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## British Wildlife Law Before the American Revolution: Lessons from the Past

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# BRITISH WILDLIFE LAW BEFORE THE AMERICAN REVOLUTION: LESSONS FROM THE PAST

*Thomas A. Lund\**

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**E**ARLY legislation may excite the condescending interest that Dr. Johnson directed toward a dog walking on its hind legs: "It is not done well; but you are surprised to find it done at all."<sup>1</sup> British wildlife law, however, merits more respect. As long ago as the Middle Ages, man's appetite for meat endowed legislators with at least an ambling competence at wildlife management. Nor has the passage of time made their efforts wholly irrelevant. Early methods of controlling habitat, for example, may still be appropriate since historical change has not altered the needs of animals as it has those of men. This is not to say that within the bestiary of early British law there does not run many a droll species of regulation, amusing only because of its ludicrous appearance. Indeed, within the following discussion of the goals and methods of those laws, a kind of carnival fever may appear at times to have overtaken the legislators. But such are the parallels between early problems and those faced today that in the end, to a surprising degree, the stock of old laws can still provide exemplary service.

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1. J. BOSWELL, *LIFE OF JOHNSON* 535 (G. Birbeck Hill ed. 1921).

## I. GOALS

Wildlife law has four major goals, and early British legislation recognized them all. First, laws can facilitate the sustained periodic harvest of wildlife. Wildlife management can be designed with the same balance sheet mentality that characterizes any ranching operation, with adjustments made for the peculiarities of wild stock. Second, wildlife statutes can be drawn primarily to regulate human behavior. Because hunting provides one of the few justifications for the use of weapons, laws purportedly enacted to control hunting may actually be designed either to restrict or to encourage the use of weapons. Moreover, hunters themselves may solicit limitations on their freedom to use certain hunting methods, thereby enhancing their sport by increasing the challenge to their skill. Third, wildlife laws can be designed to favor particular groups. Because wild animals are not ordinarily subject to man's control, and control seems the basis for most popular views of ownership, wildlife may be treated as a unique form of wealth. Lawmakers may thus be able to grant hunting privileges to a favored group without exciting the contention that would ensue were privileges granted with respect to other forms of property. Fourth, wildlife regulations can aim to vindicate what are supposed to be the desires of the animals themselves. While some assert that rights can belong only to people,<sup>2</sup> a curious convergence of both very primitive and very sophisticated law would protect the rights of other than human supplicants.<sup>3</sup> Living wild animals have been a congenial vehicle for the manifestation of this doctrine.

### A. Sustained Yield

The concept that the yearly harvest of a species might be limited so that the remaining numbers can breed and replenish the stock has been the common intellectual property of mankind since the dawn of the pastoral era.<sup>4</sup> The numbers and the breeding habits of wild animals, however, are less obvious than those of domestic beasts; techniques to manage wildlife for sustained yield have therefore been more difficult to develop.

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2. See, e.g., *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 76, 55 N.E. 812, 814 (1900) (Holmes, C.J.) ("All proceedings, like all rights, are really against persons").

3. See C. STONE, *SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS* (1972); C. ELTON, *THE ECOLOGY OF INVASIONS BY ANIMALS AND PLANTS* 143 (1958).

4. See generally J. BRONOWSKI, *THE ASCENT OF MAN* 59-89 (1973).

The final slaughter of British wolves, said to have been called for by Kings Edgar and Canute,<sup>5</sup> proved that intensive hunting could destroy a species. The information necessary to manage a harvest for sustained yield, however, was more complex than that required for extermination. The population dynamics of different species vary widely, and estimation of the resiliency of a species in the face of large breeding stock depletions is no simple task.<sup>6</sup> Some early English laws reflect this difficulty. At one time the legislators believed that hares had been "almost utterly destroyed"<sup>7</sup> by hunting, an event that Australians might wish to have been more likely. A corvine irruption of the sixteenth century was also less susceptible to man's efforts at control than was believed by framers of a bounty measure.<sup>8</sup> The lawmakers feared: "[I]f the said crows, rooks and choughs should be suffered to breed and continue, as they have been in certain years past, they will undoubtedly be the cause of the great destruction and consumption of a great part of the corn and grain which hereafter shall be sown throughout this realm . . ."<sup>9</sup> Fortunately, however, the danger to Britain was not nearly so grave.

Hunting incentives or restrictions do not significantly affect the total numbers of a species when human pressure simply substitutes for natural causes of mortality and prematurely removes individual animals that would not in any case have affected the breeding pool.<sup>10</sup> The arts of weaponry were so poorly developed and the numbers of hunters were generally so limited that early lawmakers did not need to restrict the harvest to the degree presently necessary. But when unusual conditions did endanger a desirable species, British lawmakers acted to preserve the stock. Damming was recognized as an industrial peril to anadromous fish as early as the fourteenth century, and weirs were required in dams to facilitate spawning-runs

5. J. MANWOOD, *TREATISE OF THE FOREST LAWS* 161 (4th ed. W. Nelson 1717).

6. Scientists still dispute, for example, the resiliency of certain whale species that have been heavily depleted by man, Fitter, *Future for Whales*, 12 *ORYX* 532 (1974), and the breeding functions of bighorn rams older than ten years, Tennesen, *Bighorn on the Run*, *NATIONAL WILDLIFE*, Oct.-Nov. 1975, at 9.

7. 14 & 15 Hen. 8, c. 10, § 1 (1522).

8. 24 Hen. 8, c. 10, § 7 (1532).

9. 24 Hen. 8, c. 10, § 1 (1532).

10. In a resilient population, severe loss rates may in effect substitute for each other without mounting up excessively high in total. Extraordinary losses through one agency may automatically protect from losses through many other agencies. The death of one individual may mean little more than improving the chances for living of another one. Furthermore, in some species, extraordinary losses may be compensated by accelerated reproduction, more young being produced in consequence of more being destroyed.

P. ERRINGTON, *OF PREDATION AND LIFE* 229 (1967).

ascending the streams.<sup>11</sup> The legislators also restricted particular methods of taking against which a species was thought defenseless. Hares could not be tracked in the snow;<sup>12</sup> nor could herons, vulnerable targets indeed, be taken by firearms.<sup>13</sup>

The income that can be derived from the sustained yield of wildlife can be both a factor in and an incentive toward management. It has recently been established as such in the United States; from 1955 to 1965 the annual income derived by American landowners from hunting and fishing increased from \$3 million to \$97 million.<sup>14</sup> In the early nineteenth century the importance of this consideration was emphasized by scholars who advocated changes in the British law. Edward Christian, Professor of Law at Cambridge, asserted that, were occupiers allowed rights to game, "it would soon become a serious and most important problem for the agriculturist to solve, *viz.* What quantity of Game should be supported and sold upon a given farm, or what proportion it should bear to the vegetable production, that the sum of both should be the greatest, or would best enable the occupier to pay his rent and maintain his family."<sup>15</sup>

## B. Weapons Control

### 1. *In Earnest*

Hunting rules can achieve a serious martial goal. Except for target practice and self-defense, hunting provides the only lawful occasion for a private citizen to use weapons. And, particularly with the limited arsenal of weapons formerly available, a practiced sportsman might be far superior to an amateur in martial skills. The security of the established rule will therefore be increased if government supporters are encouraged to hunt and potential dissidents are prohibited from hunting.<sup>16</sup>

The British have always been adept at finding a serious purpose

11. 17 Rich. 2, c. 9, § 1 (1393).

