



**TOURO UNIVERSITY**  
JACOB D. FUCHSBERG LAW CENTER  
*Where Knowledge and Values Meet*

**Touro Law Review**

---

Volume 32  
Number 1 *Symposium: Billy Joel & the Law*

Article 11

---

April 2016

## **The Downeaster Alexa: Iconic Male v. a Perfect Storm of Regulations**

Maureen A. Eggert

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Administrative Law Commons](#), and the [Environmental Law Commons](#)

---

### **Recommended Citation**

Eggert, Maureen A. (2016) "The Downeaster Alexa: Iconic Male v. a Perfect Storm of Regulations," *Touro Law Review*. Vol. 32: No. 1, Article 11.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol32/iss1/11>

This Article is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

## ***THE DOWNEASTER ALEXA: ICONIC MALE V. A PERFECT STORM OF REGULATIONS***

*Maureen A. Eggert\**

*“A small fraction of the Code of Federal Regulations presents a scene of horror to the lover of solitude.”<sup>1</sup>*

### **I. INTRODUCTION**

When first asked to speak at the Billy Joel and the Law Conference, I was surprised, yet intrigued.<sup>2</sup> I am no musicologist, and while I enjoy many of Mr. Joel’s songs, I cannot put myself in the same category as his truly devoted fans. However, the topic was enticing, and I have a five-generation connection to Long Island, so I eagerly agreed. Then came the important question—what to write about? I considered how Billy Joel intersects with the law. Never a follower of celebrity coupling and uncoupling, I immediately dismissed Joel’s divorces. Unmotivated to explore copyright issues

---

\* Associate Director for Student and Instructional Services and Adjunct Professor Women’s, Gender and Sexuality Studies, Wake Forest School of Law. My thanks to Professor Samuel J. Levine, for inviting me to speak at the Billy Joel and the Law conference and to the editors of the *Touro Law Review* for their patience and assistance.

<sup>1</sup> AMERICAN GUY: MASCULINITY IN AMERICAN LAW AND LITERATURE 38 (Saul Levmore & Martha C. Nussbaum eds., 2014).

<sup>2</sup> Before addressing the applicable laws and regulations, it is important to understand the origin of the term “perfect storm.” Now a commonly used phrase, the term “perfect storm” gained popularity after the hit book-to-movie adaption, *The Perfect Storm*. See SEBASTIAN JUNGER, *THE PERFECT STORM: A TRUE STORY OF MEN AGAINST THE SEA* (1997); *THE PERFECT STORM* (Warner Bros. Pictures 2000). Both the book and the movie were based on the imagined account of a real-life tragedy that took place during the infamous Perfect Storm of 1991. A nor’easter that had developed into an unnamed hurricane, the storm caused over \$200 million in damages and was responsible for the death of at least thirteen people, including the crew of the *Andrea Gail*, a commercial fishing boat that sailed out of port in Massachusetts. JUNGER, *supra* at 83. The crew had suffered a poor fishing season so they were making a last run with the hope of catching enough swordfish to end the year with a profit. The crew fished successfully and, as the storm began, decided to try and outrun it to return home with their catch. They started for home on October 26<sup>th</sup> and were last heard from on October 28, 1991. JUNGER, *supra* at 103. No bodies were ever found. JUNGER, *supra* at 213.

from his career, I dismissed that idea as well. I mulled over possible inspiration; could I tie “[y]ou may be right/ I may be crazy”<sup>3</sup> to mental health laws? Perhaps I could work “walked through Bedford Stuy alone”<sup>4</sup> into a talk on urban gentrification and *Kelo*<sup>5</sup>-type condemnation? Then I recalled *The Downeaster Alexa*,<sup>6</sup> a song that I had always found poignant.<sup>7</sup> Growing up within walking distance of the ocean, I have always been keenly aware of issues such as sea turtle preservation, overfishing, and polluted ocean waters. I assumed that there would be plenty of rules and regulations that could be derived from the facts in the song, and a quick perusal of the lyrics confirmed my assumptions.

As I watched *The Downeaster Alexa* video,<sup>8</sup> I noted something else; a number of images seemed oddly familiar. One moment in particular—a few seconds of a woman standing on shore, holding a child in her arms and looking out to sea<sup>9</sup>—gave me that “I should know where I have seen that face before” feeling that you often get at conferences and cocktail parties. I recognized the image from paintings I had seen before. Some online searching delivered the answer. *The Downeaster Alexa* video, whether intentionally or by chance, had mirrored many classical paintings of fishermen and their families.<sup>10</sup>

I began to consider the iconic image of the fisherman—arguably analogous to the image of the American cowboy. Perhaps the use of such a familiar and trusted figure lends to the appeal of the song. While few people are required to understand regulations on the use of purse sein nets and pelagic loglines, it is the rare adult who has not felt the confusion and frustration of trying to cope with a regula-

---

<sup>3</sup> BILLY JOEL, *You May Be Right*, on GLASS HOUSES (Columbia Records 1980).

<sup>4</sup> *Id.*

<sup>5</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>6</sup> BILLY JOEL, *The Downeaster Alexa*, on STORM FRONT (Columbia Records 1990).

<sup>7</sup> Yes, I freely admit to a weakness for sad, possibly even schmaltzy, songs – blame it on my Irish heritage.

<sup>8</sup> JOEL, *supra* note 3.

<sup>9</sup> JOEL, *supra* note 3.

<sup>10</sup> Depictions of women and children waiting on shore for fishermen to return home is a common theme in such paintings. See August Wilhelms Nikolaus Hagborg, *Waiting*, oil on canvas (1877); Winslow Homer, *Dad's Coming!*, oil on panel (1873) (National Gallery of Art, Washington, D.C.); Charles Stanley Reinhart, *Awaiting the Absent* (1888) (depicting women and children waiting on shore for their returning fisherman); see also Winslow Homer, *The Herring Net*, oil on canvas (1885); William Turner, *A Coast Scene with Fishermen Hauling a Boat Ashore (The Iveagh Seapiece)*, oil on canvas (1803-04); Peder Severin Krøyer, *Fishermen Hauling the Net on Skagen's North Beach* (1883); Georges Jean Marie Haquette, *Fishing at Sea* (1901).

tion that appears to exist for no other purpose than to complicate one's life. The goal of the Billy Joel and the Law conference was to explore how Joel's work relates to American law, society, and culture.<sup>11</sup> Thus, exploring the concept that *The Downeaster Alexa* documents the struggle of an iconic everyman engaging in one of the classic literary conflicts, man against society, proved an intriguing and appropriate topic.

This piece begins by defining key words from lyrics of *The Downeaster Alexa*. Next, this article considers the protagonist who is subject to the regulations. Not just a typical "everyman," the fisherman is an enduring icon—strong and bold enough to garner the admiration of the working-man, yet familiar enough that the average person can see his or her own life mirrored in the fisherman's struggle. In the third section, information gleaned from the lyrics is used to determine regulations with which the song's protagonist must comply. Federal regulations are emphasized since they apply across the state jurisdictions indicated in song, but state regulations do receive some mention. The article concludes with a question: can anything be done to reconcile consumers' demands for seafood and the livelihood and way of life of the Long Island fishermen, and the sustainability of the ocean and its species?

## II. EXAMINING THE LYRICS<sup>12</sup>

Some critics decry Joel's lyrics as being simplistic and banal.<sup>13</sup> However, even after decades, Joel has no dearth of fans who enjoy them.<sup>14</sup> *The Downeaster Alexa* lyrics are not just entertaining; they provide geographical evidence that allows the listener to establish the legal jurisdiction of the song's protagonist. The lyrics indicate to the listener the types of fish the protagonist is catching and the methods he uses. Both of these facts are important in determining the regulations fishermen must understand and with which they must comply.

---

<sup>11</sup> TOURO LAW CENTER, <http://www.tourolaw.edu/AboutTouroLaw/StudentProfile.aspx?id=35> (last visited Sept. 20, 2015).

<sup>12</sup> See JOEL, *supra* note 3.

<sup>13</sup> Brian Eckhouse & Michael Mishak, *Billy Joel: Everyman or Nobody?*, LAS VEGAS SUN (Feb. 12, 2009), <http://lasvegassun.com/news/2009/feb/12/everyman-or-nobody>.

<sup>14</sup> Nick Paumgarten, *Thirty-Three-Hit Wonder*, THE NEW YORKER (Oct. 27, 2014), <http://www.newyorker.com/magazine/2014/10/27/thirty-three-hit-wonder>.

### A. Fishing

*Well I'm on the Downeaster Alexa*

**Downeaster:**<sup>15</sup> A specific style of boat whose design features a small cabin and long open back deck, originated from the lobster boats used in Maine. A downeaster is a sturdy workhorse of a boat that is designed to handle rough seas while also carrying heavy loads at a good speed.<sup>16</sup> The fact that the boat is a downeaster immediately indicates to listeners that the song takes place on the East Coast—presumably the Northeast or New England coastal areas.<sup>17</sup>

*There are giants out there in the canyons*

**Giants:** In the song, “giants” refer not to the hyperthyroid humanoids of fairytale fame, but to the equally impressive, giant Bluefin tuna.<sup>18</sup> While the majority of tuna eaten in the U.S. is caught in the Pacific Ocean, tuna is a profitable fish<sup>19</sup> and thus a highly desirable catch for East Coast fishermen as well.

**Canyons:**<sup>20</sup> Just as dry land has hills and valleys, so too does the topography of the ocean floor. Submarine canyons are steep sided valleys that extend from a continental shelf, much in the same way land canyons extend off the edges of plateaus. The strong currents that carve the canyons also deliver nutrients to the ocean, thus creating

---

<sup>15</sup> For images of downeasters visit the whimsically named but purely “G” rated website, DOWNEAST BOATPORN, <http://brian-robbins.com/downeast-boatporn/> (last visited August 3, 2015).

<sup>16</sup> See THE OXFORD YACHT AGENCY, <http://oya.com/tips/2008/07/what-is-a-downeast-boat/> (last visited Dec. 7, 2015) (describing in detail a downeaster).

<sup>17</sup> While downeasters may be purchased by anyone with sufficient money, they are most commonly found on the east coast due to their cost, including their origin in Maine and custom finishing generally on the east coast. These boats are a rarity on the west coast. See Point\_Slowma, *Downeaster on the west coast?*, THE HULL TRUTH BOATING FORUM (Sept. 18, 2015, 9:57 PM), <http://www.thehulltruth.com/boating-forum/538792-downeaster-west-coast.html#b>.

<sup>18</sup> *River Monsters: Giant Bluefin Tuna*, ANIMAL PLANET, <http://www.animalplanet.com/tv-shows/river-monsters/fish-guide/giant-bluefin-tuna/> (last visited Dec. 7, 2015).

<sup>19</sup> Sarah Johnson, *Anyone for Sushi? Fisherman catches 1000lb tuna (that'll make 20,000 servings with rice)*, DAILY MAIL (Nov. 25, 2012), <http://www.dailymail.co.uk/news/article-2238284/Anyone-sushi-Fisherman-catches-1-000lb-tuna-make-20-000-pieces-delicacy.html>.

<sup>20</sup> Steve W. Ross & Sandra Brooke, *Mid-Atlantic Deepwater Canyons*, NOAA OCEAN EXPLORER, <http://oceanexplorer.noaa.gov/explorations/12midatlantic/background/canyons/canyons.html> (last visited Oct. 10, 2015).

popular feeding grounds for a wide variety of fish and other aquatic creatures.<sup>21</sup>

*[I]f you work with the rod and the reel  
Tell my wife I am trolling Atlantis*<sup>22</sup>

**Rod and reel:** In general, this refers to a fishing pole with an attached device that is used to pull in a fish that has been hooked. However, the song is not referring to a thirty-dollar Walmart special. Tuna, such as the previously mentioned Bluefin “giants,” may be caught using a rod and reel, but equipment sturdy enough to hook and land such strong, fast fish is costly, running over one thousand dollars for each rod and reel combination.<sup>23</sup>

**Trolling:** “[A] highly selective way of fishing [whereby a] fishing vessel pulls several fishing lines through the water column. . . . [O]nly fast-moving fish can swim quickly enough to take the bait, and any non-target fish which is accidentally caught can be immediately returned to the ocean live.”<sup>24</sup> While this method of fishing lacks the volume and efficiency of purse seine net fishing,<sup>25</sup> it is also much better environmentally than either net fishing or the use of multi-hooked long-lines.<sup>26</sup>

**Atlantis:** While at first one might consider this a reference to Plato’s doomed allegorical island,<sup>27</sup> Atlantis is the name of one of many deep-water Atlantic canyons. It is located within an easy distance of Nantucket and Martha’s Vineyard. In an online discussion about the song, a person posting claims to have been Joel’s captain on the

---

<sup>21</sup> *Oceans*, NATURAL RESOURCES DEFENSE COUNCIL, <http://www.nrdc.org/oceans/canyons/> (last visited Dec. 7, 2015).

