign ownership of wildlife to confer on states the right to control the use of wild animals, but not

287. Blumm & Paulsen, *supra* note 273, at 1450.

288. *Id.* at 1437.

289. Richard M. Frank, *The Public Trust Doctrine: Asserting Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 667 (2012).

290. Blumm & Paulsen, *supra* note 273, at 1451–52.

291. *Id.* at 1452.

292. *Geer v. Connecticut*, 161 U.S. 519, 529 (1896).

293. Blumm & Paulsen, *supra* note 273, at 1440.

294. *See* *Ctr. for Biological Diversity v. FPL Group*, 83 Cal. Rptr. 3d 588, 598–99 (Ct. App. 2008) (citing *Toomer v. Witsell*, 334 U.S. 385, 402 (1948)).

295. Blumm & Paulsen, *supra* note 273, at 1451.

[affirmative] duties of conservation. Such an interpretation fails to acknowledge the responsibilities inherent in ownership in a sovereign capacity—states' sovereign ownership of wildlife creates a trust, with corresponding obligations, as well as the authority to preserve wildlife.<sup>296</sup>

Because state resources and property have, for a long time, been recognized to be held in trust for the common benefit of all state citizens and not just the select few, the failure to find an affirmative sovereign government duty to conserve and protect natural resources makes very little sense given today's increasing resource scarcity and risk of species extinction. Even as early as 1821, judges supported that conclusion: "Common property" resources, which include "the sea, the fish, and the wild beasts," were "placed . . . in the hands of the sovereign power, to be held, *protected*, and regulated for the common use and benefit."<sup>297</sup> At an early stage, the U.S. Supreme Court similarly confirmed that the state has a duty to protect the public interest in wildlife "for the benefit of the people, and not . . . for the benefit of private individuals as distinguished from the public good."<sup>298</sup> Further, as has been the case since the early public trust doctrine cases, preservation of the public access to wildlife has always been an essential part of the doctrine. But with insufficient legal protections, the public may simply not have "access" to some wildlife species for much longer if the species in question are placed in needless jeopardy by trophy hunters as is arguably the case.<sup>299</sup>

Wildlife is thus arguably deserving of protections under not only the state sovereign ownership doctrine, but also the public trust doctrine. Both doctrines should be understood as linked. It makes no sense to grant "access" to wildlife as a resource if it no longer exists. This concern is highly relevant in the case of threatened and endangered species. The public trust doctrine has long been seen as highly flexible<sup>300</sup> and may thus cover wildlife without liberalizing the doctrine to an extent not warranted under existing precedent. Indeed, "courts and legislatures in at least twenty-two states have expressly employed the words 'trust' or 'trustee' when

296. *Id.* at 1440.

297. *Arnold v. Mundy*, 6 N.J.L. 1, 71 (1821) (emphasis added).

298. *Geer v. Connecticut*, 161 U.S. 519, 529 (1896).

299. Blumm & Paulsen, *supra* note 273, at 1457–58.

300. *See Arnold*, 6 N.J.L at 23.

discussing state management of wildlife.”<sup>301</sup> In other words, little legal or practical reasoning exists to interpret the public trust doctrine to be separate from the notion of state ownership of wildlife. Importantly, several courts adhere to this view. The two doctrines were expressly combined in a recent California case in which the Center for Biological Diversity argued that the destruction of wildlife by nine wind farm operators violated the public trust doctrine as well as numerous state statutes.<sup>302</sup> Noting that “certain interests are so particularly the gifts of nature’s bounty that they ought to be reserved for the whole of the populace,” the court concluded that the state has an affirmative duty to preserve wildlife.<sup>303</sup> California courts have for a long time found that because wild animals belong to the state in a sovereign capacity, the state can prohibit actions that adversely affect wildlife if deemed necessary for the public good.<sup>304</sup> Said the court in *Center for Biological Diversity*:

[w]hatever its historical derivation, it is clear that the public trust doctrine encompasses the protection of undomesticated birds and wildlife. They are natural resources of inestimable value to the community as a whole. Their protection and preservation is a public interest that is now recognized in numerous state and federal statutory provisions.<sup>305</sup>