12. 14 & 15 Hen. 8, c. 10 (1522).

13. 19 Hen. 7, c. 11, § 1 (1503).

14. REPORT OF THE 58TH CONVENTION OF THE INTERNATIONAL ASSOCIATION OF GAME, FISH AND CONSERVATION COMMISSIONERS 155 (1968).

15. E. CHRISTIAN, THE GAME LAWS 304 (1817). Another scholar explained that, were the sale of game legalized, "proprietors might find the expenses of preservation repaid by the profits of sale." C. LONG, CONSIDERATIONS ON THE GAME LAWS 17 (2d ed. 1825).

16. As one game-law commentator observed, one analysis of early British game laws concluded that "they were originally made with a view of taking the arms out of the hands of the common people, or at least with a design of rendering them inexperienced in the use of them . . ." S. PURLEWENT, A DIALOGUE BETWEEN A LAWYER AND A COUNTRY GENTLEMAN UPON THE SUBJECT OF THE GAME LAWS 14 (3d ed. 1771) (copy in the Bodleian Law Library, Oxford, England).

behind apparently frivolous pastimes, and hunting behavior is no exception. Considerably before Wellington saw the earnest goals of youthful sport ("The battle of Waterloo was won on the playing fields of Eton . . ."),<sup>17</sup> legislators had proclaimed that unless hunting were wisely practiced, the security of the realm would be endangered. Not long after the rout of the French at Agincourt, a law was designed to ensure continued British skill with the long bow. According to the legislative prologue, that weapon had "subdued and reduced divers and many regions and countries to their due obeisance, to the great honour, fame and surety of th[e] realm and subjects, and to the terrible dread and fear of all strange nations. . . ."<sup>18</sup> The use of new hunting techniques might have sapped Britain's strength; controls were therefore imposed to prevent the citizenry from relying too heavily on that novelty, the gun.<sup>19</sup>

While affording supporters of the crown continued practice with arms, British game laws<sup>20</sup> also sought to disarm dissidents.<sup>21</sup> Blackstone maintained that the earliest game laws were part of feudal policy to exclude the defeated from the use of arms: "[N]othing could do this more effectually than a prohibition of hunting and sporting. . . ."<sup>22</sup> Although their purpose might be "oftener meant than avowed," subsequent legislators continued to espouse this policy.<sup>23</sup> Some propagandist maintained that these covert aims underlay hunting rules imposed after the bloodless revolution:

Before these useful laws were made,  
Each lively youth, each jolly blade  
Well knew the use of hostile arms,  
Ready prepared for war's alarms,  
    But since we have a Revolution  
And alter'd much our Constitution,  
It is decreed, each Bird—each Beast,  
Shall have in part Quietum est . . .<sup>24</sup>

17. This statement is attributed to the Duke of Wellington in J. BARTLETT, *FAMILIAR QUOTATIONS* 400 (13th ed. 1955).

18. 33 Hen. 8, c. 9, § 2 (1541).

19. 33 Hen. 8, c. 6, § 1 (1541).

20. "Game" has been a term of art narrowly limned. Professor Christian, for example, observed regarding a statute including as "game" pigeon, fish, and fowl: "Could anyone have supposed this possible in a land of learning and liberty?" E. CHRISTIAN, *supra* note 15, at 9. Despite this weighty caution, however, the term will be used generally throughout this discussion to describe any wild animal subject to taking for food or sport.

21. *See* note 16 *supra*.

22. 2 BLACKSTONE, *COMMENTARIES* \*413.

23. *Id.* at \*413-14.

24. E. THOMAS, *AN ABSTRACT OF ALL THE GAME LAWS* 4 (10th ed. 1784) (copy in the Bodleian Law Library, Oxford, England).

Some early legislators did not conceal their belief that unless unreliable elements were forbidden the use of weapons, they would become competent with arms and then imperil the safety of the country. Fourteenth century lawmakers had instituted hunting regulations because they had observed that "sometime under such colour [of hunting, groups] make their assemblies, conferences, and conspiracies for to rise and disobey their allegiance . . . ." <sup>25</sup> Subsequent statutes identified even more precisely the danger posed by permitting the poor to use weapons: Tempted to poach, they might experience success and then turn to such graver offenses as burglary and highway robbery. <sup>26</sup>

Incidents, even in the early nineteenth century, show that the challenge by poachers to civil authority was not insignificant. Testimony before the House of Lords Committee on the Game Laws gives an idea of the force poachers could mount:

In the middle of November 1826, a large concourse of poachers, to the amounts of about 50, attacked a wood of mine, at about half past eleven in the evening; about 28 of them were armed with guns, about 12 with sticks, the remainder with a stone in each hand, by which they kept making noise by knocking them against each other, for the purpose of keeping the persons in line going through the woods; and on the outside of the wood were two men on horse back, about 50 yards from one another, who had horns, and they directed in which way the line should be carried on. In that way they thoroughly went through the wood, firing a great number of times, and killed a large quantity of Pheasants. My keepers were there, but finding the force was very large, they were unable to cope with them; and according to the orders I always gave them, not to have any fray of that nature, unless they were sure of being successful, they were only able to look on, and not to take any steps for saving the Game. <sup>27</sup>

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25. 13 Rich. 2, c. 13, § 1 (1389).

26. See, e.g., 4 & 5 W. & M., c. 23, § 1 (1692). As one commentator observed, "[A]ll the statutes made for the preservation of the game, agree in the character of such men; for they tell us, that they are of the vulgar sort, and of little or no worth; that they are loose, idle, disorderly and dissolute persons; that they ruin themselves and families, and damnify their neighbors; and by neglecting all lawful employment, they commonly turn highwaymen and burglars." W. NELSON, *THE LAW OF ENGLAND CONCERNING THE GAME* preface (1727).

27. PARL. PAPERS (Lords), 1828 (235), [Reports] vol. 8, p. 333 (*Report from the House of Lords Committee on the Game Laws*). Another taste of the dangers presented by resistance to the game laws is provided by a warning protesting the penalty of transportation for poaching that was sent in 1816 to prominent landowners near Bath:

[T]he first of our country that this law is inflicted on . . . there shall not one gentleman's seat in our country escape the rage of fire. We are nine in number; and we will burn every gentleman's house of note. The first that impeaches shall be shot. We have sworn not to impeach. You may think it a threat, but

These dangers were part of the inspiration for a scheme known generally as the "qualification statutes," which allowed the use of various weapons for hunting only to those with a vested interest in the established rule.<sup>28</sup> Thereby did the law both arm the powerful and disarm those whom Blackstone described as the "rustici."<sup>29</sup> The caste-like overtones of the scheme were emphasized by enforcement provisions that authorized the qualified to disarm the unqualified.<sup>30</sup>

## 2. *For Fun*

Because the qualification statutes ensured that everyone legally interested in game could fill his belly by other means, no great emergency required that wildlife be harvested in an effective and efficient manner. A hunter's goal might not be to bag his quarry with maximum dispatch, but rather to delay the pleasure as long as decently possible.