<sup>22</sup> JOEL, *supra* note 3.

<sup>23</sup> Mike Christy, *To Fish for a Giant*, NEW ENGLAND SPORTSMAN, <http://www.nesportsman.com/articles/article223.shtml> (last visited Jan. 29, 2016).

<sup>24</sup> *Fishing Techniques*, OCEAN WISE, [www.oceanwise.ca/content/fishing-techniques](http://www.oceanwise.ca/content/fishing-techniques) (last visited Jan. 29, 2016).

<sup>25</sup> Patrick J. Kiger, *Bluefin Fishing by the Numbers*, NATIONAL GEOGRAPHIC CHANNEL (July 18, 2012), <http://channel.nationalgeographic.com/wicked-tuna/articles/rod-and-reel-bluefin-tuna-fishing-by-the-numbers/>.

<sup>26</sup> Fen Montaigne, *Still Waters: The Global Fish Crisis*, NATIONAL GEOGRAPHIC (Aug. 1, 2013, 10:22 AM), <http://ocean.nationalgeographic.com/ocean/global-fish-crisis-article/#page=1>.

<sup>27</sup> See generally PLUTO, TIMAEUS (Desmond Lee Trans., 1977) (c. 360 B.C.E.), <http://classics.mit.edu/Plato/timaeus.html>

Alexa and states that “Billy liked the double meaning . . . .”<sup>28</sup> So it is possible that, while providing a geographic reference, Joel may have chosen to mention that specific canyon because its lost way of life reflects the dying island life style of the protagonist.<sup>29</sup>

*[S]ince they tell me I can't sell no stripers . . .*

**Stripers:** Common term for Atlantic Striped Bass.<sup>30</sup> While the bass can be farm-raised or wild, in the context of this song it is the latter. Like salmon, stripers are anadromous, meaning that they leave the ocean to spawn in fresh or brackish waters.<sup>31</sup> Therefore, both marine and freshwater agencies have authority to regulate this species.

### B. Geographic/Jurisdictional Indicators

*I'm cruising through Block Island sound  
I have charted a course to the Vineyard  
But tonight I am Nantucket bound  
We took on diesel back in Montauk yesterday  
And left this morning from the bell in Gardiner's Bay . . . .*<sup>32</sup>

**Block Island Sound** – A body of water extending from Gardiner's Bay in New York, past the coastline of Rhode Island.<sup>33</sup>

**Vineyard** – Refers to Martha's Vineyard, an island South of Cape Cod, Massachusetts.

**Nantucket** – Another island south of Cape Cod. Close to, but smaller than Martha's Vineyard.<sup>34</sup>

**Montauk** – The tip of the south fork/peninsula of Long Island.<sup>35</sup>

<sup>28</sup> Robert, *Comment to The Downeaster Alexa*, SONGFACTS, <http://www.songfacts.com/detail.php?id=4243> (last visited Oct. 10, 2015).

<sup>29</sup> JOEL, *supra* note 3 (“There ain't much future for a man who works the sea/ But there ain't no island left for islanders like me.”).

<sup>30</sup> See *Atlantic Striped Bass*, FISHWATCH, <http://www.fishwatch.gov/profiles/atlantic-striped-bass> (last visited Dec. 7, 2015); *All About Striped Bass*, LATERAL LINE, [http://www.laterallineco.com/fishing\\_journal/striped\\_bass/striped\\_bass\\_history\\_stripedbass\\_migration\\_pattern.html](http://www.laterallineco.com/fishing_journal/striped_bass/striped_bass_history_stripedbass_migration_pattern.html) (last visited Dec. 7, 2015).

<sup>31</sup> FISHWATCH, *supra* note 30.

<sup>32</sup> JOEL, *supra* note 3.

<sup>33</sup> See *About Block Island*, <http://www.block-island.net> (last visited Sept. 21, 2015).

<sup>34</sup> See Nantucket Official Website, FAQ: Where is Nantucket?, <http://www.nantucket-ma.gov/Faq.aspx?QID=60> (last visited Dec. 7, 2015).

<sup>35</sup> See *Long Island*, DICTIONARY OF AMERICAN HISTORY (2003),

**Bell in Gardiner's Bay** – Gardiner's Bay is the body of water located between Long Island's North and South "Forks," or peninsulas. At the mouth of Gardiner's Bay, where the Bay connects to Block Island Sound, there is a bell buoy.<sup>36</sup>

Understanding the song's lyrics helps to explain the protagonist's plans and motivation. While downeasters are fast and strong, they are also small, and thus, hold limited amounts of fuel. The lyrics suggest the fisherman lives in or near Montauk and fueled up his boat there before heading out through Gardiner's Bay into Block Island Sound. He is planning to stay the night in Nantucket, but he must pass Martha's Vineyard on the way, so he will chart a course to Martha's Vineyard first.<sup>37</sup> He will need to refuel at a marina on one of the two islands so that he can leave Nantucket early the next morning in order to troll Atlantis, and then return quickly to New York to sell his catch.

The lyrics also indicate the protagonist's usual or preferred catch—tuna (giants), Atlantic Striped Bass (striper), and swordfish. Listeners can reasonably speculate as to why this fisherman is taking such a long costly trip into the deep and hazardous waters. Perhaps it was the possibility of catching a big money tuna, but given his lament that "they tell me I can't sell no stripers/ And there's no luck in swordfishing here,"<sup>38</sup> it appears that necessity rather than preference made the choice. Lack of success fishing the waters closer to shore may also have extended out to the closer Block Canyon, explaining the longer journey to Atlantis Canyon.<sup>39</sup>

---

<http://www.encyclopedia.com/doc/1G2-3401802430.html>.

<sup>36</sup> JOEL, *supra* note 1.

<sup>37</sup> Tom, Comment on the *The Downeaster Alexa*, SONGTALK (Sept. 24, 2015, 10:57 AM), (<http://www.songfacts.com/detail.php?id=4243>). There is a spirited discussion on this blog where one poster, Tom from Montauk, New York, claims to be Joel's former boat captain and to be familiar with Joel's songwriting process for *The Downeaster Alexa*. I cannot verify the poster's identity, but his comments on general geographical locations are valid and so the link is offered for consideration. The commenter explains that:

As you pass the Vineyard you would turn into the channel between the 2 island and head to Nantucket Harbor which is on the North Side of Nantucket. A fisherman using a slow boat, especially in strong North winds might use this rout if he intended to head offshore to eastern canyons like Atlantis. . . . Nantucket would be like the "last gas" or supplies stop for such a trip.

*Id.*

<sup>38</sup> JOEL, *supra* note 1.

<sup>39</sup> Uncfish, *West/East Atlantis vs Block Canyon*, THE HULL TRUTH BOAT FORUM (Sept. 9, 2008, 5:37PM), <http://www.thehulltruth.com/northeast/192011-west-east-atlantis-vs-block->



### III. FISHERMAN AS MALE ICON

Many of Joel's songs tell the stories of the unsung "everyman," of the blue collar, hardworking men who fight the good fight, but who often are overwhelmed by forces beyond their control such as war,<sup>40</sup> the economy,<sup>41</sup> class distinctions,<sup>42</sup> and the general disappointment and inequities of life.<sup>43</sup> In *The Downeaster Alexa*, Joel uses a fisherman to depict the plight of many hardworking men who have been swamped by the state and federal laws and regulations that govern their much-loved way of life.<sup>44</sup> However, this is not just any "everyman." The protagonist in *The Downeaster Alexa* is special. He is an iconic figure, much like the idealized and romanticized American cowboy; thus, his appeal and sympathy for his plight extend beyond his profession, his class, and even his race and gender.

At first, the idea of fisherman as icon may seem puzzling. Understanding how the fisherman assumes the role of the iconic male requires one first to determine what is necessary to be an American male icon.<sup>45</sup> Media scholars have established "primary features of hegemonic masculinity in American culture."<sup>46</sup> These features include physical ability and control, occupational achievement, frontiersmanship, patriarchy, and heterosexuality.<sup>47</sup> Along with isolation<sup>48</sup> or an "otherness" that separates an individual from the rest of society, these are the components required to be an icon. To establish the fisherman's validity as icon, we consider each of the elements, first determining how they apply to an uncontested American icon,

---

canyon.html#b.

<sup>40</sup> BILLY JOEL, *Goodnight Saigon*, on THE NYLON CURTAIN, (Columbia Records 1982).

<sup>41</sup> BILLY JOEL, *Allentown*, on THE NYLON CURTAIN, (Columbia Records 1982).

<sup>42</sup> BILLY JOEL, *Uptown Girl*, on AN INNOCENT MAN, (Columbia Records 1983).

<sup>43</sup> BILLY JOEL, *Movin' Out (Anthony's Song)*, on THE STRANGER (Columbia Records 1977); BILLY JOEL, *No Man's Land*, on RIVER OF DREAMS (Columbia Records 1993).

<sup>44</sup> See JOEL, *supra* note 3 ("I was a bayman like my father was before/ Can't make a living as a bayman anymore/ There ain't much future for a man who works the sea/ But there ain't no island left for islanders like me.").

<sup>45</sup> See AMERICAN GUY, *supra* note 1 ("America is specified since some have suggested that an iconic American man must merely be self-sufficient and "at home on the frontier," while his British counterpart "was expected to display wit and charm over dinner following a successful hunt or the command of seagoing vessel by day.").

<sup>46</sup> Nick Trujillo, *Hegemonic Masculinity on the Mound: Media Representations of Nolan Ryan and American Sports Culture*, 8 CRITICAL STUDIES IN MASS COMM. 291 (1991).

<sup>47</sup> *Id.*

<sup>48</sup> J. Harvie Wilkinson III, *Solitary Man in American Literature and Law* in AMERICAN GUY, *supra* note 1, at 32-37.

the American cowboy,<sup>49</sup> and then considering how the fisherman also meets these criteria.

The cowboy's status as American icon is reflected in paintings,<sup>50</sup> songs,<sup>51</sup> literature,<sup>52</sup> and in the more modern formats of film and television.<sup>53</sup> In film alone, there is an entire genre<sup>54</sup> that presents the general public with exaggerated images ranging from physically and morally superior cartoonish men such as the Lone Ranger,<sup>55</sup> to dangerous antiheroes<sup>56</sup> like Clint Eastwood's character in *Unforgiven*. While fishermen have not received such exhaustive media treatment, they too have grabbed the collective imagination in a way that other professionals have not. While admiration is shown for the hard work of farmers,<sup>57</sup> and no one can reasonably deny the physically demanding life of a coalminer or lumberjack, few jobs hold the romantic—if illusory—ideal of cowboys and of those who work the sea. As with the cowboy, evidence of this heroic image is visible in paintings,<sup>58</sup> literature,<sup>59</sup> movies,<sup>60</sup> and songs.<sup>61</sup> Even the toys children play with

---

<sup>49</sup> Eric Foner & John A. Garraty, *The Reader's Companion to American History*, HISTORY CHANNEL (2010), <http://www.history.com/topics/cowboys> ("Something there was about him—tall in the saddle, alone, facing danger, one man against nature's vast, treeless plains and humanity's outlaws — that appealed to people and made the cowboy a folk hero, a half-real, half-mythological symbol of the American West.").

<sup>50</sup> See, e.g., Frederic Remington, *Turn him Loose in the Bull*, oil on canvas (1893) (American Museum of Art, Denver, Colorado); see also Charles Russell, *The Herd Quitter*, oil on canvas (1897) (Montana Historical Society).