Although the applicability of the public trust doctrine to wildlife may not have been widely recognized previously, “it is likely that more courts will soon recognize that state ownership of wildlife is part of the public trust doctrine, thus imposing duties and empowering states to ensure wise stewardship of wild animals and their habitats.”<sup>306</sup> Whether viewing the issue as a “public trust” or “state ownership” doctrine, it is clear that states have not only the right to protect natural resources, but also the appurtenant fiduciary obligation to protect such resources. This logically

301. Blumm & Paulsen, *supra* note 273, at 1471.

302. *Ctr. for Biological Diversity v. FPL Group*, 83 Cal. Rptr. 3d 588, 592 (Ct. App. 2008) (affirming the trial court’s dismissal of the case, but on the grounds that the Center for Biological Diversity sued the wrong party).

303. *Id.* at 596 n.12 (citations omitted).

304. *See Ex parte Maier*, 103 Cal. 476 (1894).

305. *Ctr. for Biological Diversity*, 83 Cal. Rptr. 3d at 599.

306. Blumm & Paulsen, *supra* note 273, at 1488.

includes the sovereign's duty to protect the wildlife trust.<sup>307</sup> In addition to empowering states to seek compensation for damages to the trust, the wildlife trust enables public entities or individual citizens "to vindicate public trust duties by maintaining actions against private parties who damage wildlife or wildlife habitat."<sup>308</sup>

Trophy hunter killings of very rare species place a treasured common good at a higher risk of total destruction. This is arguably a violation of the public trust doctrine that courts have the power *and* duty to prevent. Thus, whereas a few members of society may desire to hunt and kill rare animals and believe this can be done sustainably, it is in the broader interest of society to act in a truly conservative way, in the root sense of the word. In the case of trophy hunting of rare animals, this amounts to discontinuing the practice of turning a blind eye towards the peril at which some species are currently placed by trophy hunting and by other causes that lead to species extinction. The community as a whole owns these animals. Under the doctrines, the government holds the resource—the animals, in this case—in trust for the public and must make sure that the resource is managed for long-term sustainable use by future generations. Thus, the doctrines allow suit against government entities for their insufficient regulatory protection of the animals. In the context of listed species, this duty falls on the federal government under the ESA as analyzed above and includes the duty to issue hunting permits only when warranted. Even more regulatory protections ought to be expanded to disallow trophy hunting of rare animals. But since the public trust doctrine is often analyzed as a state law issue, the question becomes whether a *federal* public trust doctrine also exists. It does:

There is, in fact, widespread recognition of the existence of the federal public trust doctrine . . . . This acknowledgement is reflected both in case law and in federal statutes.

. . . .

. . . Many well-considered federal court opinions have assumed the existence of a federal public trust doctrine, and many state courts consider the public trust to have always existed, meaning that state

307. *Id.*

308. *Id.*

constitutional or statutory codifications of the public trust merely reflect a pre-existing sovereign duty.<sup>309</sup>

For reasons of public policy, and under the public trust or the state ownership of wildlife doctrines, rare animals must be protected at all costs before it is too late. The difficulty in this context lies in *who* will be willing and, importantly, able to bring suit to seek the invalidation of trophy hunting contracts or to require affirmative governmental protections under the aforementioned legal doctrines. This will be analyzed next.

### VIII. STANDING

This section will mainly focus on standing under the public trust doctrine and state ownership of wildlife doctrines, but to recap: Under contract law, “a party to an illegal bargain can neither recover damages for breach thereof, nor, by rescinding the bargain, recover the performance . . . .”<sup>310</sup> A contract may be declared unenforceable for reasons of public policy *without* being illegal under positive law as discussed above, but it is currently one of the parties to the contract who must challenge its validity. In the case of assisted trophy hunting, it is not unthinkable that one of the parties will change his or her mind after contract execution and seek to escape his or her executory contractual promise. Parties may renege from their promises before or after the killing. If courts refused to enforce either the promise of assistance or payment for such assistance, a clear signal would be sent to other persons interested in the practice that their contractual promises may not be enforced. Not enforcing trophy hunting contracts would also send a clearer signal to legislators to take more regulatory action at the national and international scales.