Besides being too effective and thereby spoiling good sport, some hunting practices were abhorrent because they were unpleasant to a person of sensitivity. Rudimentary firearms, for example, were not elegant. They were loud and smelly. Through the seventeenth century they were "fired by a match, and [were] thought a mode of killing game not fit to be pursued by a gentleman."<sup>31</sup> Their use was restricted.<sup>32</sup> Considerations of taste also helped to prohibit a practice now described as "jacklighting,"<sup>33</sup> but during the sixteenth century called hunting by "lowbels." Groups would venture forth after dark ringing bells and flashing lights and then easily gather up partridges and pheasants stupefied by the spectacle.<sup>34</sup> The comedic overtones of this sport coupled with its lethal efficiency led to its prohibition.<sup>35</sup>

## C. *Class Discrimination*

The third goal of wildlife regulation has been to secure unequal distribution of the right to utilize wildlife. In other areas of the law,

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they will find it a reality. The Game Laws were too severe before. The Lord of all men sent these animals for the peasant as well as the prince.

Quoted in E. CHRISTIAN, *supra* note 15, at 292-94.

28. See text at notes 39-50 *infra*.

29. 2 BLACKSTONE, *supra* note 22, at \*413.

30. 33 Hen. 8, c. 6, § 2 (1541).

31. E. CHRISTIAN, *supra* note 15, at 6.

32. 33 Hen. 8, c. 6, § 2 (1541).

33. Frog hunting with jack lights, for example, is prohibited during certain months under Louisiana law. LA. REV. STAT. ANN. § 56:369 (West 1952).

34. W. NELSON, *supra* note 26, at 216.

35. 23 Eliz. 1, c. 10, §§ 1-3 (1581).



subtle insight may be required to ferret out legislative techniques used to beggar the powerless,<sup>36</sup> but early British game law requires no such acuity. Class discriminations were openly embraced from the earliest periods until at least the mid-nineteenth century. Their legacy of ill feelings may still imbue some condemnation of wildlife protectors as "elitists."<sup>37</sup>

In 1389, the course of wildlife law was confirmed by a reference to "gentlemen's game,"<sup>38</sup> and this attitude was elaborated into a comprehensive scheme in the qualification statutes. Until their abolition in 1831,<sup>39</sup> the qualification statutes allowed only prominent citizens to take game, to possess certain weapons, and ultimately, to eat certain animals.

Although codes of conduct contemporaneous with early qualification statutes provided some means for identifying a gentleman, the British legislators generally took a more pragmatic view. Money was the principal touchstone. The earliest qualification statute allowed hunting rights only to a lay person who owned lands worth forty shillings annually or to a cleric who held a yearly living of ten pounds.<sup>40</sup> The value of the base land was later raised to one hundred pounds.<sup>41</sup> Wealth was also a test for the use of hunting gear. One statute, with limited exceptions, denied the use of handguns to those with an estate worth less than one hundred pounds.<sup>42</sup> Naked figures mean something, of course, only to those savants familiar with the exchange rate between different historical periods. Blackstone's juxtaposition of two different qualifications provides a more vivid perspective on the statutes' effect: "[F]ifty times the property [is required] to enable a man to kill a partridge, as to vote for a knight of the shire . . ."<sup>43</sup>

Some of the statutes eschewed the reliable monetary test and in-

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36. The development of the law of equal protection in the United States provides one example. See generally *Equal Protection of the Laws*, in *SELECTED ESSAYS ON CONSTITUTIONAL LAW, 1938-1962*, at 789-968 (E. Barrett, Jr. & N. Nathanson eds. 1963).

37. Cf. text at notes 144-48 *infra*.

38. 13 Rich. 2, c. 13, § 1 (1389).

39. 1 & 2 Will. 4, c. 32, § 6 (1831).

40. 13 Rich. 2, c. 13, § 1 (1389).

41. 22 & 23 Car. 2, c. 25, § 3 (1670). See also 1 Jac. 1, c. 27, § 1 (1604). This increase, however, may simply have been an adjustment for inflation. J. PAUL, *GAME LAWS* appendix (3d ed. 1780).

42. 33 Hen. 8, c. 6, § 1 (1541).

43. 4 BLACKSTONE, *supra* note 22, at \*175. This observation was countered by the remarkable rejoinder that "the law surely would be more oppressive, if it required a greater qualification for a vote for a representative in parliament, than for the amusement of a sportsman." E. CHRISTIAN, *supra* note 15, at 125.

stead invoked terms of art. One limited the use of hailshot (an early form of shotgun) to those of the "degree of a Lord of the Parliament."<sup>44</sup> Another reserved the power to appoint gamekeepers to "lords of manors, or other royalties, not under the degree of an esquire . . . ."<sup>45</sup> While "the degree of an esquire" clearly did not comprehend every base scrivener, the term was imprecise. One commentator explained that the title belonged to "whomever either by blood, or place in the state, or other eminency, we conceive some higher attribute should be given than that sole title of gentleman. . . ."<sup>46</sup> Other views had it that the title belonged to those "whose fortune can enable them to maintain an army of gamekeepers, and whose nerves are sufficiently firm to risk the constant exposure of human life in the protection of a mere amusement."<sup>47</sup>

Precedent was ample for the gentry's appropriation of the right to hunt,<sup>48</sup> but perhaps excepting the Olympian policy regarding ambrosia, no ruling class had ever sought to corner a particular food. Culinary monopoly, however, was a salient goal of the British game laws in their mature form. It had been perceived only gradually as a worthy end for legislation. The various restrictions on hunting had only barred the lower classes from themselves running the animals to earth; they might still buy the meat on the open market. But subsequently, the sale of game was restricted in such a way as to disclose a vigorous intent to preserve game from contact with a base gullet.

At first the law restricted the purchase of game only if it were then held for resale; one might patronize a poacher if one intended to eat the meat oneself.<sup>49</sup> As with today's de facto law of prostitution, the sale was illegal but the purchase was not. This exception, however, allowed both the qualified and the unqualified to eat game, and that was inconsistent with the socially discriminatory policy behind the restrictions. So, while purchase for consumption remained legal, a statutory presumption was established that any unqualified person who possessed game held it for the purpose of resale.<sup>50</sup> This

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44. 6 & 7 W. & M., c. 13, § 3 (1694).

45. 22 & 23 Car. 2, c. 25, § 2 (1670).

46. J. PAUL, *supra* note 41, appendix.

47. BEAUTIES OF THE GAME LAWS 13-14 (1823) (anonymous pamphlet in the Bodleian Law Library, Oxford, England). Gamekeepers arguably were entitled to kill poachers who fled upon being detected. E. CHRISTIAN, *supra* note 15, at 144.

48. See 2 BLACKSTONE, *supra* note 22, at \*413-14.

49. 32 Hen. 8, c. 8, § 8 (1540), established the first such prohibition against the sale of pheasants.

50. 5 Anne, c. 14, § 2 (1706); 9 Anne, c. 25, § 2 (1710).

presumption finally sealed inviolate the gastronomic preserve of the upper classes.