<sup>51</sup> HAL LEONARD, COWBOYS SONGS: 62 CLASSIC SADDLE SONGS (2005).

<sup>52</sup> Amber Kelly, *The Myth of the Literary Cowboy, Part 1: Peculiarly American*, PLOUGHSHARES (Feb. 22, 2013), <http://blog.pshares.org/index.php/the-myth-of-the-literary-cowboy-part-1-peculiarly-american>.

<sup>53</sup> *Western*, ENCYCLOPEDIA BRITANNICA (updated Jan. 23, 2015), <http://www.britannica.com/art/western>.

<sup>54</sup> C.J. Perry, *The Evolution of the Western Genre*, FILMSLATE (Mar. 6, 2015), <http://www.filmslatemagazine.com/the-evolution-of-the-western-genre/>.

<sup>55</sup> While the Lone Ranger was never seen to wrangle cows he falls into the hard riding, sharp-shooting law enforcement variety under the umbrella term "cowboy."

<sup>56</sup> Perry, *supra* note 54.

<sup>57</sup> See *Salt of the Earth: A Photo Exhibition on Farmers Who Have Protected Their Land with Orange County Land Trust*, ORANGE COUNTY LAND TRUST (July 26, 2014), <http://www.oclt.org/event/salt-earth-photo-exhibition-farmers-protected-land-orange-county-land-trust/> (noting that salt farmers often are dubbed the "salt of the earth").

<sup>58</sup> See Hagborg, *supra* note 10.

<sup>59</sup> See ERNEST HEMINGWAY, *THE OLD MAN AND THE SEA* 9 (1952); see generally HERMAN MELVILLE, *MOBY-DICK; OR, THE WHALE* (1851).

<sup>60</sup> *JAWS* (Universal Pictures 1975) (involving local fishermen who offer to hunt down a Great White shark to protect their community). See also *THE PERFECT STORM*, *supra* note 2.

<sup>61</sup> See Brett McKay & Kate McKay, *The 10 Manliest Sea Shanties*, THE ART OF MANLINESS (Sept. 23, 2008), <http://www.artofmanliness.com/2008/09/23/the-10-manliest->

demonstrate how certain “manly” professions are more idealized than others.<sup>62</sup>

While fishermen may never have had a media heyday like the cowboys in the 1950s, they are a more enduring icon than the cowboy. The fisherman’s exploits have been recorded in art and song for longer than cowboys have existed, and his future incarnation as captain of a spaceship ensures the continuing heroism of men who guide vessels beyond sight of land. Perhaps because his place in society is so entrenched, he does not have the same glamour as the idealized cowboy. Yet, in a time when cowboys’ mounts tend to have four wheels and air-conditioned cabs, fishermen still haul their nets by hand, and still have their “hands on the wheel.”<sup>63</sup>

### A. Physical Ability and Occupational Achievement

A successful cowboy needed to be physically skilled in riding and roping. He had to shoot fast and straight enough to defend both himself and his herd against depredations by man or beast. He also had to have the strength and endurance to work long hours with indifferent food and little sleep. If he could do all this, a cowboy would prove himself to his male compatriots as one who could do the physical, dirty “men’s work” well. Those who could not withstand the challenges of extreme weather, long hours, low pay, and dangerous conditions would return to jobs that were less physically demanding or closer to civilization, where women and children also resided, and thus, shut out of the male only exclusivity.

Fishermen face equal, if not more daunting physical challenges.<sup>64</sup> A fisherman aboard a downeaster faces blazing sun, icy salt water, fierce storms, and slippery decks. He is required to stay awake

---

sea-shanties/ (noting that sea shanties have their origins in the songs sailors sang as they worked). See also *Shanties and Sea Songs*, BRETHREN OF THE COAST, [http://brethrencoast.com/Sea\\_Shanties.html](http://brethrencoast.com/Sea_Shanties.html) (last visited Sept. 21, 2015).

<sup>62</sup> Judith E. Owen Blakemore & Renee E. Centers, *Characteristics of Boys’ and Girls’ Toys*, 53 SEX ROLES 9-10, 619, 622 (Nov. 2005) (finding that boys preferred to play with cowboy and soldier figurines over “dolls”).

<sup>63</sup> JOEL, *supra* note 3.

<sup>64</sup> See Christopher Cannon et al., *The Deadliest Jobs in America*, BLOOMBERG BUSINESS (May 13, 2015), <http://www.bloomberg.com/graphics/2015-dangerous-jobs/> (indicating that fishers having the highest probability of dying on the job, based on the U.S. Department of Labor statistics); see generally Census of Fatal Occupational Injuries, United States Department of Labor (Sept. 17, 2015, 10:00 AM), <http://www.bls.gov/news.release/pdf/cfoi.pdf> (including statistics of number and rate of fatal occupational injuries).

and alert for many hours, rushing to meet quotas and to return to port with his perishable catch.<sup>65</sup> Even with mechanical winches, much of the work is still done by hand, as it had been for hundreds of years.

The masculinity of such hard work is acknowledged in a study of George Bellows' painting *The Big Dory*.<sup>66</sup> The painting is a scene of fishermen pushing a boat into the ocean off Mohegan Island, Maine, and the study's author explains how this depicts the essence of masculinity. Working together to achieve their goal, the men demonstrate "strength, stamina, self-reliance, and industriousness," and in completing this difficult physical task, they "conform to [a] heroic masculine ideal."<sup>67</sup> Although the painting is over one hundred years old and today's fishermen have modern equipment to help launch their boats, you can still find fishermen on shore launching their boats by hand,<sup>68</sup> exhibiting this heroic ideal.

### B. Familial Patriarchy

Of course not every cowboy was a patriarch of his own family, but he did acquiesce in the hierarchy of his workgroup, respecting his role within it, and acknowledging its leaders. Moreover, even the greenest cowboys protected and provided for their herds. The heroic cowboy as displayed on screen went above and beyond the average man, extending his protection and leadership beyond his own family.<sup>69</sup> He placed his plans, wants, even his safety, aside when he found someone weak and in need of protection.<sup>70</sup> Often, this protector did not even work as a cowboy since his powerful need to protect others led him to take leadership roles in law enforcement such as sheriff or

---

<sup>65</sup> See JOEL, *supra* note 3 ("Tell my wife I am trolling Atlantis/ And I still have my hands on the wheel").

<sup>66</sup> George Bellows, *The Big Dory*, oil on panel (1913) (New Britain Museum of Art).

<sup>67</sup> James W. Denison IV, *A "Peculiarly American" Enthusiasm: George Bellows, Traditional Masculinity, and The Big Dory*, BOWDIN COLLEGE HONORS PROJECT at 64 (May 2014), <http://digitalcommons.bowdoin.edu/honorsprojects/14/> (commenting on the stereotypical male in mid-nineteenth century America).

<sup>68</sup> See *Billy Joel Videos: The Downeaster Alexa*, BILLY JOEL.COM, <http://www.billyjoel.com/the-downeaster-alexa-video> (last visited Dec. 7, 2015) (depicting modern-day fishermen launching their boat from ashore).

<sup>69</sup> See *HIGH NOON* (Stanley Kramer Prods. 1952) (noting that the protagonist, a recently retired marshal, does not flee when a dangerous man comes in order to kill him).

<sup>70</sup> *Id.* (stating that the protagonist hears the man is coming to kill him on his wedding day, and stays even when his new wife and townspeople urge him to run for safety).

marshal.<sup>71</sup> Even cowboys who were less than paragons had a strong desire to ensure justice for those in need. When the regular social enforcement mechanisms of the times had been corrupted by those with money and power, the patriarchal man took a more independent and self-sufficient route, and let his skills with a gun ensure justice.<sup>72</sup>

While fishermen are not known for using a badge and a six-gun, the patriarchal nature of fishing antedates that of cowboys. Fishing has been a way of life for thousands of years. Before cowboys existed, men went to sea to provide food for their families. In *The Downeaster Alexa*, the protagonist explains that he has “bills to pay and children who need clothes” and keeps fishing despite his lack of success in the overfished waters because “people back on land . . . count on me,” clearly establishing himself as a father, family protector, and breadwinner.<sup>73</sup> In a recent essay about the Alaskan crab fishermen, the author explains how the “men reinforce the traditional masculine concept of patriarch, caretaker, and provider,”<sup>74</sup> not only with their own families but also towards crew members who report to them.<sup>75</sup>

### C. Heterosexuality

While heterosexuality is not explicitly mentioned as a requirement for being a cowboy, it is implied by the demand for physical ability to do male jobs and the patriarchal element that stresses being the head of the familial household. To have a family at the time when the cowboy image was formed required living as a heterosexual. This deep, if implied, assumption of unquestioned cowboy heterosexuality was demonstrated by many reactions to the movie *Brokeback Mountain*.<sup>76</sup> While a film focusing on star-crossed gay

---

<sup>71</sup> See *Gunsmoke*, TV LAND, <http://www.tvland.com/shows/gunsmoke/bios/james-arness> (last visited Sept. 21, 2015) (stating that Marshal Dillon chooses to be a law officer in a violent and lawless early Dodge City, Kansas).

<sup>72</sup> See *UNFORGIVEN* (Warner Bros. 1992) (noting that in order to seek revenge, women find a bounty because the town sheriff does little to seek justice for the community).

<sup>73</sup> See Trujillo, *supra* note 46, at 291 (depicting the importance of patriarchy in displaying masculinity by stating that “[t]raditionally, such patriarchal representations include males as ‘breadwinners,’ ‘family protectors,’ and ‘strong father figures’”).

<sup>74</sup> Burton P. Buchanan, *Portrayals of Masculinity in Discovery Channel’s Deadliest Catch in REALITY TELEVISION: ODDITIES OF CULTURE 9* (Alison F. Slade et al. eds., 2014).

<sup>75</sup> *Id.* at 10 (writing that a Deck Boss holds a place on board for a man who has a death in the family, and a Captain is asked to be the godfather of a crewman’s first child).

<sup>76</sup> See Guy Trebay, *Cowboys, Just Like in the Movies*, N.Y. TIMES (Dec.18, 2005),

lovers was going to be the focus of interest and controversy, the fact that the characters were cowboys provided extra fuel for the discussion fire. A senior fellow from the conservative group, Concerned Women for America, charged the movie “with subverting a sacred American symbol.” Her rationale was that, by having gay cowboys as the lead characters, the movie promotes homosexuality because “cowboys have this macho image, cowboys are particularly admired by children. Cowboys are heroes.”<sup>77</sup>

The same implication of heterosexuality can be seen on fishing boats. The need to prove themselves via “manly” work, coupled with the expectations that they will adhere to their patriarchal roles, sends crewmen the message that heterosexuality is the norm. “The men are exercising their heterosexuality constantly as they hold up to the pressures, the rigors of . . . fishing. The men who stand up to the adverse conditions and difficult work are revered by other men and respected as one of the elite group of men who are seasoned fishermen.”<sup>78</sup>

#### D. Frontiersmanship

Frontiersmanship, a blend of independence, freedom, and self-sufficiency,<sup>79</sup> is a given for a cowboy. A cowboy’s job required being outdoors and far from the support, and the limits, of society. He was an outdoorsman who thrived, not just survived, in challenging, rugged spaces. Upon encountering an emergency, the cowboy was required to solve the problem himself, or die trying. This was part of both the danger and the glory of being a cowboy, and part of what helped fashion his romanticized image. Distance from society, and thus, the requirement for extreme self-sufficiency, paid dividends of freedom and independence. When the danger, tedium, and physical discomfort of this life are downplayed, as in the movies, the allure of sleeping under the stars on the open prairie, appeals to many who desire to “get away from it all.”

Frontierism also connotes a grimmer side of the cowboy icon. Cowboy garb was distinctive and suited to its job. Heeled boots,

---

[http://www.nytimes.com/2005/12/18/fashion/sundaystyles/cowboys-just-like-in-the-movie.html?\\_r=0](http://www.nytimes.com/2005/12/18/fashion/sundaystyles/cowboys-just-like-in-the-movie.html?_r=0).

<sup>77</sup> *Id.*

<sup>78</sup> Buchanan, *supra* note 74, at 12.