Where the parties seek to perform their contracts, standing for an outside challenger would be more difficult. Third parties cannot, for example, intervene in a lawsuit if there is no lawsuit in

309. Michael Blumm & Lynn Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central*, 45 ENVTL. L. 399, 421, 430 (2015) (footnotes omitted) (elaborating further on both case and statutory law recognizing that the U.S. federal government is also subject to the public trust doctrine); see also *Juliana v. United States*, No. 6:15-CV-1517-TC, 2016 WL 1442435, at \*9–13 (D. Or. Apr. 8, 2016) (declining to dismiss action as urged by defendant, which argued that there is no “independent cause of action under the [public trust] doctrine against the federal government by a private individual”).

310. WILLISTON ON CONTRACTS, *supra* note 153, § 12:4.

which to intervene in the first place. Thus, a twist on existing third-party beneficiary law would have to be developed in order for a third party to invalidate the contract as analyzed above. In this context, third parties could be a yet-to-be-defined class of persons intended to benefit from the *non*-performance of the contract. As discussed in Section VI.B, existing third-party law would not have to be changed a great deal to include the particular targeted animals. Although this may seem like a legally radical idea, new action in this area is needed now if we as a society want to save certain species from extinction. Consensus exists among both hunters and non-hunters that we do.<sup>311</sup> If not, third parties seeking to invalidate a trophy hunting contract could, as mentioned above, plausibly come to include a group of people who have a reasonable and definable interest in the wild animal targets.

At first blush, the problem of standing may seem insurmountable when neither contractual party raises an issue with a trophy hunting contract. However, the standing difficulty may be overcome under either federal or state law via the public trust doctrine and the state ownership of wildlife doctrine. While the main purpose of this Article is to challenge the belief that trophy hunting contracts must be enforced under freedom of contract, it is outside the scope of the Article to go in full depth into the complex issue of standing. Existing legal scholarship and other legal theory has already done so. This Article will simply raise some of the most crucial aspects of the doctrine and seek to add to existing scholarship by focusing on a few new and crucial aspects of state standing that may be asserted if a party seeks to challenge trophy hunting contracts on the bases of contract law, the public trust doctrine, or the state ownership of wildlife doctrine. Anyone wishing to seek redress in court using the principles mentioned in this Article should closely investigate how to obtain standing to address the underlying substantive issue. This is particularly relevant in the environmental law context, where standing has proved difficult in so many cases.

#### A. Federal Standing

The federal standing doctrine requires plaintiffs—or some of them—to “establish an entitlement to judicial action, separate from

311. See *supra* notes 18–23 and accompanying text.

proof of the substantive merits of the claim advanced.”<sup>312</sup> Absent constitutional standing, federal courts believe they lack power to entertain the proceeding.<sup>313</sup> The case and controversy requirement under Article III creates three minimal elements in order to have standing: (i) the plaintiff must have suffered an injury in fact, (ii) there must be a causal connection between the injury and the conduct complained of, and (iii) it must be likely and thus not just speculative that the asserted injury will be redressed by a favorable decision.<sup>314</sup> In addition to the constitutional limits on standing, the Court has also articulated prudential standing barriers. One such limitation is the prohibition against third-party standing.<sup>315</sup> The Court has explained that “even when the plaintiff has alleged injury sufficient to meet the ‘case or controversy’ requirement, this Court has held that the plaintiff generally must assert his [or her] own legal rights and interests, and cannot rest his [or her] claim to relief on the legal rights or interests of third parties.”<sup>316</sup> However, “[i]njury to rights recognized at common law—property, *contracts*, and torts—are sufficient for standing purposes.”<sup>317</sup>

Third parties may arguably also assert standing under other common law, such as the public trust doctrine, for the following reasons. First, the injury-in-fact requirement entails “an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical.”<sup>318</sup> As analyzed, third parties can assert a legal interest in the protection of wildlife under the state ownership of wildlife doctrine and/or the public trust doctrine. Because of the prohibition against generalized grievances, plaintiffs cannot sue if the injury is widely shared in an undifferentiated way with many people.<sup>319</sup> Seeking judicial protections of a particular animal to be killed in the near future may, however, be differentiated from a generalized claim by, for example, nature organizations studying the animals, local residents, and people planning to visit the area in

312. 13A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3531 (3d ed. 1998).

313. *See id.* § 3522.

314. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

315. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 83 (4th ed. 2011).

316. *Warth v. Seldin*, 422 U.S. 422, 499 (1975).