With these restrictions protecting the status of game, it attained an "artificial pre-eminence"<sup>51</sup> and became the delicacy without which no feast would be complete.<sup>52</sup> During the heyday of the restrictions on sale, for example, the chief official of London celebrated Lord Mayor's Day with a banquet including seventy dishes of partridge, pheasant, and hare, all animals that legally could not be sold.<sup>53</sup>

Several rationales might be advanced for this unusual concern with who might taste certain meat, explanations that need not rely on the alchemical eighteenth century critique that "[o]ne would almost be tempted to think, from the peculiar attention the legislature hath in all ages paid to the preservation of the Game, that there was some sovereign medicinal quality in the blood and juices of these animals . . . ."<sup>54</sup> One possible explanation is that, during the earliest periods of regulation, wildlife was a considerable part of the productivity of land. This was particularly true when many large tracts had not been subdued to domestic agriculture. Wildlife had in fact been allocated to various feudal vassals, Blackstone asserted, in order to shore-up their power and allegiance.<sup>55</sup> This theory is not wholly satisfactory, however, because in subsequent years wildlife became economically less significant and qualification statutes continued to be enacted and enforced.

Qualification statutes might have been justified on the theory that they gave the landowner rights to what, after all, was supported by his land.<sup>56</sup> This rationale, however, fails to account for two as-

51. C. LONG, *supra* note 15, at 43.

52. As one commentator observed, if the sale of widgeon or teal were against the law, "[i]t would be viewed in the light of a forbidden fruit, and every opulent householder would aim at the possession of so fashionable a delicacy." *Id.*

53. A report of this incredible bill of fare observed that the law against the sale of game "had introduced a graduated system of temptation, from the Lord Mayor to the labourer." *Id.* at 42. Another author observed:

Under the law it might happen, that the lord mayor might be required to punish the purveyor of the civic feasts; nay, more, *horresco referens*, the Mansion-house might be subjected to a search, and a fine imposed on the chief magistrate of the city of London (if an unqualified person) for the splendid fare produced for the entertainment of the princes, and nobles, and statesman, and citizens of the land.

BEAUTIES OF THE GAME LAWS, *supra* note 47, at 12.

54. S. PURLEWENT, *supra* note 16, at x.

55. 2 BLACKSTONE, *supra* note 22, at \*413.

56. One nineteenth century commentator stated:

As to the defence of the landowner against qualified persons, we often read notices to the following effect: "Qualified persons are requested not to trespass on these woods, &c.: all trespassers will be prosecuted:" that is to say, a man purchases lands, he incurs great expense in turning out, feeding, and watching his

pects of the qualification scheme. Under typical statutes, owners of properties worth less than the statutory amount who were equally subject to wildlife depredations were not qualified to kill the damaging animals.<sup>57</sup> On the other hand, some statutes qualified the socially eminent without regard to whether they owned any land at all.<sup>58</sup>

A fourteenth-century eleemosynary rationale postulated that the system was conceived not to favor the powerful, but to improve the weak: While hunting might concededly be an amusing diversion, the pastime could ensnare those without sufficient responsibility to see where first duties lay. Legislators had in fact observed that "divers artificers, labourers, and servants, and grooms" had indulged in hunting even "on the holydays, when good Christian people be at church, hearing divine service . . . ."<sup>59</sup> The qualification statutes were therefore designed to help these misdirected souls. Furthermore, the denial of game to certain groups might be the last spur necessary to encourage them to surmount their lethargy and apply themselves with the degree of effort needed to join the ranks of the elite. As a Member of Parliament from Oxford explained, the qualification statutes actually were "inducements to the acquisition of *learning* and *honour*, and to the perserverance necessary to attain the stations which conferred them . . . . [Thus, they were] cheap incentives to exertion."<sup>60</sup>

Finally, a proto-Marxist approach examined the consequences to productivity if game were available to all. Labor would then fall to short supply, for "it will scarcely be contended that the labourer would prefer continued toil and low wages to occasional indolence and high profits. If the peace or safety of the country was really

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game, and he humbly requests persons, who are protected by superior property or rank from summary process, not to rob him of that which he has acquired. Should such trespasser be detected, the proprietor has the enviable power of comparing purses with him, by action at law in our courts, which, like the London Tavern, always open their doors to those who are able to pay.

BEAUTIES OF THE GAME LAWS, *supra* note 47, at 14.

57. [A] man may be possessed of thousands of acres of inferior land, abounding in every species of game, the very *beau ideal* of the sportsman, but unless the value amount to one hundred pounds per annum, the unfortunate proprietor is totally deprived of the enjoyment of that right of property; but the owner of a small fraction of an acre, in some confined alley in the city, where not a head of game has been bred in the memory of man, shall be qualified to sport wherever permission is given him.

*Id.* at 8.

58. *E.g.*, 1 Jac. 1, c. 27, § 3 (1604), included among the qualified those who were "the son or sons of any knight, or of any baron of parliament, or of some person of higher degree, or the son and heir apparent of any esquire . . . ."

59. 13 Rich. 2, c. 13 (1389).

60. *Quoted in* C. LONG, *supra* note 15, at 62-63 (emphasis original).

to be determined in this way, it would be better at once to accelerate the return to domestic habits by an extirpation edict, as in the case of the wolves . . . ."<sup>61</sup>

Whatever the reasons, the fact remains that game became exclusive provender for the rich. As "E. Thomas, Astronomer" waggishly counseled the masses:

Therefore of Partridge, Pheasant, Hare,  
You must not eat—of this beware!  
For Gentlemen—who're men of might  
Have just laid down what they think right;  
But right or wrong—'tis all the same,  
They will, and must have all the Game.<sup>62</sup>

#### D. *Wildlife Rights*

The vindication of the supposed desires of wild animals themselves is the fourth purpose of wildlife law. That the law can recognize nonhuman rights has recently been reemphasized (or, perhaps more accurately, rediscovered) in the United States, notably by Professor Stone<sup>63</sup> and Justice Douglas.<sup>64</sup>

Early Englishmen perceived the transition from nonhuman to human as a continuum rather than a sharp break;<sup>65</sup> the view that animals themselves might possess rights was therefore not preposterous to them.<sup>66</sup> Indeed, protection of the rights of animals was consistent with the widespread practice of holding them for their wrongs<sup>67</sup> and required only that a champion be found to assert their interests. That spokesman was the king. The king's concern for wildlife was voiced through an entire jurisdiction, separate from the common law and complete in itself, that was effective until about the sixteenth century: the Forest Jurisdiction.<sup>68</sup> Within this area,

61. *Id.* at 31. See 22 & 23 Car. 2, c. 25, § 1 (1670).

62. E. THOMAS, *supra* note 24, at 4.

63. See C. STONE, *supra* note 3.

64. See *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting).

65. See E. TILLYARD, *THE ELIZABETHAN WORLD PICTURE* 23-33 (1943).

66. Manwood, for example, observed that hunting was prohibited on Sunday because it was "a Day appointed for the Rest both of Man and beasts . . . ." J. MANWOOD, *supra* note 5, at 297.

67. See E. EVANS, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS* (1906). Among the instances of prosecutions or excommunications of animals, Evans cites the following: a dog in Scotland in the first half of the sixteenth century; a dog in Chichester, England in 1771; a cock in Leeds, England in the nineteenth century; and, in New Haven, Connecticut, only 39 years before the chartering of Yale, a cow, two heifers, three sheep, and two sows. *Id.* at 325-34.