<sup>79</sup> Buchanan, *supra* note 74, at 11.

vests without topcoats, bandit-like kerchiefs, and floppy brimmed hats, as the cowboys' un-barbered and unwashed selves, were usually covered with trail dust. While practical, their well-worn clothing made clear the less civilized, and more dangerous, lives they lived than the conventionally-attired townspeople. In addition, historically there was often a fine line where being a cowboy left off and being an outlaw began.<sup>80</sup> While most cowboys carried rifles rather than six-guns, and used them more often against deadly animals than against cattle rustlers, the image of cowboy as gunslinger lent a bold and exciting aspect to a physically grueling, low paying job, and so was not discouraged.

The fishermen's frontier was the endless sea rather than the endless prairie, but its demands and dangers were no easier. Wooden boats were even less a challenge to an angry sea than those made of today's modern materials. Storms were harder to predict and fish, while likely more plentiful, were no more predictable in their paths of migration than they are today. The fishermen in the reality show *Deadliest Catch* are described as having the "cowboy spirit."

The men have a limited amount of time to fish . . . and a grueling schedule in which to accomplish it all. The lifestyle of the men on the crab boats is very reminiscent of the lifestyle of the American cowboy as he makes his way with his herd . . . . He too has a limited schedule, faces natural calamities that damage his herd and is out of the normal environment for most people.<sup>81</sup>

While the prairie has been fenced in, the fisherman's frontier is still as vast and almost as unexplored as it was hundreds of years ago.<sup>82</sup>

Like cowboys, sailors also had a distinctive appearance that was heavily influenced by the demands of their jobs. Both jobs share lack of time and space for personal effects that limit the personal groom to the bare minimum. Consequently, hair is often long and

---

<sup>80</sup> Many outlaws of the Old West got their start as cowboys. See *Old West Outlaws*, LEGENDS OF AMERICA, <http://www.legendsofamerica.com/we-outlawlist-b.html> (last visited Aug. 3, 2015).

<sup>81</sup> Buchanan, *supra* note 74, at 11.

<sup>82</sup> Ninety-five percent of our oceans remain unexplored and unseen by human eyes. See *How much of the ocean have we explored?*, NATIONAL OCEAN SERVICE (Aug. 3, 2015), <http://oceanservice.noaa.gov/facts/exploration.html>.

beards and mustaches common.<sup>83</sup> A fisherman's need for protective gear has left the image of yellow oilskins in the minds of most Americans. While technology has changed the materials, a water-repellent jacket with hood or a protective hat are still essential elements of the fisherman's gear.<sup>84</sup> In the same way as a successful cowboy would display his skill, and thus his ability to earn money, with an impressive pair of fitted boots and expensive spurs, a sailor often used tattoos to indicate his profession and the extent of his travels.<sup>85</sup> While today, tattoos are common and have come to be viewed as art or at least as acceptable adornment, this was not always the case. Previously they were considered uncivilized and expected to be seen only on persons of low class or low morals. "This indifference to appearance stands to reinforce the frontier aspect of life aboard a . . . boat."<sup>86</sup> Again, such a comparison reinforces the hegemonic themes of frontiersmanship, rugged independence, and self-reliance.<sup>87</sup>

Just as cowboys had their outlaw side, the idealized, wholesome Gorton's fisherman has his antithesis in the form of smugglers and pirates. As the outlaw image lends excitement to the dutiful cowboy, so does the pirate myth add to the romanticized image<sup>88</sup> of living free and lawless on the sea, outside the constraints of civilization. This "dashing rogue" image, which captured the attention of the media has appeared in both outer space<sup>89</sup> and the futuristic works.<sup>90</sup> Star Wars<sup>91</sup> reformed smuggler, Han Solo,<sup>92</sup> is an ideal example of a

---

<sup>83</sup> Buchanan, *supra* note 74, at 11.

<sup>84</sup> Buchanan, *supra* note 74, at 11.

<sup>85</sup> Hunter Oatman-Stanford, *Hello Sailor! The Nautical Roots of Popular Tattoos*, COLLECTORS WEEKLY (Dec. 12, 2012), <http://www.collectorsweekly.com/articles/the-nautical-roots-of-the-modern-tattoo/>.

<sup>86</sup> Buchanan, *supra* note 74, at 11.

<sup>87</sup> Buchanan, *supra* note 74, at 11.

<sup>88</sup> *Museum explores appeal of pirates in pop culture*, THE ST. AUGUSTINE RECORD (Aug. 14, 2006), [http://staugustine.com/stories/081406/nation\\_4016842.shtml#.VgXSBOv4uFI](http://staugustine.com/stories/081406/nation_4016842.shtml#.VgXSBOv4uFI) ("A new exhibition at The Mariners' Museum uses artifacts, images and costumes to look at how literature and film have transformed the brutal thieves and murderers of the high seas into legendary figures with lasting appeal.").

<sup>89</sup> *Space is An Ocean*, TVTROPES, <http://tvtropes.org/pmwiki/pmwiki.php/Main/SpaceIsAnOcean> (last visited Aug. 3, 2015).

<sup>90</sup> Michael Penncavage, *Pirates in THE GREENWOOD ENCYCLOPEDIA OF SCIENCE FICTION AND FANTASY: THEMES, WORKS, AND WONDERS* 599-601 (Gary Westafhl ed., 2005).

<sup>91</sup> STAR WARS EPISODE IV: A NEW HOPE (20th Century Fox 1977).

<sup>92</sup> Shawn Kotzen, *The Treacherous 13: A Look at Pop Culture's Top Pirates*, TECHNOLOGY TELL (October 14, 2013 8:30 a.m.), <http://www.technologytell.com/entertainment/29674/the-treacherous-13-a-look-at-pop-cultures-top-pirates/>.



character who has made the transition from sea pirate to “space pirate.”

Some have suggested that due to its approval of reckless self-determination and extreme self-sufficiency, extreme masculinity is the antithesis of law, and that lawyers themselves “have never been much associated with manliness.”<sup>93</sup> It might be more accurate to say that extreme masculinity is not as much about disorder and disregard of *all* rules, but more a matter of an extremely independent male deciding which of society’s rules support his own personal code of morals. Often it was the gun-toting cowboy who ensured that justice prevailed when the official legal system had been shanghaied by the rich and powerful man who lacked the icon’s moral fortitude and abused his power. In an episode of *Gunsmoke*,<sup>94</sup> a judge orders Marshal Matt Dillon to evict a couple from their home. Due to a loophole in the law, the couple had failed to file the deed claim within a year.<sup>95</sup> When Matt made an effort to explain the circumstances to the judge, Matt discovered that a wealthy landowner had filed for the couple’s land. Matt refused to remove the couple due to the impending birth of their first child, so the judge sent a deputy sheriff to evict the young family.<sup>96</sup> Since Matt Dillon had taken a job as a law enforcement officer in a dangerous town, he clearly was no advocate of disorder. However, as evidenced in this episode, he was more concerned with the spirit of the law and using it as tool for justice than in unquestionably following legal dictates.<sup>97</sup> This does not mean that law and iconic manliness cannot coexist, but it is often an uneasy truce. It is just this strained relationship between the iconic man and the regulations governing his livelihood that can be seen in *The Downeaster Alexa*.

### *Solitude*

In addition to his classical Western manliness, an icon can be recognized by his isolation. He is literally a man set apart. The reason for his solitude is often job related and fits the manly script – sacrificing comforts and companionship in order to do the job. Bringing a herd of cows to market or filling the hold of the fishing boat re-

---

<sup>93</sup> Richard A. Posner, *Hemingway and the Decline of Manhood in AMERICAN GUY*, *supra* note 1, at 21.

<sup>94</sup> GUNSMOKE: LETTER OF THE LAW (CBS Television Broad. Oct. 11, 1958).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

quires days and nights in remote locations far from family and civilization and perhaps becoming accustomed to long periods alone. This type of man may also seek peace and quiet.<sup>98</sup> Other times, he may feel that he is out of place in more conventional society, or that he needs to leave in order to protect others from the tumult and dangers that seem to follow him. A recent essay about American men, law, and solitude delineated “three dimensions of male solitariness: heroic, introspective, and alienated.”<sup>99</sup>

As an example of the first category, the author profiles Shane, a cowboy from the novel of the same name. Shane begins by displaying his physical prowess and then moves into a patriarchal role as protector of the family for whom he is working. The author observes “[h]is solitary conviction translates into assertive and independent action . . . [a]s he assumes the role of protector, Shane fulfills his potential as a man.”<sup>100</sup> Yet shortly after this apex of masculinity, Shane decides that he must leave the family. His superior ability as a gunman could bring danger to the family he fought to protect, and he realizes that his actions have left him with “no place in the more sedate community he was helping to create.”<sup>101</sup> It is this attribute of “otherness” and isolation that actually may make the icon more appealing. No one can relate to perfection, but everyone understands feeling out of place.<sup>102</sup>

This heroic tendency to ride into the sunset once a man’s job is done foreshadows his permanent departure. While men still herd cattle, it is as often from the cab of a truck or even the cockpit of a

---

<sup>98</sup> See Mark Engblom, *The Fortress at 50: A Final Fortress Flyover*, COMIC COVERAGE (March 30, 2008), [http://comiccoverage.typepad.com/comic\\_coverage/2008/03/the-fortress--6.html#more](http://comiccoverage.typepad.com/comic_coverage/2008/03/the-fortress--6.html#more) (describing superman’s unambiguously named “Fortress of Solitude.” Located in remote locations such as the Arctic, under the ocean or the center of the earth, it is where Superman retreats for “solace”).

<sup>99</sup> Wilkinson III, *supra* note 48, at 31.

<sup>100</sup> Wilkinson III, *supra* note 48, at 32.

<sup>101</sup> Wilkinson III, *supra* note 48, at 33.

<sup>102</sup> ERIC HOBSBAWM, *FRACTURED TIMES: CULTURE AND SOCIETY IN THE TWENTIETH CENTURY* 288-89 (2013).

In a way the loner lent himself to imaginary self-identification just because he was a loner. To be Gary Cooper at high noon . . . you just have to imagine you are one man, whereas to be Don Corleone . . . you have to imagine a collective of people who follow and obey you, which is less plausible. I suggest that the cowboy, just because he was a myth of an ultra-individualist society . . . was an unusually effective vehicle for dreaming.

*Id.*

plane as from the back of a horse. Also, the vast prairie has been fenced in and regulated. Much of the still undeveloped or farmed land now belongs to the state and is subject to its laws and rules. The lone cowboy, riding the vast prairie, living according to his, not society's, rules is no more.

So too, the fishermen's jobs take them far from home and the comforts of civilization. In years past, ocean voyages would last months or even years with no possibility of communication. Technology has changed this somewhat, but the job still requires long periods at sea, on a very small vessel, far from family and friends. The solitude of one iconic fisherman, Ernest Hemingway's "old man,"<sup>103</sup> is shown to be a positive trait when the old man, unlike the other fishermen, would go so far out to sea that land was no longer visible. "By striking out on his own and working according to his own rule, the old man surpasses the limitation of sticking close to shore nestled in the safety of numbers."<sup>104</sup> Today, despite the existence of those still willing to go beyond the shore to "where the oceans are deep," their heroic isolation, like Shane's, may no longer be needed.

Much in the way that the frontier spirit's relation to law was speculated upon, so too is the relationship between law and solitude examined. In a recent essay on law and literature, it was suggested that the "[l]aw is to some extent an antidote to the destructive capacities of male solitude" in that "the ordering of society by law obviates the need for a lone maverick to sacrificially deliver justice."<sup>105</sup> Again, a key characteristic of the iconic male is shown to be at odds with the law. Notably, when the author acknowledges that law can exceed its goal of promoting social inclusion and responsibility to the point of being confining, the Code of Federal Regulations is chosen as an example of law that "presents a scene of horror to the lover of solitude."<sup>106</sup> It is just these federal regulations that play a significant

---

<sup>103</sup> HEMINGWAY, *supra* note 59.

<sup>104</sup> Wilkinson III, *supra* note 48.

<sup>105</sup> Wilkinson III, *supra* note 48, at 37.

<sup>106</sup> Wilkinson III, *supra* note 48, at 38.