317. CHEMERINSKY, *supra* note 315, at 83 (emphasis added).

318. *Lujan*, 504 U.S. at 560 (internal quotation marks omitted).

319. *See, e.g., Allen v. Wright*, 468 U.S. 737, 751 (1984).



question in the near future.<sup>320</sup> The asserted injury would be particularized and not hypothetical. Although the Cecil case was not highly publicized until after the killing, other cases have been publicized before the hunt occurred. For example, media and other public attention exposed the trophy killing of a black rhinoceros by TV entertainer Corey Knowlton before the hunt took place.<sup>321</sup> Plaintiffs can thus argue both particularity and imminence in such cases.

Second, the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.”<sup>322</sup> In trophy hunting cases, the action challenged would precisely be the action of the defendant hunter or assistants and not a third party.

Third, it must be “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”<sup>323</sup> Narrowly interpreted, this would not be a problem. The individual animal would, if the trophy hunt is prevented via judicial action, be saved. A difficulty may lie in the fact that a reasonable argument can be made that one individual animal will not lead to the ultimate demise of the species in general. Thus, redressability by a favorable decision may be held speculative. On the other hand, with the amount of existing and continually surfacing reports on the effects of hunting in general and trophy hunting on endangered species, plaintiffs might prevail on this prong as well.

Other legal hurdles in obtaining federal court standing exist, but this much seems clear: plaintiffs who either live in the nation in which the trophy hunt is to be conducted—and some such hunts are in the United States—or have clear plans to visit the area under federal standing doctrine would be asserting their own rights,

320. See *Lujan*, 504 U.S. at 562–64.

321. See, e.g., *Corey Knowlton Paying Big Money to Hunt Black Rhino Sparks Outrage*, INSIDE EDITION (Jan. 17, 2014), <http://www.insideedition.com/headlines/7649-corey-knowlton-paying-big-money-to-hunt-black-rhino-sparks-outrage> [<https://perma.cc/D85E-ZR9M>]; Jason Kurtz, *Man Who Paid \$350k for the Right to Kill a Black Rhino: “I Will Say to Bob Barker . . . the Price Was Wrong”*, CNN (Jan. 16, 2014), <http://piersmorgan.blogs.cnn.com/2014/01/16/man-who-paid-350k-for-the-right-to-kill-a-black-rhino-i-will-say-to-bob-barker-the-price-was-wrong> [<https://perma.cc/3D7Y-GST2>]; Ed Lavandera, *Winner of Black Rhino Hunting Auction: My \$350,000 Will Help Save the Species*, CNN (Jan. 17, 2014), <http://www.cnn.com/2014/01/16/us/black-rhino-hunting-permit> [<https://perma.cc/E8PL-8ATE>].

322. *Lujan*, 504 U.S. at 560.

323. *Id.* at 561 (internal quotation marks omitted).

rather than relying upon a third party standing theory. This is arguably so because their legal rights fall under the public trust doctrine or state ownership of wildlife doctrine, which, by their very definition, grant rights to all citizen stakeholders and not just a select few individuals such as the hunters and their assistants. As important as the issue of species extinction has become, the issue falls within the “zone of interest”<sup>324</sup> to be protected by possible statutes in the area such as the ESA. Importantly, the ESA itself contains a citizen suit provision that has been held to expand the zone of interest test to allow for “any person” to commence a civil suit<sup>325</sup>—“an authorization of remarkable breadth when compared with the language Congress ordinarily uses.”<sup>326</sup>

Further, “aesthetic and environmental well-being like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.”<sup>327</sup> For these and other reasons, federal standing may well be possible, even for non-contractual parties.

## B. State Standing

Notably, state standing principles are not the equivalent of federal standing principles.<sup>328</sup> State standing laws differ from state to state. The following analysis of state standing will be limited to California because of recent developments in the doctrine of state ownership of animals and the related state standing principles. California also serves well as an example of a state standing framework as related to trophy hunting because of the large amount of money exchanging hands—legally or illegally—in the state for various wildlife products and services. Finally, trophy hunting contracts may well be challenged on the grounds of public policy or under the public trust theory in the state of California first, as has been the case with several other emerging legal theories.

324. *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

325. 16 U.S.C. § 1540(g) (2012).