68. Manwood's treatise, first published "about the later End of the Reign of Queen Elizabeth," is a lament for the decay of the jurisdiction. J. MANWOOD, *supra* note 5, preface.

special doctrines protected wildlife, special officials policed those regulations,<sup>69</sup> and special courts balanced the rights of men against the rights of wildlife.<sup>70</sup>

One might contend that the system was conceived not to vindicate wildlife rights, but to foster sport for the king and those to whom he had granted his authority. The brute wards of the jurisdiction did apparently include only those species that provided good hunting.<sup>71</sup> On the other hand, John Manwood, a scholar and judge during the sixteenth century who attempted to revive the system from desuetude, surmised that hunting sport was not the only end the system sought to achieve. Rather, he asserted, the king found "[d]elight and [p]leasure" from those animals that might "rest and abide" within the forest, content in his "safe [p]rotection."<sup>72</sup>

Whatever its basic purpose, the jurisdiction provides a striking example of a sophisticated legal system constructed upon the premise that animals themselves hold rights and that those rights should be vindicated by officials of the state. For example, while tort doctrine outside the forest dealt with wrongs against men, that inside the forest was primarily concerned with wrongs against wildlife. These wrongs were categorized according to the immediacy of their effect on wildlife. "Nocumentum speciale" prohibited those actions most directly injuring wildlife, such as the unauthorized release of hunting dogs within the forest.<sup>73</sup> "Nocumentum commune," in contrast, was an act or omission that harmed men within the forest, such as the improper construction of a dam or the failure to keep a bridge in good repair.<sup>74</sup> But part of the reason for the prohibition of "nocumentum commune," Manwood explained, was the ultimate effect of such wrongs on wildlife.<sup>75</sup> An unrepaired bridge would cause people to detour from pathways and thereby disrupt wildlife

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69. These special officials included stewards, verderors, foresters, regarders, and agistors. *Id.* at 147.

70. These special courts were known as courts of attachments, swainmote, and justice seats. *Id.*

71. *See id.* at 144:

But a Forest is not a privileged Place for all manner of wild Beasts or Fowls, but only for Beasts of Forest, Chase, and Warren, and no other, that is, for the Hart, the Hind, and the Hare which are Beasts of the Forest; the Buck, the Doe, the Fox, which are Beasts of the Chase; the Hare, the Cony, the Pheasant, and the Partridge, which are Beasts and Fowls of Warren, and no other.

72. Manwood described the jurisdiction as a "territory of woody grounds and fruitful pastures, privileged for wild beasts and fowls of forest, chase and warren, to rest and abide there in the safe protection of the King for his delight and pleasure." *Id.* at 143.

73. *Id.* at 208.

74. *Id.* at 207.

75. *Id.*

habitat; improper damming might drown a meadow not only pastured by domestic stock, but also valued for wildlife forage.

Plants were divided into categories according to their importance to forest animals. The doctrine of "special vert" gave particular protection to the mast- and fruit-bearing plants on which deer fed.<sup>76</sup> But appreciation was also manifest for the role of vegetation as shelter for wildlife from predation and weather; "nocumentum generale" restricted the cutting of any plants that grew in sufficient density to provide cover.<sup>77</sup>

That wildlife was fundamental to the jurisdiction is also indicated by Manwood's assertion that when wildlife did not in fact live within an area of the forest, the forest dwellers might with impunity violate the prohibitions of its law.<sup>78</sup>

### E. *The Interrelationship of the Goals*

Because the goals of wildlife law are not invariably consistent with one another, their interrelationships are significant. For example, while it may be an exercise in anthropomorphism to believe that animals want to live, they certainly dislike pain. Rules that authorize hunting therefore may contravene the preferences of the hunted animals themselves.<sup>79</sup> Hunting laws, however, may be conducive to the health of the hunted species as a whole. Reproductive patterns have evolved to compensate for predation, and where man eliminates natural predators, as by the extermination of wolves in early Britain,<sup>80</sup> the prey species may suffer a population irruption. Its food supply may then be destroyed by overconsumption, which in turn may lead to starvation, disease, and death for much of the population.<sup>81</sup> In such cases, a sustained-yield policy may paradoxically support a larger number of animals than would survive were all hunting prohibited.<sup>82</sup> Moreover, to the extent that wildlife is valued as

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76. *Id.* at 356.

77. *Id.* at 208.

78. *Id.* at 145.

79. The forest law did in fact reward certain animals that had distinguished themselves in the chase by granting them protection from future hunting. The "Hart-Royal proclaimed" was a six-year-old buck that won protection by eluding the king. *Id.* at 179-80.

80. *See id.* at 161.

81. *See* E. KORMONDY, *CONCEPTS OF ECOLOGY* 97 (1969); Hairston, Smith & Slobodkin, *Community Structure, Population Control, and Competition in Population and Community Ecology*, in *READINGS IN POPULATION AND COMMUNITY ECOLOGY* 382 (W. Hazen ed. 1964). *See also* P. ERRINGTON, *supra* note 10, at 204-07.

82. *See* I. GABRIELSON, *WILDLIFE CONSERVATION 191-92* (1959) (discussing the dispute over whether predation produces beneficial or deleterious consequences). *See also* *Hunt v. United States*, 278 U.S. 96 (1928) (discussing the permissibility of ex-

a source of hunting pleasure, hunting helps to ensure that wildlife habitat is preserved from inconsistent economic exploitation. The Forest Jurisdiction well demonstrates the benefits that wildlife may derive from an interest in hunting.

Policies aimed at a sustained yield of wildlife may also seem inconsistent with sporting rules that restrict the use of effective weapons. These rules, which increase the costs of harvesting wildlife, appear to conflict with the economic model that ranching provides: If "fair play" is not at issue in rounding up cattle, it might be equally inappropriate in harvesting deer. Law enforcement problems, however, may make early British practices defensible as the only practicable method to have ensured a sustained yearly harvest. A limit on the number of animals a hunter may kill might appear to be a more economically efficient way to assure that no species is reduced below the number that can provide a steady yield, but the difficulty of administering such limits might have made them unenforceable. When a large part of Britain was rustic or wild, the police problems involved in establishing that a hunter had exceeded his limit would have been far greater than those involved in establishing that he was hunting at an improper time or with a prohibited apparatus.

The qualification statutes also appear to have been an effective, although discriminatory, method to protect wildlife against excessive pressure. But as large numbers of people came to abhor the scheme, the difficulties of enforcement increased. Those who opposed the qualification statutes were so numerous by the eighteenth century that illegal hunting may have reduced the wildlife population below that which a more acceptable policy would have preserved.<sup>83</sup>

Resistance to the law was not confined to the unqualified. Qualified landowners might not only ignore poaching, but also perpetrate subterfuges to help the unqualified circumvent the law. Many of the unqualified were fraudulently appointed "gamekeepers" and as such authorized to hunt. In 1710, a limitation was imposed that a manor might have only one gamekeeper,<sup>84</sup> but despite this restriction the practice continued. Six years later the lawmakers

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terminating deer in a preserve area because of grazing damage caused by a deer population-explosion).