[T]he law has been a catalyst of inclusion . . . . From the simple speed limit to the most complex 1040, law relentlessly tugs and pulls people from their solitary state and, depending on one's point of view, into communal security or confinement. A small fraction of the Code of Federal Regulations presents a scene of horror to the lover of solitude. The regulatory state may be with us and necessarily so, but that does not mean men of literary solitude would see it as other than oppressive or threatening.

and unwelcome role in the life of the Long Island fishermen.

**E. Why would a possibly homophobic white male icon still have broad appeal?**

In establishing the fisherman's credentials as icon, it was clear that traditional male icons have historically been portrayed as white, heterosexual males. Therefore, it is reasonable to question why such a privileged icon would appeal to today's more diverse society. The reason is that icons only tangentially reflect reality. While cowboys were brave, honest, and hardworking, they undoubtedly were afflicted with the varied faults and prejudices of real people. The men we see depicted in literature, films and other media are sanitized, idealized versions of the real men. While the Iconic Cowboy has uniformly been portrayed as a heterosexual male of Western European descent, he is more than just brave and manly. He is a moral and physical paragon who uses his privilege to protect the weak, powerless, and disenfranchised. He shows respect for persons of color<sup>107</sup> and for women,<sup>108</sup> even when "civilized" society does not. The icon is not just a man, but a representation for all the virtues he embodies, qualities that are not exclusive to any gender, color, or orientation. What person has not at some point imagined being a hero and prevailing over "evil," be it a movie-worthy supervillain or just a run-of-the-mill bureaucratic gorgon at the Department of Motor Vehicles? And as many struggle to keep up with rapidly changing technology and to find stability in economically uncertain times, they can sympathize with a man who feels that his traditions are not valued and that his way of life is gone. So too can the icon's portrayal as a loner or

---

*Id.*

<sup>107</sup> The Lone Ranger's sidekick, Tonto, was an American Indian, the traditional enemy in most western movies. *THE LONG RANGER* (ABC Television Broad. 1949-1957) (Although the role of Tonto was not ideal in that it contained many cultural stereotypes, Tonto was the man who created the Lone Ranger and was generally portrayed as brave and capable.); see also Jerry Adler, *Is the New Tonto Any Better Than the Old Tonto?*, *SMITHSONIAN MAGAZINE* (July 2013), <http://www.smithsonianmag.com/history/is-the-new-tonto-any-better-than-the-old-tonto-4833743/?no-ist> (mentioning that although Tonto means "stupid" in Spanish, the character was portrayed as a brave and noble man).

<sup>108</sup> In an episode of *Gunsmoke*, Marshal Dillon invites saloon hostess Miss Kitty to a public dance. When, due to her profession, the townspeople treat her rudely and insist that she leave the dance, Dillon "takes off his badge to confront those who insulted her." See Suzanne & Gabor Barabas, *GUNSMOKE: A COMPLETE HISTORY AND ANALYSIS OF THE LEGENDARY BROADCAST SERIES WITH A COMPREHENSIVE EPISODE-BY EPISODE GUIDE TO BOTH THE RADIO AND TELEVISION PROGRAMS* 367 (1990).

outsider resonate with anyone who feels that he or she does not fit the mold that society prescribes. As one author described: “the cowboy . . . evoke[s] images of what the nation should be and appeal[s] to disparate – and would-be warring - cultural factions and economic classes.”<sup>109</sup>

While today’s fisherman is not idolized in the media, he represents one of the few remaining connections between modern society and this idealized man of the past.<sup>110</sup> His historically heroic image, coupled with the highly relatable experience of confronting an inflexible regulatory bureaucracy, crosses cultural and economic boundaries. When the fisherman in *The Downeaster Alexa* laments that there is “[n]o Island left for Islanders like me” he speaks for many, and what was one man’s protest song becomes a paean to all who feel they have no place in today’s world.

#### IV. REGULATIONS<sup>111</sup> AND ENFORCING BODIES

Much the way a boat may not be swamped by one giant wave, but slowly sunk by the combined efforts of unceasing waves and an increasing number of small leaks, so too can the continuous flow of regulations drown the average fisherman. While it is not unreasonable that a dangerous activity, whose purpose is to provide food for the public, requires regulations, the actual number and complexity of these regulations can be daunting. This is particularly true when you consider that people who must comply with the regulations not only have no legal training, but often have only a limited degree of education. Add to the complexity and number of regulations, the fact that many of them change annually, and that they can require the purchase of permits and new equipment, and it is easy to understand how fishermen come to view regulations as an adversary. The goal of this section is to both inform the reader of the broad spectrum of regula-

<sup>109</sup> Jennifer Moskowitz, *The Cultural Myth of the Cowboy, or, How the West Was Won*, 5 AMERICANA: THE JOURNAL OF AMERICAN POPULAR CULTURE (Spring 2006), [http://www.americanpopularculture.com/journal/articles/spring\\_2006/moskowitz.htm](http://www.americanpopularculture.com/journal/articles/spring_2006/moskowitz.htm).

<sup>110</sup> Buchanan, *supra* note 74 (explaining the popularity of reality fishing shows like *Deadliest Catch* and *Wicked Tuna*).

<sup>111</sup> While regulation must have statutory authorization, the laws tend to be more general and change with less frequency than the regulations they authorize. It is the myriad, complex, and frequently changing regulations with which an individual must comply, and therefore are more likely to be the direct cause of frustration. Therefore, this piece uses the term regulation broadly to encompass all official laws and rules, as well as guidelines and advisory materials.

tions that govern commercial fishing, and to help put the reader into the gumboots of the fisherman as he faces a regulatory perfect storm.<sup>112</sup>

### A. Employment and Vessels

Before a fisherman can begin to consider catching fish, he first needs a boat and crew. As any employer knows, the process of hiring requires knowledge of both state and federal employment regulations, as well as all the attendant forms and record keeping.<sup>113</sup> New York has a detailed regulation on size limits for commercial fishing boats.<sup>114</sup> Then those boats must comply with an extensive list of safety and environmental standards.<sup>115</sup>

Commercial fishing is always at the top of the list of labor and employment's dangerous jobs,<sup>116</sup> so safety is a major concern and the focus of numerous regulations.<sup>117</sup> While drowning or injuries caused by working with nets, winches, and hooks are unquestionable concerns,<sup>118</sup> working below deck can be just as deadly. Fuel, toxic mate-

---

<sup>112</sup> It is beyond the scope of this piece to present all possible regulations that are mentioned or implied in *The Downeaster Alexa*. Hence, this section focuses on major legislation, much of it federal, and the regulations that it has generated. The song's lyrics indicate that the protagonist is from the state of New York, so some relevant state regulations will be discussed using this jurisdiction.

<sup>113</sup> The Small Business Administration offers a short overview of some of the most important steps to becoming an employer. See *Hire Your First Employee*, U.S. SMALL BUSINESS ADMINISTRATION, <https://www.sba.gov/content/hire-your-first-employee> (last visited Jan. 18, 2016).

<sup>114</sup> Part of the frustration with regulations is their constant variation and exceptions; for an excellent example, see generally *Commercial Fishing Vessels: Seventy Foot Fishing Boat Restriction Law, Conditions of the Law*, N.Y. STATE DEP'T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/outdoor/77989.html> (last visited January 18, 2016) (discussing Environmental Conservation Law § 13-0349).

<sup>115</sup> *Commercial Fishing Vessel Safety Home*, UNITED STATES COAST GUARD, <http://www.uscg.mil/d13/cfvs/default.asp> (last visited January 18, 2016); *Introduction to Marine Safety and Environmental Protection*, UNITED STATES COAST GUARD, (April 19, 2013), <http://www.uscgaux.info/content.php?unit=P-DEPT&category=ms-courses>.

<sup>116</sup> See Fatal Occupational Injury Statistics, *supra* note 64.

<sup>117</sup> *OSHA Publications: Confined Space Safety on Commercial Fishing Vessels*, UNITED STATES DEP'T OF LABOR, <https://www.osha.gov/Publications/confinedspacesafety-commercialfishingvessels-factsheet.pdf>.

<sup>118</sup> Personal Flotation Devices (PFDs) must be provided and used. The latter is often harder to ensure than the former, thus campaigns such as the one promoted by the Center for Disease Control. See *The National Institute for Occupational Safety and Health (NIOSH), Workplace Safety & Health: Commercial Fishing Safety*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/niosh/topics/fishing/> (last visited Jan. 18, 2016).

rials, and enclosed spaces raise concerns about oxygen levels and the possibility of explosions below deck.<sup>119</sup>

The Federal Commercial Fishing Industry Vessel Safety Act of 1988<sup>120</sup> established an extensive program of vessel safety. With numerous exceptions, commercial fishing vessels are not required to obtain safety permits. However, a captain may choose to have a free, voluntary inspection.<sup>121</sup> If the vessel passes inspection, it will be issued a permit. There is no penalty for infractions discovered during the inspection; instead, the captain will receive instructions on how to remedy the defect(s). If a vessel does not have a safety permit, it can be boarded randomly by the Coast Guard and inspected. Lack of compliance at that time can result in citations, fines, and in the case of violations, the boat may be deemed “extremely dangerous.” The vessel may be ordered to moor until repairs are made, thus delaying, shortening, or even terminating a planned fishing run.<sup>122</sup> No fisherman wants to work in hazardous conditions, but the vast number of regulations, their extensive detail, and their frequent changes can seem more overwhelming than many of the dangers. The government has valiantly tried to compile all relevant rules, regulations, policies, and forms via a well-organized Coast Guard webpage,<sup>123</sup> but the amount and complexity of information are still daunting.

## B. Fishing

### 1. State

After the captain’s vessel has met health, safety, and environmental specifications, the captain must also obtain all required

---

<sup>119</sup> See *Confined Space Safety*, *supra* note 117.

<sup>120</sup> Pub. L. No. 100-424, 102 Stat. 1585, (Sept. 9, 1988); 46 C.F.R. § 28.10 (2014); see also *Federal Requirements for Commercial Fishing Industry Vessels*, FISHSAFE.INFO, <http://www.fishsafe.info/FederalRequirementsCFV2009.pdf> [hereinafter FISH SAFE, Federal Requirements].

<sup>121</sup> To view an example of the inspection form, see *U.S.C.G. Commercial Fishing Vessel Safety Examination*, UNITED STATES COAST GUARD, U.S. DEP’T OF HOMELAND SECURITY, [http://www.uscg.mil/d13/cfvs/PDFs/CFVS\\_ExamBookletCG-5587Rev\\_06\\_08.pdf](http://www.uscg.mil/d13/cfvs/PDFs/CFVS_ExamBookletCG-5587Rev_06_08.pdf).

<sup>122</sup> FISH SAFE, Federal Requirements, *supra* note 120, at 3-4.

<sup>123</sup> The U.S. Coast Guard, via their safety program webpage, makes a valiant attempt to simplify, including providing a link entitled, *What is all the stuff?*, that leads to an abbreviated description of the U.S. legislative and rulemaking process. *Regulations, References and Definitions List: What is all the stuff?*, UNITED STATES COAST GUARD, U.S. DEP’T OF HOMELAND SECURITY, <http://www.uscg.mil/d13/cfvs/regs.asp> (last visited Jan. 18, 2016).

documentation before fishing.<sup>124</sup> In New York, commercial fishermen obtain required documents from the Bureau of Marine Resource, a division of the New York Department of Environmental Conservation (DEC).<sup>125</sup> The DEC, working in conjunction with state and federal fishery organizations,<sup>126</sup> manages all of New York State's marine resources and fishery activities, including commercial activities.<sup>127</sup> This includes establishing quotas and management plans as well as the regulations and procedures to enforce them. To enforce the necessary regulations, the DEC requires permits and licenses, establishes trip limitations,<sup>128</sup> sets limits to harvesting seasons, and decides on a minimum catch size for certain fish.<sup>129</sup> The DEC also develops and enforces procedures, which describe how to properly store, transport and sell "food fish."<sup>130</sup> Also, the methods used to fish are regulated by the DEC and may vary by season.<sup>131</sup> The DEC requires state permit holders to submit "Vessel Trip Reports" (VTR) as a way to monitor state permit holders.<sup>132</sup> There are exceptions, reporting alterna-

---

<sup>124</sup> *H.M.S. Commercial Compliance Guide: Guide for Complying with the Atlantic Tunas, Swordfish, Sharks, and Billfish Regulations*, NAT'L MARINE FISHERIES SERVICE, (April 2014) [http://www.nmfs.noaa.gov/sfa/hms/compliance/guides/documents/hms\\_commercial\\_compliance\\_guide\\_april\\_2014\\_print.pdf](http://www.nmfs.noaa.gov/sfa/hms/compliance/guides/documents/hms_commercial_compliance_guide_april_2014_print.pdf).