326. *Bennett v. Spear*, 520 U.S. 154, 164 (1997).

327. *Sierra Club*, 405 U.S. at 734.

328. *Jasmine Networks, Inc. v. Super. Ct.*, 103 Cal. Rptr. 3d 426, 433 (Ct. App. 2009).

The concept of standing “has been largely a creature of twentieth century decisions of the *federal* courts. . . . It is rooted in the *constitutionally limited subject matter jurisdiction* of those courts.”<sup>329</sup> But at least in California, “no such wariness surrounds the subject matter.”<sup>330</sup> In California, plaintiffs are not required to “establish an entitlement to judicial action[] *separate from proof of the substantive merits of the claim advanced.*”<sup>331</sup> Rather, the California Constitution authorizes superior courts to adjudicate “any cause” brought before them.<sup>332</sup>

In a recent case, defendants suggested that standing in California must be obtained via California Code of Civil Procedure section 367.<sup>333</sup> The section prescribes that “[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute.” In other words, “the action must be maintained in the name of the person who has the right to sue under the substantive law.”<sup>334</sup> Thus, “if the plaintiff has a cause of action in his [or her] own right, and he [or she] pursues it in his [or her] own name, section 367 poses no obstacle to maintenance of the action.”<sup>335</sup>

In California and elsewhere, standing is of heightened importance if a plaintiff attempts to assert the rights of *third parties* (“*jus tertii*”). This is so because

if the plaintiff is asserting *only* the rights of another, he is presumably not the real party in interest. Again, however, the fundamental weakness in his case is his own lack of a right of action. If not for that deficiency, his attempt to assert the rights of others would go only to the question of *remedy*. It is only when he seeks to assert the rights of others *instead* of his own that the question may properly arise whether his action is barred by a lack of standing.<sup>336</sup>

329. *Id.* at 432 (internal quotation marks omitted) (emphasis on “federal” added).

330. *Id.*

331. *Id.* at 433 (internal quotation marks omitted).

332. CAL. CONST. art. VI, § 10; *Jasmine Networks*, 103 Cal. Rptr. 3d at 432; *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5 (Ct. App. 2001) (following *Nat'l Paint & Coatings Assn.*); *Nat'l Paint & Coatings Assn. v. State*, 68 Cal. Rptr. 2d 360 (Ct. App. 1997) (rejecting claimed state standing requirement where California Constitution “contains no ‘case or controversy’ requirement”).

333. *Jasmine Networks*, 103 Cal. Rptr. 3d at 433.

334. *Id.*

335. *Id.*

336. *Id.* at 434.

In California, the “real question . . . is whether the plaintiff has pled, or can prove, one or more elements of his cause of action.”<sup>337</sup> This is a substantive issue that typically includes taking a hard look at whether a duty owed to the plaintiff has been breached.<sup>338</sup>

Of course, states have the right to enact and implement wildlife conservation regulations. The public trust doctrine further imposes an affirmative duty on states as sovereigns to protect natural resources on behalf of all the citizens of the state. The state ownership of wildlife doctrine arguably does the same for the purpose of wildlife, as analyzed above. Merging the two doctrines would mean that the state ownership doctrine would, for sure, not only give states the *authority* to manage their wildlife populations, but also the *duty* to do so.<sup>339</sup> In *Center for Biological Diversity*, the California Court of Appeals expressly combined the two doctrines, thus providing a model for other state courts to do the same.<sup>340</sup>

Importantly, *Center for Biological Diversity* expressly found that members of the general public have standing to challenge the sovereign’s wildlife management strategies under the public trust doctrine: “Wildlife . . . is considered to be a public trust resource of all the people of the state, and *private parties have the right to bring an action to enforce the public trust.*”<sup>341</sup> A substantive duty is thus owed to members of the general public by the sovereign in this context, namely to take action to protect natural resources such as wild animals.

Several other courts have come to the same result. In West Virginia, for example, where a water diversion contract between two government entities was challenged by plaintiffs in their capacities as riparian owners, as users of a spring for sport fishing, and as chairman of an organization dedicated to preserving healthy cold water environments for future generations, the state’s highest court found standing, noting that

[t]he significant and important environmental concerns underlying this action should not be lost sight of in the highly theoretical law of standing. Conflicting claims and interests as to precious natural

337. *Id.*

338. *See id.*

339. Blumm & Paulsen, *supra* note 273, at 1437.

340. *Ctr. for Biological Diversity v. FPL Group*, 83 Cal. Rptr. 3d 588, 590 (Ct. App. 2008).