83. As a committee on the game laws observed, because trade in game was illegal "it is impossible to regulate the supply . . . Large quantities of game are therefore sometimes wasted, and even thrown away." *PARL. PAPERS (Commons), 1823 (260), [Reports] vol. 4, p. 110 (Report from the Select Committee on the Laws Relating to Game)*. Indeed, a poulterer estimated that one third of the game sent to London was not consumed. *Id.* at 118.

84. 9 Anne, c. 25, § 1 (1710).



were compelled to observe that "under colour and pretence" of appointing gamekeepers:

[I]t is become usual and frequent in several parts of the kingdom, for lords and ladies of manors to grant powers and deputations to the farmers, tenants, and occupiers of the lands and estates lying within the precincts of their respective manors, to be game-keepers . . . which practice is a very great abuse of the powers intended . . . to be granted, and manifestly tends very much to the destruction of the game of this kingdom . . . .<sup>85</sup>

Landowners not rich enough to be qualified were even less receptive to the laws. As a parliamentary committee considering the qualification statutes observed:

[T]hose possessors of land who fall within the statutable disqualifications feel little or no interest in the preservation of Game; . . . they are less active in repressing the baneful practice of poaching, than if they remained entitled to kill and enjoy the Game found upon their own lands. Nor is it unnatural to suppose, that the injury done to the crops in those situations where Game is superabundant, may induce the possessors of land, thus circumstanced, rather to encourage than to suppress illegal modes of destroying it.<sup>86</sup>

## II. METHODS

Whatever the purposes of wildlife regulations, the methods employed have been divided by ecologists into three categories: restrictions on the take, habitat improvement, and artificial stocking.<sup>87</sup> The former two are germane to British law prior to the American Revolution.<sup>88</sup>

### A. *Take Limitations*

The size of the take was restricted in Britain by four legislative techniques: (1) only limited numbers might hunt (2) during restricted periods (3) with controlled apparatus (4) for animals whose value had been reduced.

The qualification statutes were the principal means used in British law to restrict the number of hunters. They were defended, even during the waning years of the system, as a method to preserve game. As one apologist asserted, "[A]dmit a general right to take wild animals, and one of two things must follow—Game would be utterly destroyed or it would not."<sup>89</sup> Although the latter prospect

85. 3 Geo. 1, c. 11, § 1 (1716).

86. Quoted in E. CHRISTIAN, *supra* note 15, at 74-75.

87. See E. ODUM & H. ODUM, *FUNDAMENTALS OF ECOLOGY* 433 (2d ed. 1959).

88. While stocking was extensively practiced in game parks, the technique was not closely regulated by law.

89. C. LONG, *supra* note 15, at 31.

may have been the more repugnant since it would have freed the rustic proletariat of the need to labor for their employers' benefit, the former was also to be feared, and the qualification statutes were equally intended to forestall this danger.

The second legislative technique—limiting the periods for wildlife taking—may in turn have secured several goals. First, it may have reduced the take to an extent that could not be offset by increased hunting during the “open period.” British prohibition of hunting on those days when the legislators commended church attendance<sup>90</sup> prevented many hunters from simply shifting their take to another time. Since virtually all holidays had some religious significance, only those without ordinary work (typically the rich and the poor) would have the leisure to hunt at other times.

Second, this technique was apparently used to restrict taking during those periods in the life cycle of a species when taking would be unproductive. Periods in a species' life cycle might be distinguished with respect to the animal's reproductive behavior, ability to evade capture, and value as a commodity. Early British law developed several doctrines to protect game during vulnerable reproductive periods. Deer fawning season was the occasion for “fence-month” within the Forest Jurisdiction.<sup>91</sup> Forest officials annually convened before this time to devise strategies to make law enforcement more effective, thereby to preserve the animals from any disturbance.<sup>92</sup> Other laws also gave particular attention to breeding animals: gathering the eggs of birds was prohibited,<sup>93</sup> and, in the eighteenth century, salmon were protected during their spawning runs so that they might “become very plentiful and common . . . as they were formerly . . .”<sup>94</sup>

Physical changes in animals' defensive abilities were also the occasion for British regulations. Birds were protected when “the said old fowl be moulted, and not replenished with feathers to fly, nor the young fowl fully feathered perfectly to fly . . .”<sup>95</sup> A subsequent moulting bird statute further exemplifies the technique of limiting the take to those periods when the animals would be most valuable. The season was justified on the basis that the flesh of moult-

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90. 13 Geo. 3, c. 80, § 6 (1773).

91. J. MANWOOD, *supra* note 5, at 134.

92. *Id.* at 136-37.

93. *See, e.g.*, 25 Hen. 8, c. 11, § 5 (1533); 2 Jac. 1, c. 27, § 27 (1604).

94. 9 Anne, c. 26, § 2 (1710).

95. 25 Hen. 8, c. 11, § 1 (1533).

ing birds had been found "unsavory and unwholesome, to the prejudice of those that buy them . . . ."96 Harvesting animals at juvenile stages was also condemned as wasteful. A seventeenth-century law set a minimum size for lobsters.<sup>97</sup> Fish fry required express protection because "in divers places they feed swine and dogs with the fry and spawn of fish . . . ."98

A sixteenth-century law limiting hunting in fields while grain was in ear<sup>99</sup> typifies the last purpose of restrictive hunting periods—minimizing interference by hunters with other productive activities.

The third legislative method of limiting take—controlling apparatus—was embodied in the prohibition of various hunting methods found to be wasteful, excessively successful, or "unsporting." Minimum net sizes protected fish fry,<sup>100</sup> jacklighting was restricted,<sup>101</sup> and hunters of herons were limited to hawking or the long bow.<sup>102</sup> The qualification statutes often prohibited not only the taking of game, but also the possession of hunting apparatus.<sup>103</sup>

The final legislative technique—decreasing the value of an animal—is an effective means of reducing the harvest. Wildlife is typically taken in areas that pose difficulties to law enforcement. By changing the operative fact for the offense from capture to sale, legislators can shift violations of the game laws to a public and social context. Although this technique was recognized by early British lawmakers,<sup>104</sup> it was not found sufficiently politic to employ rigorously. Sale and purchase by the unqualified was restricted,<sup>105</sup> but such was the "artificial pre-eminence of Game," "a forbidden

96. 9 Anne, c. 25, § 4 (1710). Deer hunting was restricted out of season "because [deer] are not able to run, and are worth nothing when caught." J. MANWOOD, *supra* note 5, at 299.

97. 11 Will. 3, c. 24, § 12 (1699).

98. 1 Eliz. 1, c. 17, § 1 (1558).

99. 23 Eliz. 1, c. 10, § 4 (1581). This statute employs the interesting technique of keying a prohibition not to a calendar period in the hope that the event will occur during that period, but rather to the event itself.

100. 1 Eliz. 1, c. 17, § 3 (1558). A statute also required that eel pots be covered in order to protect mature salmon. 4 Anne, c. 21, § 5 (1705).

101. 23 Eliz. 1, c. 10, § 6 (1581). *See* text at notes 33-35 *supra*.

102. 19 Hen. 7, c. 11, § 9 (1503).