<sup>125</sup> *Commercial Fishing & Aquaculture Permits*, N.Y.S. DEP'T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/permits/96310.html> [hereinafter D.E.C., *Commercial Fishing Permits*].

<sup>126</sup> See *Commercial Fishing: Fisheries Management*, N.Y. DEP'T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/outdoor/26821.html> (last visited Jan. 18, 2016).

New York State participates in several fishery management organizations. The Atlantic States Marine Fishery Commission (ASMFC) is made of the 15 Atlantic coast states and coordinates the management of marine and anadromous resources found in the states' marine waters. The Mid-Atlantic Fisheries Management Council (MAMFC) is a group of regional fishery management councils that cooperatively manage marine resources found in the federal marine waters of that region. NOAA, National Marine Fisheries Service (NMFS), is a branch of the federal government that is dedicated to the conservation and management of the marine resources.

*Id.*

<sup>127</sup> D.E.C., *Commercial Fishing Permits*, *supra* note 125.

<sup>128</sup> D.E.C., *Commercial Fishing Permits*, *supra* note 125; *Marine Permits and Licenses*, N.Y.S. DEP'T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/outdoor/98948.html> (last visited Jan. 18, 2016).

<sup>129</sup> *Commercial Fishing*, N.Y.S. DEP'T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/outdoor/98948.html> (last visited Jan. 18, 2016).

<sup>130</sup> *Food Fish and Food Fish Landing License*, N.Y.S. DEP'T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/outdoor/100383.html> (last visited Jan. 18, 2016).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*



tives, and species-specific requirements to these various regulations. However, they may require a close reading and an acronym dictionary.<sup>133</sup>

Even when a general license is obtained, it may still be necessary to obtain an additional license to fish in certain locations or to fish for special species, such as tuna and striped bass. While fishermen are expected to know state boundaries, fish certainly do not. In the case of sport fishing, the states specified in the song offer license reciprocity, but commercial fishing requires a much elaborate legal process. In the early 1940s, the fifteen Atlantic coastal states<sup>134</sup> acknowledged the benefits of joining together to share in the management of migratory fishery resources. To this end, they ratified an Interstate Compact<sup>135</sup> that created the Atlantic States Fishery Commission, also referred to as “the Commission.”<sup>136</sup> The Interstate Compact received Congressional approval in 1942.<sup>137</sup> Since that time, the Commission, comprised of an equal number of representatives from each state, has “served as a deliberative body of the Atlantic coastal state, coordinating the conservation and management of 25 nearshore fish species.”<sup>138</sup> All of the states from the song belong to the Commission and work together to set regulations for the minimum size and catch limitations.<sup>139</sup> While this is helpful, it is still the fisherman’s responsibility to learn any exceptions for protected bodies of water or for state specific health alerts.

The Commission also provides a bridge between the state and federal regulations. In addition to coordinating among states, the Commission works in conjunction with the federal government, via NOAA fisheries and the U.S. Fish and Wildlife Service. The passage of the Atlantic Striped Bass Conservation Act (1984) and Atlantic Coastal Fisheries Cooperative Management Act<sup>140</sup> are two significant examples of state and federal agency cooperation. “As a result of the

---

<sup>133</sup> *Vessel Trip Reports: Submitting Fishing Trip Information*, N.Y.S. DEP’T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/outdoor/91590.html> (last visited January 18, 2016).

<sup>134</sup> *Compact, Rules & Regulations*, ATLANTIC STATES MARINE FISHERIES COMMISSION, (Dec. 2003), <http://www.asmfc.org/files/pub/CompactRulesRegulations>.

<sup>135</sup> *Id.*

<sup>136</sup> *About Us*, ATLANTIC STATES MARINE FISHERIES COMMISSION, <http://www.asmfc.org/about-us/program-overview> (last visited Sept. 22, 2015).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

Acts, all Atlantic coast states that are included in a Commission fishery management plan must implement required conservation provisions of the plan or the Secretary of Commerce (and the Interior in the case of striped bass) may impose a moratorium for fishing in the noncompliant state's waters."<sup>141</sup>

## 2. *Federal*

The National Marine Fisheries Service is an office of the National Oceanic and Atmospheric Administration (NOAA).<sup>142</sup> Working under the specifications of the Marine Mammal Protection Act (MMPA)<sup>143</sup> and the Endangered Species Act (ESA),<sup>144</sup> NOAA Fisheries works to protect and conserve marine mammals, sea turtles, and other endangered species of fish and sea life, while still permitting commercial and recreational marine activities.<sup>145</sup> NOAA efforts include the promulgation of protective regulations and cooperation with the regional fishery councils<sup>146</sup> created under the Magnuson-Stevens Fishery Conservation and Management Act (MSA).<sup>147</sup>

The MSA is the backbone of federal marine fishery legislation.<sup>148</sup> Passed in 1976<sup>149</sup> to ensure the "long-term biological and economic sustainability" of the national waters,<sup>150</sup> it has been updated many times, most significantly in 1996<sup>151</sup> and 2007.<sup>152</sup> When first passed, a top priority of the Act was to decrease overfishing by foreign fleets by creating a U.S. fishery conservation zone that extends

---

<sup>141</sup> *About Us*, ATLANTIC STATES MARINE FISHERIES COMMISSION, <http://www.asmfc.org/about-us/program-overview> (last visited Jan. 18, 2016).

<sup>142</sup> *About NOAA*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, <http://www.noaa.gov/about-noaa.html> (last visited Jan. 18, 2016).

<sup>143</sup> Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-407 (2012).

<sup>144</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44 (2012).

<sup>145</sup> *Our Mission*, NOAA FISHERIES, [http://www.nmfs.noaa.gov/aboutus/our\\_mission.html](http://www.nmfs.noaa.gov/aboutus/our_mission.html) (last visited Jan. 18, 2016).

<sup>146</sup> *Regional Fishery Management Councils*, NOAA FISHERIES, <http://www.nmfs.noaa.gov/sfa/management/councils/index.html> (last visited Jan. 18, 2016).

<sup>147</sup> Magnuson-Stevens Fishery Conservation & Mgmt. Act of 1976, 16 U.S.C. §§ 1801-84 (2012).

<sup>148</sup> *Id.*

<sup>149</sup> Fishery Conservation & Mgmt. Act of 1976, Pub. L. No. 94-265 (1976).

<sup>150</sup> *Magnuson-Stevens Fisheries Conservation and Management Act*, NOAA FISHERIES, [http://www.nmfs.noaa.gov/sfa/laws\\_policies/msa/](http://www.nmfs.noaa.gov/sfa/laws_policies/msa/) (last visited Jan. 18, 2016).

<sup>151</sup> Sustainable Fisheries Act, Pub. L. No. 104-297 (1996).

<sup>152</sup> Magnuson-Stevens Fishery Conservation & Mgmt. Reauthorization Act of 2006, Pub. L. No. 109-479 (2007).

out 200 miles off the U.S. coast.<sup>153</sup> Prevention of domestic overfishing was also deemed necessary to ensure a safe and substantial supply of seafood for both commercial and recreational fishing.<sup>154</sup> In order to attain these conservation goals, the MSA authorized the creation of eight regional fishery management councils.<sup>155</sup> The Councils are currently composed of members from commercial and recreational fishing groups, as well as from environmental, academic, and government interests. Their primary focus is the development of fishery management plans (FMP),<sup>156</sup> including plans for rebuilding fishery stocks. As part of accomplishing these plans, the Councils are responsible for setting annual catch limits. These plans, and particularly the catch limits, anger many commercial fishermen. While the law explicitly requires the use of scientific information, such as surveys and studies, to determine the appropriate limits, the resulting constraints are often disputed. One frequent complaint is that the scientific evidence contradicts what fishermen see while they are on their boats.<sup>157</sup>

### *Bycatch*

The MSA also included national standards for fishery management.<sup>158</sup> These standards have evolved with its many amendments and now contain standards for establishing and maintaining a federal bycatch program.<sup>159</sup> Bycatch is the unintended “capture of non-target species.”<sup>160</sup> These non-target species may include: other species of fish, the same species of fish but the wrong size or sex, and often may include sea turtles, marine birds, and mammals such as dolphins.<sup>161</sup> While a certain amount of bycatch may be considered an

<sup>153</sup> Pub. L. No. 94-265 (1976); *But see* Proclamation No. 5030, 48 Fed. Reg. 10605 (March 10, 1983) (superseding the 200-mile fishery conservation zone).

<sup>154</sup> *About NOAA*, *supra* note 142.

<sup>155</sup> Magnuson-Stevens Fishery Conservation & Mgmt. Act of 1976, 16 U.S.C. § 1852 (2007); *see also* *Regional Fishery Management Councils*, NOAA FISHERIES, <http://www.nmfs.noaa.gov/sfa/management/councils/> (last visited January 18, 2016).

<sup>156</sup> Fishery Conservation Act of 1976, *supra* note 149.

<sup>157</sup> Fishery Conservation Act of 1976, *supra* note 149, § 303(5)(b)(3)-(4).

<sup>158</sup> Fishery Conservation Act of 1976, *supra* note 155, § 1851.

<sup>159</sup> *National Standard Guidelines*, NOAA FISHERIES, [http://www.nmfs.noaa.gov/sfa/laws\\_policies/national\\_standards/](http://www.nmfs.noaa.gov/sfa/laws_policies/national_standards/) (last visited Jan. 18, 2016).

<sup>160</sup> *Bycatch: Overview*, WORLD WILDLIFE FUND, <http://www.worldwildlife.org/threats/bycatch> (last visited Jan. 18, 2016).

<sup>161</sup> Afshan Praven et al., *The Impact of Overfishing on Fish Population: The Concept of*

acceptable consequence, “too often the scale of mortality is so high that it threatens the very survival of species and their environments. Every year, at least 7.3 million tons of marine life are caught incidentally.”<sup>162</sup> It is the capture and demise of so many threatened and endangered species that has been the impetus for regulations, governing how fish are caught in addition to limits on amounts and acceptable size.

Certain methods of fishing may result in significantly higher bycatch than other fishing methods.<sup>163</sup> For example, Long Island fishermen have historically preferred to use purse seine nets to catch striped. Purse seines are large nets that are used to encircle a school of fish.<sup>164</sup> The netting is then pulled shut much like “purse strings” and can be hauled up onto the boat. Amounts of bycatch vary depending on the type of nets and how they are operated.<sup>165</sup> When seine nets were banned<sup>166</sup> the fishermen switched to gill netting, a questionable improvement.<sup>167</sup> Another high bycatch method is longlining:

Longlining is a commercial fishing method commonly

---

*Overfishing & How Do We Know Overfishing Takes Place?*, AQUAFIND, <http://aquafind.com/articles/Overfishing-Report.php>.

<sup>162</sup> *What is Bycatch?*, CONSORTIUM FOR WILDLIFE BYCATCH REDUCTION, <http://www.bycatch.org> (last visited Jan. 18, 2016).

<sup>163</sup> See *Fishing Techniques*, OCEAN WISE, <http://www.oceanwise.ca/content/fishing-techniques> (providing concise, illustrated depictions of different fishing methods and their impact).

<sup>164</sup> *Purse Seine: Fishing Gear and Risks to Protected Species*, NOAA FISHERIES, <http://www.nmfs.noaa.gov/pr/interactions/gear/purses seine.htm> (last visited Jan. 18, 2016).

<sup>165</sup> *Commercial Fishing Pressure: Bycatch*, OCEAN HEALTH INDEX, <http://www.oceanhealthindex.org/methodology/components/commercial-fishing-high-bycatch> (last visited Jan. 18, 2016).