341. *Id.* at 591.

resources are proper matters of judicial consideration, notwithstanding the difficulties and complexities so often involved.<sup>342</sup>

The court went on to state that

[w]hen a person's significant interests are directly injured or adversely affected by governmental action, such person has standing [under West Virginia law] to obtain a declaration of rights, status or other legal relations. Sufficient interest will be, in close cases, a question of degree; a formula fitting all cases does not exist.<sup>343</sup>

When it comes to the trophy hunting of rare species, the following stands out: Under pure contract law, it may still be difficult for a third party to obtain standing to seek to have a federal or state court declare the underlying contract unenforceable for reasons of public policy. If, however, one of the contractual parties should seek to do so, they will have standing *per se* under the contract. Although trophy hunting parties may, of course, want to execute their contractual promises, the general body of case law in this area shows that many contractual parties change their minds after contract execution and seek to avoid their contractual promises for a variety of reasons. Trophy hunters or their assistants may do so as well and would thus have standing.

Both the public trust doctrine and the state ownership of wildlife doctrine constitute established *substantive* law issues, crucial to obtaining standing in state courts. Under California state law, for example, recall that plaintiffs cannot sue if they assert *only* the rights of others *instead* of their own, but *can* do so if they can prove one or more elements of their *own* cause of action. Plaintiffs may do so by asserting their long-established rights in wildlife owned and protected by the sovereign. This turns the issue into one of the correct remedy to be issued and thus bypasses the state standing problem, at least in California.

If a plaintiff files suit in state court, but the defendant seeks removal to federal court under the federal question doctrine based on, for example, the ESA,<sup>344</sup> will the plaintiff have to meet the elevated federal standing requirements or the more liberal state requirements? The answer is the latter. "Lack of standing is a

342. *Shobe v. Latimer*, 253 S.E.2d 54, 60 (W. Va. 1979).

343. *Id.* at 61.

344. 28 U.S.C. § 1331 (2012).

jurisdictional defect, and the proper course is remand under § 1447(c), not dismissal.”<sup>345</sup>

A difficulty in this context lies in the fact that trophy hunts are typically conducted outside the United States and often in relatively faraway areas such as Africa. However, with careful pleading and relevant lawsuit strategizing,<sup>346</sup> parties in the United States can demonstrate an interest in wildlife overseas whether as groups of private individuals planning to view the wildlife in the nations in question, research institutions, or other clearly interested stakeholders. Recall that Cecil the lion was being studied by the Oxford University’s Wildlife Conservation Research Unit when killed. Oxford University itself may not have wanted to bring suit for an alleged violation of the public trust doctrine, but other groups may indeed wish to do so in the future. Further, some hunts take place in the United States (Alaska, for example). In such cases, the suit may lie in U.S. federal or state courts. Overseas parties wishing to bring suit in the United States may wish to join U.S.-based parties to avoid the case being transferred to a potentially less favorable forum under, for example, the doctrine of *forum non conveniens*.<sup>347</sup>

345. *Maine Ass’n of Interdependent Neighborhoods v. Comm’r, Me. Dep’t of Human Servs.*, 876 F.2d 1051, 1054 (1st Cir. 1989) (internal quotation marks omitted); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (concluding that it is “the parties . . . asserting federal jurisdiction [who must] carry the burden of establishing their standing under Article III”); *Page v. Tri-City Healthcare Dist.*, 860 F. Supp. 2d 1154, 1171–72 (S.D. Cal. 2012) (remanding to state court an action in which plaintiff lacked standing to assert the claim, reasoning that where plaintiff in a removed action lacks federal standing to sue, the action generally should be remanded, not dismissed, as state court may afford standing where federal court would not).

346. While recognizing the somewhat activist ring of this word, it is important to recall that parties on both sides of the conservation issue, and many other issues, strategize in selecting lawsuits, parties, and causes. That is simply a fact of modern legal realism.