103. *See, e.g.*, 13 Rich. 2, c. 3 (1389); 33 Hen. 8, c. 6, § 1 (1541). *See also* 2 & 3 Edw. 6, c. 14 (1548).

104. *See, e.g.*, 32 Hen. 8, c. 8 (1540); 9 Anne, c. 25, § 1 (1710). In addition, when the whipping and hard labor mandated by 4 & 5 W. & M., c. 23, § 3 (1692), were found insufficient to deter the burning of plants critical to the well-being of grouse, the legislature prohibited the purchase of the ashes of those plants from unlicensed sellers. 5 Anne, c. 14, § 5 (1706).

105. *See, e.g.*, 32 Hen. 8, c. 8 (1540); 2 Jac. 1, c. 27, § 4 (1604); 9 Anne, c. 25, § 2 (1710).

fruit,"<sup>106</sup> that lawmakers would not prohibit the qualified from purchasing the delicacy, even from poachers.<sup>107</sup> Indeed, the ruling classes supported lawbreakers to such degree that a professor of law lamented that "children and domestics all are conscious that the table of the master of the house is furnished with the spoils of iniquity."<sup>108</sup>

### B. *Habitat Development*

Regulating the takers of wildlife is an obvious method of controlling animal numbers. But that technique is not the most effective way to deal with diminishing populations. As two distinguished ecologists have asserted: "When game begins to get scarce, people generally think and act in the order [of (1) preservation of breeding stock by means of game laws restricting the harvest; (2) artificial stocking; and (3) habitat improvement], which is sometimes unfortunate, since the third item is often more important than the first two. If suitable habitat is lacking . . . protection or stocking is useless."<sup>109</sup>

British legislators at the earliest stage regarded the development of wildlife habitat as essential to wildlife preservation. While the Forest Jurisdiction differed from some present-day wildlife reserves in that the jurisdiction by design included private land holdings that were farmed and developed for other uses,<sup>110</sup> the forest law sought to harmonize these uses with the requirements of wildlife habitat. A landowner, for example, might develop his property, but he was required to retain adequate vegetation for wildlife forage and cover.<sup>111</sup> Moreover, all land within the forest was subject to an easement for the benefit of wildlife so that during the winter, when browse was scarce, forest officials might enter private land and cut down vegetation and take branches to feed wildlife.<sup>112</sup>

106. C. LONG, *supra* note 15, at 43.

107. E. CHRISTIAN, *supra* note 15, at 179. Commentators had made the suggestion that the best method to preserve game would be to make illegal the purchase as well as the sale. See S. PURLEWENT, *supra* note 16, at x-xi.

108. E. CHRISTIAN, *supra* note 15, at 298.

109. E. ODUM & H. ODUM, *supra* note 87, at 433. The Odums also stated: [O]ften the best way to "control" a particular organism, whether we wish to encourage or discourage it, is to modify the community, rather than to make a direct "attack" on the organism. For example, it has been demonstrated time and again that we have a better quail population by maintaining the particular biotic community in which the quail is most successful than by raising and releasing birds or manipulating any one set of limiting factors (such as predators, for example).

*Id.* at 246. See also P. MATTHIESSEN, *WILDLIFE IN AMERICA* 205 (1959).

110. J. MANWOOD, *supra* note 5, at 375.

111. *Id.* at 360, 381.

112. *Id.* at 164.

Livestock must be limited if wildlife is to thrive,<sup>113</sup> and special doctrines regulated ranching. The forest law restricted some commoners to the number of stock that could be fed on their own land during the winter.<sup>114</sup> A "commoner sans number," who by the common law could run stock without limit, by the forest law was required to preserve wildlife forage.<sup>115</sup> Shepherd practices were subject to a prohibition against "staff-herding." Herders were prohibited from driving their cattle from pasture to pasture within the forest because the shepherds' presence would deter deer from exercising their equal rights to these productive areas.<sup>116</sup>

Restrictions limited the possession of other animals that posed dangers to forest wildlife. A license was required to run sheep or goats because those stock "taint the pasture where they feed, that the beasts of the forest will not depasture there; so that they do, as it were, banish them from every place where they are."<sup>117</sup> Watchdogs were potentially even more damaging to wildlife, and Manwood described the draconian measure employed to forestall their aggressiveness:

Three claws of the fore-feet shall be cut off by the Skin: And accordingly the same is now used, by setting one of his Fore-feet upon a piece of Wood eight Inches thick, and a Foot square, and then setting a Chisel of two Inches broad upon the three Claws of his Fore-foot, to strike them off at one Blow; and this is the manner of expediting Mastiffs.<sup>118</sup>

Where there was insufficient forage for both game and stock, the grantee of the rights for domestic forage had to reduce his herd. Indeed, if wildlife were so to increase as to require all the forage, the stockman would be completely ousted.<sup>119</sup>

Because forest landowners suffered these burdens on their private lands, even without petition they were accorded the privilege

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113. REPORT OF THE 60TH CONVENTION OF THE INTERNATIONAL ASSOCIATION OF GAME, FISH, AND CONSERVATION COMMISSIONERS 35 (1970) (statement of Representative John Dingell).

114. J. MANWOOD, *supra* note 5, at 87.

115. *Id.* at 94-95.

116. *Id.* at 98.

117. *Id.* at 7.

118. *Id.* at 116. A commentator on American wildlife management has confirmed the significance of the domestic dog as a predator:

Probably more destructive in the aggregate than any of the foregoing animals [wolf, bobcat, coyote, fox, black bear, golden eagle, and mountain lion], unless it be the mountain lion, is the domestic dog. In settled regions this animal is the predator of prime importance, due to its universal presence and the persistence of its attacks. Once a dog acquires the deer-hunting habit, it must be dealt with summarily, for the habit is not otherwise easily discouraged.

1 R. TRIPPENSEE, WILDLIFE MANAGEMENT 210 (1948).

119. J. MANWOOD, *supra* note 5, at 237.

of commoning forest land.<sup>120</sup>

### III. THE LESSONS OF EARLY LAW

Three areas of current concern for those interested in wildlife are the destruction of wildlife habitat for economic development, the relationship between gun control and wildlife law, and the conflict between hunters and those interested in wildlife for other reasons. While early British law may not be binding precedent in these areas,<sup>121</sup> the system is a worthwhile counterpoise against which to balance current policies.

Although the Second Circuit has observed that cost "in our affluent society . . . is only one of several factors" to be considered in determining whether environmental values should be preserved,<sup>122</sup> economic crises repeatedly undercut policies that limit economic productivity. From the vantage point of early British law, with its willingness to protect wildlife habitat at the expense of power production,<sup>123</sup> lumbering,<sup>124</sup> and food resources,<sup>125</sup> recent restrictions can be viewed not as novel incursions into the "rights" of property owners, but rather as the continuing manifestations of regulations long a part of Anglo-American jurisprudence. Present resistance to the federal statute protecting eagles,<sup>126</sup> for example, appears improper in light of the ancient history of raptor preservation. Even in the fifteenth century, landowners were prohibited from disturbing various hawks regardless of "any hurt by them done . . ." Nor did the law countenance indirect measures to eliminate these valued birds: no landowner might "purposely drive them out of their coverts accustomed to breed in, to cause them to go to other coverts to breed . . ." All men were to "suffer them to pass at their liber-

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120. *Id.* at 99.