<sup>166</sup> Russel Drumm, *Recalling the Striped Bass War, 20 Years On*, THE EAST HAMPTON STAR (June 28, 2012 11:41 AM), <http://easthamptonstar.com/Lead-article/2012628/Recalling-Striped-Bass-War-20-Years>.

<sup>167</sup> WORLD WILDLIFE FUND, *supra* note 160. There are different kinds of nets used in fishing:

Gillnets are mesh nets that allow fish to pass their heads and gill coverings through a hole in the mesh and then get stuck when they try to back out . . . . Bycatch occurs because the nets also trap everything larger than the net’s mesh, which includes juvenile fish, sharks, seabirds, marine turtles and cetaceans (whales, dolphins, porpoises). The nets are very hard to see, blending in perfectly with the water and difficult for cetaceans to detect by echolocation. Gillnets that are lost at sea are rarely recovered and can continue to capture marine animals for many years.

WORLD WILDLIFE FUND, *supra* note 160.

targeting swordfish, tuna and halibut, where hundreds or thousands of baited hooks hang at intervals along a single fishing line. The hooks (commonly called “J hooks”) cause problems for marine turtles when swallowed, usually resulting in death. Sharks, non-target billfishes and juvenile tunas are often hooked as well.<sup>168</sup>

In comparison to these methods, hook and line fishing, or trolling, is a highly selective way of fishing. When a fishing vessel pulls one or more fishing lines through the water only “fast-moving fish can swim quickly enough to take the bait, and any non-target fish which is accidentally caught can be immediately returned to the ocean live.”<sup>169</sup> Additionally, this fishing method does not make contact with the ocean floor as do dredging or trawling, which cause significant habitat damage.

Where the species targeted make trolling impractical, there are other ways to prevent bycatch. Modifying existing fishing gear can increase the chances of escape for non-target species or, better yet, reduce the number caught in the first place. Turtle excluder devices (“TEDs”) can be installed to allow the turtles to escape while the target catch remain.<sup>170</sup> “J hooks” can be replaced with “circle” hooks.<sup>171</sup> “These hooks are far less likely to be swallowed by turtles than J-shaped hooks, which cause suffocation or internal bleeding when ingested.”<sup>172</sup> Additionally, different sized hooks and net openings can be used to catch target fish while excluding other species of fish that are too large or small to meet regulation size requirements. Some bycatch prevention methods are amazingly simple. Streamers tied to lines and laser lights have been proven to scare away birds. Certain sounds can deter porpoises<sup>173</sup> and sharks can be discouraged with specific smells.<sup>174</sup> Some of the best solutions come

---

<sup>168</sup> WORLD WILDLIFE FUND, *supra* note 160.

<sup>169</sup> OCEAN WISE, *supra* note 163.

<sup>170</sup> *Turtle Excluder Devices*, NOAA FISHERIES, <http://www.nmfs.noaa.gov/pr/species/turtles/teds.htm> (last visited Jan. 18, 2016).

<sup>171</sup> WORLD WILDLIFE FUND, *supra* note 160.

<sup>172</sup> WORLD WILDLIFE FUND, *supra* note 160.

<sup>173</sup> *Research Programs: Fishing Gear Modifications*, CONSORTIUM FOR WILDLIFE BYCATCH REDUCTION, <http://www.bycatch.org/research-projects/fishing-gear-modifications> (last visited Jan. 18, 2016).

<sup>174</sup> *Initiatives: International Smart Gear Competition*, WORLD WILDLIFE FUND, [http://www.worldwildlife.org/initiatives/international-smart-gear-competition?\\_ga=1.10093952](http://www.worldwildlife.org/initiatives/international-smart-gear-competition?_ga=1.10093952)

from fishermen themselves. The World Wildlife Federation sponsors “Smart Gear Competition” to encourage development of new ideas.<sup>175</sup> “The Consortium for Wildlife Bycatch Reduction . . . supports collaborative research between scientists and the fishing industry to identify practical bycatch reduction solutions for endangered species” and facilitates the “global exchange of information . . . on [these] reduction techniques.”<sup>176</sup>

While there are many advances and techniques to decrease bycatch, they require both change, and more significantly, money. Some devices can be added to existing nets, but even these are an additional expense. When regulations require the switch from one type of net to another, this can be a serious financial blow to independent fishermen, which only adds to the stress of transitioning to a new method of working.

### *Bass*

Although mentioned only once in *The Downeaster Alexa*, the Atlantic Striped Bass, commonly known as striper, has been an integral part of the Long Island fishing economy, and also the East Coast fishing economy, since the 1600s.<sup>177</sup> Popular fishing lore claims that, upon seeing the Chesapeake River bass spawning grounds, Captain John Smith thought that the fish seemed so plentiful that one might walk “dry-shod” across their backs over the river.<sup>178</sup> Because striped bass fish spawn in fresh or brackish water and then enter the ocean to mature, they are protected by both fresh and salt-water regulations. Stripper remained plentiful well into the 19<sup>th</sup> century, but numbers began to decline dramatically in the 1970s.

In 1984, Congress passed the Atlantic Striped Bass Conservation Act.<sup>179</sup> The Act required the coastal states from Maine to North

---

1.1233886967.1437073498 (last visited Jan. 18, 2016).

<sup>175</sup> *Id.*

<sup>176</sup> *About Us*, THE CONSORTIUM FOR WILDLIFE BYCATCH REDUCTION, <http://www.bycatch.org/about> (last visited Jan. 18, 2016) (“The Consortium for Wildlife Bycatch Reduction consists of Blue Water Fishermen’s Association, Duke University, Maine Lobstermen’s Association, New England Aquarium, and University of New Hampshire.”).

<sup>177</sup> *Striped Bass*, N.Y.S. DEP’T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/animals/50070.html> (last visited Jan. 18, 2016).

<sup>178</sup> GEORGE BROWN GOODE, THE FISHERIES AND FISHERY INDUSTRIES OF THE UNITED STATES, SECTION I: NATURAL HISTORY OF USEFUL AQUATIC ANIMALS 427 (1884), <http://docs.lib.noaa.gov/rescue/oceanheritage/SH221G591884-sec1.pdf>.

<sup>179</sup> Atlantic Striped Bass Conservation Act, Pub. L. No. 98-613, 98 Stat. 3187 (1984).

Carolina to adopt a striper management plan that would be promulgated by the previously mentioned Atlantic States Marine Fisheries Commission. The federal government was granted enforcement power to shut down all fishing for the species in states that do not follow the plan.<sup>180</sup> Only a year after this legislation passed, bass spawned in the Hudson River were found to contain dangerous levels of polychlorinated biphenyls (“PCBs”).<sup>181</sup> This resulted in striped bass being banned from the marketplace. The ban was lifted after five years, but that same year, an even more controversial ban was announced. The state of New York banned haul seining, a method of fishing which involves nets drawn from shore launched boats. This ban hit commercial fishermen hard, as it was an efficient method that had been in use since the time when horses were used to draw the nets to shore.<sup>182</sup> A year before the ban, Billy Joel had released *The Downeaster Alexa*, and with the passing of the haul seine ban, he was moved to join the protesting fishermen in illegally catching striper. He, along with many others, was arrested for his act of civil disobedience.<sup>183</sup>

Additionally, there was conflict between commercial fishermen and sport fishermen.<sup>184</sup> As early as 1983, Governor Mario Cuomo was criticized for signing legislation limiting the size of bass that could be caught in New York waters.<sup>185</sup> State officials claimed that the law’s intent was to stop the decline of the striped bass populations, but there was much speculation that it was done at the behest of sport fishermen, who wanted to drive much of the competition for striped bass out of business. A few months after the protest in which Joel took part, one of the other protesters,

a lifelong bayman and the husband of Town Councilwoman Cathy Lester, died of a heart attack. A week later, his daughter Della Lester received an anony-

---

<sup>180</sup> *Id.*

<sup>181</sup> Drumm, *supra* note 166.

<sup>182</sup> Drumm, *supra* note 166.

<sup>183</sup> Drumm, *supra* note 166.

<sup>184</sup> Drumm, *supra* note 166. (“Statistics showed that sport fishermen had landed a half-million pounds of legal-size bass (over 36 inches) the year before, not including another quarter-million pounds that died after being caught and released. By contrast, commercial netters and market hook-and-line fishermen actually harvested less than their 128,000-pound quota that same year, 1989.”).

<sup>185</sup> Jose Barbanel, *Minimum Size of Striped Bass Raised by State*, N.Y. TIMES (Aug. 10, 1993).

mous letter. It read: "Your father was punished for killing bass. Good riddance! He was a pig to slaughter. Billy Joel should join him in hell." She received more hate mail in the weeks that followed. The letters were postmarked Nassau County and bore commemorative sportfishing stamps.<sup>186</sup>

That same year the New York Sportfishing Federation advocated for the state to make striped bass exclusively a gamefish.<sup>187</sup> Such a supposition does not appear as outrageous as it may first sound. Striped bass continue to be highly monitored and regulated.<sup>188</sup> As fishermen are struggling to survive economically, any organization or agency that advocates for limitations on the striper meets with much hostility.<sup>189</sup>

### *Tuna and Swordfish*

In addition to striped bass, Joel referenced both swordfish and tuna in his song. Both species are large, fast, strong and highly migratory. Sport fishermen love the challenge of landing them, and they are highly desirable as trophy fish to sports fisherman and highly profitable for commercial fishermen.<sup>190</sup> Some focus exclusively on these large deep-water fish (the crew of the doomed *Andrea Gail* were targeting swordfish), while for others, they are welcome wind-falls.<sup>191</sup> Like striped bass, both species are heavily overfished and their numbers have seriously declined in the past decades.<sup>192</sup> They also may be subject to health regulations that limit or ban their sale

---

<sup>186</sup> Drumm, *supra* note 166.

<sup>187</sup> Drumm, *supra* note 166.

<sup>188</sup> *Atlantic Striped Bass*, ATLANTIC STATES MARINE FISHERIES COMMISSION, <http://www.asmfc.org/species/atlantic-striped-bass> (last visited Jan. 18, 2016).

<sup>189</sup> Nelson Bryant, *Outdoors: Disagreement on Striped Bass*, N.Y. TIMES (March 25, 1990).

<sup>190</sup> Dennis Hollier, *How Fish Get from the Sea to Your Plate*, HAWAII BUSINESS (Feb. 2014), [www.hawaiibusiness.com/how-fish-get-from-the-sea-to-your-plate/](http://www.hawaiibusiness.com/how-fish-get-from-the-sea-to-your-plate/).

<sup>191</sup> Sarah Johnson, *Anyone for sushi? Fisherman catches 1,000lb tuna (that'll make 20,000 servings with rice)*, DAILY MAIL (Nov. 25, 2012), <http://www.dailymail.co.uk/news/article-2238284/Anyone-sushi-Fisherman-catches-1-000lb-tuna-make-20-000-pieces-delicacy.html>.

<sup>192</sup> *U.S. to Stress Quota Compliance and Warns of Penalties at International Atlantic Tuna and Swordfish Meeting*, NOAA (Nov. 13, 1988), <http://www.publicaffairs.noaa.gov/pr98/nov98/noaa98-r159.html>.



even when a fisherman can catch them.<sup>193</sup>

Both of the species fall under the protection of federal regulations for highly migratory species (HMS), specifically those for Atlantic Highly Migratory Species.<sup>194</sup> The regulations are authorized by both the previously mentioned Magnuson-Stevens Act<sup>195</sup> and the Atlantic Tunas Convention Act of 1975.<sup>196</sup> The importance of tuna and swordfish to both fishing and the ecosystem has been acknowledged with many, frequently changing<sup>197</sup> regulations written specifically to protect these species. NOAA makes an effort to simplify the process of compliance by providing “Atlantic HMS Fisher Compliance Guides [that] are designed to provide a plain language summary of HMS regulations.”<sup>198</sup> However, considering the length of the guides,<sup>199</sup> and the caution that they “are not a substitute for the regulations found in the Code of Federal Regulations,” the beleaguered fishermen are unlikely to view them as much of an improvement.