347. The doctrine of *forum non conveniens* allows courts to dismiss a case where another forum is better suited to hear the case. This dismissal does not prevent a plaintiff from refiling his or her case in the more appropriate forum. The applicable test was set forth in *Gulf Oil Corp. v. Gilbert*:

If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is

Third parties might, as mentioned above, have a difficult time asserting standing under contract law, but might enhance their chances by adding the public trust doctrine or the state ownership of wildlife doctrine to a potential lawsuit purely based on contract law. This would, of course, require adding government entities as defendants. As analyzed, established case law points out that at least the public trust doctrine imposes an affirmative duty on the sovereign to protect natural resources—in this case wildlife—on behalf of *all* citizens present and future. With that follows standing to challenge deficient sovereign positive law protections such as potential licenses to hunt rare species or, if no hunting or import permits are required, to raise the issue of whether a person *should* be allowed to import or own a trophy from a rare animal killed in or even outside the jurisdiction. Third parties ought to also have standing to challenge the validity of trophy hunting contracts for the same reasons. The legal doctrines arguably support one another: contractual unenforceability arguments lend further weight to public trust doctrine arguments just as the public trust doctrine (or state ownership of wildlife doctrine) adds weight to private contract law arguments. The key is, as always, to ensure the presence of the relevant defendants. Whether courts address the issue under the public trust doctrine or the slightly different legal label of “state ownership,” the common good to be protected is no longer just the right to hunt animals; modernly, it is equally important *not* to hunt endangered species.

In short, members of the general public seeking standing to challenge trophy hunting could argue, as an issue of first impression, that contract law should be expanded to allow suit by sufficiently interested third parties just as intended third parties may currently bring suit on their own behalf even when this was *not* traditionally so. Further, the federal government is the ultimate sovereign responsible for protecting rare animals under both the

obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, “vex,” “harass,” or “oppress” the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.

330 U.S. 501, 508 (1947). “The forum non conveniens determination is committed to the trial court’s sound discretion and may be reversed only when there has been a clear abuse of discretion.” Piper Aircraft Co. v. Reynolds, 454 U.S. 235, 237 (1981).

common law public trust doctrine and its responsibilities under the ESA. The public trust duty allows courts to grant standing to the general public in such cases. In other words, third party plaintiffs should phrase their challenge in terms of the established general public trust doctrine or state ownership of wildlife doctrine in addition to contract law.

#### IX. CONCLUSION

Rare animals are killed both in and beyond the United States for sport. Often, such killing takes place via “trophy hunting” contracts whereby a hunter obtains assistance from local parties in hunting and killing the animal either for the experience itself or, frequently, also to bring back to the United States taxidermied parts of the killed animal as a “trophy.” These are arguably glorified contracts for assistance in killing rare animals that a few wealthy individuals, typically from wealthy nations, can afford. Critics opine that such individuals take egotistical opportunity of the fact that many of the communities in which the hunts are to be undertaken have a dire need for economic influx in general, as well as for funds for ecosystem conservation in particular. Others are of the opinion that trophy hunting helps bring both attention and much needed funds to species conservation specifically. However, serious doubt exists as to whether trophy hunting truly contributes to local communities and to the societal goal of species and ecosystem conservation. As long as such doubt exists, grounds exist to judicially or legislatively halt trophy hunting. In fact, this must happen under the precautionary principle of environmental law adopted by most nations around the world. Trophy hunting can be halted judicially in one of two ways: through the common law of contracts in suits against the contracting parties or through the closely related public trust and state ownership of wildlife doctrines through suits against the sovereigns that allow such hunts to continue. These doctrines also lend further weight to the contractual argument.

Where contracting parties might be seeking to avoid otherwise enforceable trophy contracts, strong arguments can be made that these contracts are unenforceable for reasons of public policy. Over time, contract law has developed along with notions of what is acceptable commercial behavior at any given point in time. Societal problems have emerged and taken legal precedence over



other concerns in the field of contract law. Examples of these are issues of contracts related to human trafficking, sex trafficking, child labor, and several other issues of great human significance. Now, we are at the brink of a sixth mass species extinction, “the worst spate of species die-offs since the loss of the dinosaurs 65 million years ago.”<sup>348</sup> This problem presents a well-known problem to ecosystems in general, but also to human beings. Of some species, only exceedingly low numbers exist. Yet, for now, the law accepts the hunting for “sport” of even such animals.

Societal notions of the acceptability of this type of hunting have, however, proved to be shifting dramatically. Public opinion is turning against trophy hunting, as exemplified by the increasingly broad and deep outrage against the practice in connection with recent hunts. When contracts offend contemporary notions of acceptable socioeconomic behavior, courts may declare the contracts unenforceable for reasons of public policy. This is so even though no statute or other positive law limits the contractual objective. Although the fear of judicial activism is real and should, of course, be taken seriously in this context as well as in others, courts have consistently followed the principle that whatever is injurious to the interests of the public is void on the grounds of public policy. This is very much the case with species extinction. As a society we simply cannot afford to let a few people continue to spend tens, if not hundreds of thousands, of dollars on killing rare animals in which a far greater number of people have an equally, if not more, viable interest. The entire *raison d'être* of the contractual unenforceability doctrine is to prevent the current or future execution and implementation of contracts that have turned highly unpalatable to the general public. The freedom of contract principle does *not* override this concern. Until it is established with sufficient clarity that trophy hunting has the alleged, but as of yet far from proven, beneficial effects on species conservation, trophy hunting contracts should be declared unenforceable for reasons of conservation as well as under the established precautionary principle of law.

As with many other areas of the law, especially environmental law, standing is an issue here. Under contract law, standing *per se*

348. *The Extinction Crisis*, CTR. FOR BIOLOGICAL DIVERSITY, [http://www.biologicaldiversity.org/programs/biodiversity/elements\\_of\\_biodiversity/extinction\\_crisis](http://www.biologicaldiversity.org/programs/biodiversity/elements_of_biodiversity/extinction_crisis) [<https://perma.cc/Y8HY-5KJC>] (last visited Mar. 19, 2016).

exists should one of the contracting parties decide to renege from their promise. This may happen with trophy hunting if, for example, the hunting assistants were better informed of the undesirability of their actions or even “bought out” from the contract. Non-governmental organizations might envision a role in this context. However, non-contracting parties seeking to have a court of law declare a trophy hunting contract unenforceable for reasons of public policy would have to argue for a change of existing law allowing third parties to challenge such contracts. As with the change of third-party beneficiary law that initially only allowed parties in privity with each other to sue, but that now allows narrow exceptions for intended third-party beneficiaries, so might contract law change in relation to standing to challenge the enforceability of certain types of contracts for reasons of public policy.

The public trust doctrine and the closely related doctrine of state ownership of wildlife impose a highly relevant duty on the government as the sovereign tasked with ensuring that wildlife is protected for the enjoyment of the present and future generations of all citizens, not just the select few. The doctrines could, as analyzed above, be used as mechanisms to ensure standing for plaintiffs seeking to challenge the validity of government regulations including the issuance of trophy hunting permits.

Courts serve a valuable gatekeeper function in this respect. The above actions would not constitute undue judicial activism. Rather, they are examples of taking necessary action before it is too late where both the marketplace and the legislature have failed to meet the goals of society at large. The judiciary takes such necessary action in many other contexts, especially when there is a gap in the legal protections otherwise afforded to certain interests. This is the case with the last few remaining animals of many rare species. All action possible should be taken to protect these for future generations. That includes halting the unnecessary and injurious practice of trophy hunting.

In one of her many great works, late Professor and Vice-Chair of the UNECE Aarhus Convention Compliance Committee Svitlana Kravchenko wrote about the existence and enforcement of environmental human rights that “[t]he enforcement of ‘rights’ in the legal system does not, by itself, change government policy, but the embedding of rights in our thought systems can.” She

continued to note that even more important than whether legal rights play a role in our minds is the issue of whether they play a role in our hearts. Said Kravchenko: “The reason that I focus on hearts is that changes there are more permanent; and where the heart goes, the head tends to follow.”<sup>349</sup> In the case of trophy hunting of rare, wild animals, both people’s hearts and minds have changed. For that reason and for the legal reasons set forth in this Article, trophy hunting contracts should be declared unenforceable for reasons of public policy. The practice should be prohibited under positive law as well.

349. Svitlana Kravchenko, *Right to Carbon or Right to Life, Human Rights Approaches to Climate Change*, 9 VT. J. ENVTL. L. 513, 514 (2008).