Just a surface look into this deep sea of regulations illustrates the complexity of the issues, and explains much of the reason for the fishermen’s frustration and desperation. They understand the importance of preventing overfishing more than most. Having a variety of plentiful and healthy species is to the fishermen’s benefit as much as it is to the environment and to society. A reduction in the number of target species requires more work and more money since the fishermen have to travel further and stay out longer to meet quotas. Fishermen certainly do not wish to kill dolphins or sea turtles; it is just that their interest in the survival of these species pales when balanced against paying a mortgage and feeding a family. Since imple-

---

<sup>193</sup> *Long Island and New York City: Health Advice on Eating Fish You Catch*, N.Y.S. DEP’T OF HEALTH (March 2015), <https://www.health.ny.gov/publications/6532.pdf>.

<sup>194</sup> 50 C.F.R. § 635.1 (2014).

<sup>195</sup> 16 U.S.C. § 1801 (2012).

<sup>196</sup> Atlantic Tunas Convention Act of 1975, Pub. L. No. 94–70, 89 Stat. 385; 16 U.S.C. § 971.

<sup>197</sup> Atlantic Highly Migratory Species; North and South Atlantic 2014 Commercial Swordfish Quotas, 79 Fed. Reg. 47919 (Aug. 22, 2014) (to be codified at 50 C.F.R. § 635).

<sup>198</sup> *Atlantic HMS Fishery Compliance Guides*, NOAA FISHERIES, <http://www.fisheries.noaa.gov/sfa/hms/compliance/guides/index.html> (last visited Jan. 18, 2016).

<sup>199</sup> The *Commercial Fishing Compliance Guide* is over sixty pages long and has a detailed, two-page table of contents available at [http://www.fisheries.noaa.gov/sfa/hms/compliance/guides/documents/hms\\_commercial\\_compliance\\_guide\\_april\\_2014\\_print.pdf](http://www.fisheries.noaa.gov/sfa/hms/compliance/guides/documents/hms_commercial_compliance_guide_april_2014_print.pdf); see also *HMS Dealer & Importer/ Exporter Compliance Guide*, NOAA FISHERIES (June 2015), [http://www.fisheries.noaa.gov/sfa/hms/compliance/guides/documents/hms\\_dealer\\_compliance\\_guide\\_06\\_2015\\_final.pdf](http://www.fisheries.noaa.gov/sfa/hms/compliance/guides/documents/hms_dealer_compliance_guide_06_2015_final.pdf).

menting conservation methods can slow down the race to catch as many fish as possible, regulations are not well received. Cost is also a big negative factor. Changing methods of fishing, even just updating equipment, may be a significant financial burden. For example, the ban on purse seine nets required the fishermen to purchase gill nets while rendering their existing inventory of seine nets worthless.

Fishermen object to many of the facts and figures<sup>200</sup> that the various agencies use to determine quotas and catch size, and to draft new or revised regulations. They also find the frequent changes to regulations unnecessarily onerous.<sup>201</sup> Additionally, they have serious objections to the degree regulations provide for sport or recreational fishermen at what can appear to be the expense of commercial fishermen.<sup>202</sup> Suggestions have been made to reconcile regulatory needs with the needs of the fishermen, but as of yet, none have been accepted unanimously, or even by a large majority, based upon their feasibility or success.

## V. ARE THERE SOLUTIONS?

In this battle of man against society, there is no real villain. One can sympathize with the song's protagonist and agree that the number of regulations that he must master is daunting. Yet, while no one enjoys the personal limitations or the forms and financial costs that come with regulations, we must also acknowledge that some level of regulations is necessary to promote many of society's goals, such as employee safety, healthy food products, and the conservation of our environment. The only way to win this battle is to find solutions that allow all parties to find the narrow space between regulation and overregulation.

Some ideas that focus on ocean and marine life conservation simultaneously benefit the independent fisherman. Among these ideas are encouraging consumers to eat down the food chain, elevating small fisheries, and developing programs for tradable bycatch credits.<sup>203</sup> Eating lower on the food chain can lessen the demand for the

---

<sup>200</sup> Letter from Governor Andrew M. Cuomo, to Cameron Kerry, Acting Sec'y U.S. Dep't of Commerce (Sept. 12, 2013), <http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/flukeletter.pdf>.

<sup>201</sup> *Id.*

<sup>202</sup> John T. McQuiston, *As Striped Bass Run, L.I. Baymen and Sportsmen Fight*, N.Y. TIMES (Sept. 1, 1992).

<sup>203</sup> Sarah Simpson ed., *10 Solutions to Save the Ocean*, CONSERVATION (July 29, 2008),

larger, endangered fish. This would mean that consumers would have to be willing to eat more sardines and anchovies and treat fish such as tuna and red snapper as occasional luxuries. Although the likelihood of changing America's eating habits is questionable, if successful, it would allow fishermen to make a living while fishing closer to shore than they do for tuna or swordfish, thus using less fuel and allowing the larger species to regenerate and mature.

Although small scale and artisanal fisheries differ slightly,<sup>204</sup> both terms refer generally to fishers working inshore, using small craft and passive gear. Their catch tends to be used to feed the fishermen's families or to be sold locally.<sup>205</sup> Small scale is the term usually used in developed nations and tends toward fewer persons using more sophisticated technology, much like the Long Island baymen, while "artisanal" is commonly used in less developed nations to indicate fishing with more people but very low technology.<sup>206</sup> Smaller fisheries still "have a significant impact on marine ecosystems – overfishing, habitat damage, and bycatch – but, because they are much more efficient than commercial fisheries . . ."<sup>207</sup> they have a better opportunity to prevent bycatch, or if it is not protected, use the bycatch productively. Additional benefits come from consuming relatively little fuel per unit of catch landed. In the United States, where there is a growing interest in organic and free-range foods and in farm-to-table, or local, eating, this might be an appealing and feasible option.

Another often mentioned solution is aquaculture.<sup>208</sup> The benefits of "farming" seafood include increasing the availability of highly desirable species, thus meeting consumer demand while reducing the pressure on wild stock.<sup>209</sup> It could also encourage people to place more emphasis on protecting coastal waters from pollution.<sup>210</sup> Unfor-

---

<http://conservationmagazine.org/2008/07/10-solutions-to-save-the-ocean/>.

<sup>204</sup> *Fisheries and Aquaculture: Small-scale and artisanal fisheries*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, <http://www.fao.org/fishery/topic/14753/en> (last visited Jan. 18, 2016).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Artisanal Fishers*, DIVER (Aug. 11, 2013), <http://diver.net/bbs/posts003/87791.shtml>.

<sup>208</sup> Aquaculture is the cultivating freshwater and saltwater populations under controlled conditions. See *What is Aquaculture?*, NOAA FISHERIES, [http://www.nmfs.noaa.gov/aquaculture/what\\_is\\_aquaculture.html](http://www.nmfs.noaa.gov/aquaculture/what_is_aquaculture.html) (last visited Jan. 18, 2016).

<sup>209</sup> *Id.*

<sup>210</sup> *Fisheries and Aquaculture: Impacts of Other Activities*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, <http://www.fao.org/fishery/topic/12277/en> (last vis-

tunately, these benefits come with some serious drawbacks. Aquaculture can be detrimental to the wild stock of smaller fish used to feed the larger farmed species.<sup>211</sup> Farming large numbers of fish in a small area can pollute the water with excess nutrients (feed & waste), chemicals, and antibiotics.<sup>212</sup> It is also possible to transfer disease and parasites to wild fish populations, and the native gene pools can be compromised if farmed fish and native species interbreed.<sup>213</sup>

Some fishermen have turned to community-based solutions. In Cape Cod, one strategy the traditional day-boat fishermen used “was to create community-harvesting cooperatives.”<sup>214</sup> That model, now known as sectors, “has since evolved and been adopted by most of the New England fishing community [for] all bottom-dwelling species.”<sup>215</sup> Among their collaborative efforts are the purchase catch share and fishing quotas to keep them in their community, special loan programs, and the development of a fishermen first responders team for whale entanglement emergencies.<sup>216</sup>

Another example of a cooperative solution is catch shares. “Catch shares are a type of management system that dedicates a secure share of fish or fishing area, to individual fishermen, communi-

---

ited Jan. 18, 2016).

<sup>211</sup> *Marine Fisheries & Aquaculture Series: Farming the Seas*, PBS: PUBLIC BROADCASTING SERVICE, <http://www.pbs.org/emptyoceans/fts/index.html> (last visited Jan. 18, 2016).

Large amounts of animal feed are needed to feed a . . . fish like the Bluefin tuna. This feed consists of fishmeal processed from forage fishes like sardines and anchovies that humans would otherwise consume . . . [T]his raises ethical issues. Much of the fish suitable for direct human consumption is being used to grow higher . . . level fish to indulge a relatively small group of affluent consumers.

Konstantinos Stergiou et al., *Farming Up Mediterranean Food Webs*, CONSERVATION BIOLOGY Vol. 23, No. 1 at 231-232 (2008).

<sup>212</sup> *Top 10 Problems with Ocean Fish Farming*, FOOD & WATER WATCH, <http://www.foodandwaterwatch.org/common-resources/fish/fish-farming/offshore/problems/> (last visited Oct. 2, 2015).

<sup>213</sup> *Id. See also Pollution & Disease: Problems with Condensed Space and Waste*, MONTEREY BAY AQUARIUM SEAFOOD WATCH, <http://www.seafoodwatch.org/ocean-issues/aquaculture/pollution-and-disease> (last visited Jan. 18, 2016).

<sup>214</sup> *Community-Based Solutions*, CAPE CODE COMMERCIAL FISHERMEN’S ALLIANCE, <http://capecodfishermen.org/community-based-solutions> (last visited Jan. 18, 2016).

<sup>215</sup> *Id.*

<sup>216</sup> *Quota Leasing*, CAPE CODE COMMERCIAL FISHERMEN’S ALLIANCE, <http://capecodfishermen.org/quota-leasing> (last visited Jan. 18, 2016); *Revolving Loan Funds*, CAPE CODE COMMERCIAL FISHERMEN’S ALLIANCE, <http://capecodfishermen.org/revolving-loan-funds> (last visited Jan. 18, 2016); *Protected Species*, CAPE CODE COMMERCIAL FISHERMEN’S ALLIANCE, <http://capecodfishermen.org/protected-species> (last visited Jan. 18, 2016).

ties or fishery associations. Each year, the Total Allowable Catch (TAC) also known as a ‘catch limit’ is set with portions of the limit divided among fishery participants.”<sup>217</sup> NOAA monitors such programs as part of its Fisheries Economics Program<sup>218</sup> and its analysis shows a number of positive results.<sup>219</sup> Catch share programs “have ended the race to fish . . . resulting in longer fishing seasons, safer working conditions, and improved management performance . . . . Economic performance for the vessels remaining in the program improved” as well.<sup>220</sup>

Each proposed solution comes with its own limitations. They may conflict with other solutions, not be extensive enough to make a sufficient impact on their own, or are the source of different, but equally serious, impacts on the environment. Often success depends on how the solutions are implemented and how conscientious participants are about following procedures. Only time will tell if any of these methods, or a combination of them, will ensure the survival of our ocean and thus the marine stock of the man who works the sea. If they are not successful, the fisherman may go the way of the cowboy and sail into the sunset of American myth.

---

<sup>217</sup> *How catch shares work: A promising solution*, ENVIRONMENTAL DEFENSE FUND, <https://www.edf.org/oceans/how-catch-shares-work-promising-solution> (last visited Jan. 18, 2016).

<sup>218</sup> *Economic Performance of U.S. Catch Share Programs*, NOAA OFFICE OF SCIENCE AND TECHNOLOGY, <http://www.st.nmfs.noaa.gov/economics/fisheries/commercial/catch-share-program/> (last visited Jan. 18, 2016).

<sup>219</sup> Ayeisha A. Brinson & Eric M. Thunberg, *The Economic Performance of U.S. Catch Share Programs*, NOAA OFFICE OF SCIENCE AND TECHNOLOGY, PROGRAMS (August 2013), [http://www.st.nmfs.noaa.gov/Assets/economics/catch-shares/documents/Catch\\_Shares\\_Report\\_FINAL.pdf](http://www.st.nmfs.noaa.gov/Assets/economics/catch-shares/documents/Catch_Shares_Report_FINAL.pdf).

<sup>220</sup> NOAA, *Economic Performance of Catch Share Programs*, *supra* note 218.