121. *See* *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829) (Story, J.): "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birth-right; but they brought with them and adopted only that portion which was applicable to their situation." An early Georgia case rejected the British forest and game laws as "not only penal to a feudal degree, but . . . productive of tyranny." *State v. Campbell*, 1 T.U.P. Charlt. 166, 168 (Ga. Super. Ct. 1808).

122. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 624 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

123. *See, e.g.*, 13 Edw. 1, c. 47 (1285); 13 Rich. 2, c. 19 (1389); 17 Rich. 2, c. 9 (1393).

124. *See* J. MANWOOD, *supra* note 5, at 374.

125. *See* text at notes 113-16 *supra*.

126. 16 U.S.C. § 668 (1970). *See* Harris, *Is the Golden Eagle a Murderer of Lambs or Just a Nice Bird?*, Wall St. J., Dec. 16, 1970, at 1, col. 4 (eastern ed.).

ties . . . ."<sup>127</sup> Similarly, one must weigh those American decisions that have held unconstitutional legislation restricting landowners' rights to kill damage-feasant wildlife<sup>128</sup> against the protection the Forest Jurisdiction afforded such animals.

But British wildlife law further shows that landowners subject to wildlife damage have at times been compensated for that cost. The Forest Jurisdiction granted subject landowners special rights of common in the forest.<sup>129</sup> This early policy might be considered, for example, in settling the persistent controversy regarding the historic federal policy permitting landowners in the western United States to pasture stock in adjoining public lands for a charge less than the fair market value of the grazing rights.<sup>130</sup> Where base properties are subject to depredations as wildlife move between federal and private land, one might defend landowner privileges within federal lands on the same basis that John Manwood rationalized those of the forest inhabitants: "[S]ince the deer have fed on their grounds, 'tis reasonable they should have common."<sup>131</sup>

The demise of the British qualification statutes provides an example of the difficulty of instituting and enforcing policies that are bitterly disputed by the landowners controlling wildlife habitat. Provision of compensation for wildlife burdens may help make restrictive laws more palatable. This theme has been emphasized by other commentators on wildlife policy. Professor Christian concluded from the history of wildlife law that, were the land occupier given some right to game, soon he would thoughtfully consider how he might support rather than destroy those animals upon his land.<sup>132</sup> Aldo Leopold, a prominent American conservationist, observed: "The only conceivable motive which might activate a sufficient number of non-shooting landholders [to manage for game] is the financial motive."<sup>133</sup> This thought finally has been transformed into policy in states such as Texas, where a game department official recently stated:

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127. 11 Hen. 7, c. 17, § 17 (1494).

128. *E.g.*, *State v. Rathbone*, 110 Mont. 225, 100 P.2d 86 (1949); *Cross v. State*, 370 P.2d 371 (Wyo. 1962).

129. J. MANWOOD, *supra* note 5, at 129. See text at note 120 *supra*.

130. See PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 117 (1970).

131. J. MANWOOD, *supra* note 5, at 129.

132. E. CHRISTIAN, *supra* note 15, at 304.

133. A. LEOPOLD, GAME MANAGEMENT 398 (1933). One of Leopold's five theorems of game management is that "[o]nly the landholder can practice game management cheaply." *Id.* at 395. See also 1 R. TRIPPENSEE, *supra* note 118, at 407.

[O]ur studies in Texas have shown that one adult white-tail can take up quite a bit of range room. Six of these old does eat as much as one 750-pound cow, five sheep or five goats. So it has been necessary for our Department to approach the ranger who is producing the game on some sort of a basis which he recognizes, and that basis of course, is the dollar bill.<sup>134</sup>

The lessons of the qualification statutes with regard to both the privilege to use weapons and the privilege to enjoy wildlife are somewhat more ambiguous. Blackstone's reprobation of the forest and game laws as owing "their immediate original to slavery"<sup>135</sup> provided an impelling spirit for American opposition to gun control. His fervor may have led him to an attitude of vigilant resistance even to apparently necessary regulation.<sup>136</sup> Indeed, an American editor of Blackstone observed in 1803 that "[a]n attentive perusal" of Blackstone's commentary establishes that the game laws

are among the powerful instruments of state-engineering, for the purpose of retaining the mass of the people in a state of the most abject subjection . . . so that the whole nation are completely disarmed, and left at the mercy of the government, under the pretext of preserving the breed of hares and partridges, for the exclusive use of the independent country gentlemen. In America we may reasonably hope that the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their liberty.<sup>137</sup>

Still, the British experience does not conclude the case against weapons control. The qualification statutes in essence functioned to arm a favored class as well as to disarm a potentially dissident one. The system divided society into two groups: a camp of armed beneficiaries of the established rule and a disarmed outer circle of those suspected to be dissidents.<sup>138</sup> Both existing and proposed weapons-control legislation in the United States respond to different considerations. Social forces rather than statutory design have arguably succeeded in dividing American society into separate armed and disarmed camps, though ironically the scheme may be the inverse of that the British lawmakers sought to create. Proponents of gun control now seek not to further that division, but rather to achieve some parity within society through generally applicable restrictions.

American law has also never sought to segregate wildlife for the taste of a privileged class of hunters. Both the inclination of

134. REPORT OF THE 56TH CONVENTION OF THE INTERNATIONAL ASSOCIATION OF GAME, FISH AND CONSERVATION COMMISSIONERS 146 (1966) (comments of E.A. Walker).

135. 2 BLACKSTONE, *supra* note 22, at \*412.

136. *See id.* at \*413.

137. 3 BLACKSTONE'S COMMENTARIES \*414 n.3 (St. George Tucker ed. 1803).

138. *See, e.g.*, 33 Hen. 8, c. 6, §§ 1-3 (1541); 2 & 3 Edw. 6, c. 14 (1548).



the settlers (who included men exiled from Britain for poaching deer<sup>139</sup>) and the geography of the New World ensured the rejection of the qualification scheme. As one court asked rhetorically, how could such a scheme "apply to a country which was but one extended forest, in which the liberty of killing a deer, or cutting down a tree, was as unrestrained as the natural rights of the deer to rove, or the tree to grow: and where was the aristocracy whose privileges were to be secured?"<sup>140</sup> Indeed, without restrictive laws, the "artificial pre-eminence of Game"<sup>141</sup> was so lacking from the American taste that it became necessary to compel sportsmen to retrieve some quarry rather than leave it to rot where it fell.<sup>142</sup>

However, contention about whether the law should protect the taste of a single group has not disappeared; it has simply changed form. The dispute over whether men should be allowed to kill other animals for pleasure threatens to produce a new qualification test: Each side includes those as eager to have their views alone prevail as were the sporting gentry intent to arrogate to themselves the sole right to game.<sup>143</sup>

Both hunters and protectors have affected the present government policies in the United States. Hunters have kept ninety percent of federal public lands open to their sport.<sup>144</sup> And their voices have had inordinate weight within state wildlife departments because those agencies have been funded through revenues derived from hunting and fishing.<sup>145</sup> On the other hand, those who condemn

139. Seven years exile in America was the penalty for breaking into an enclosure to take deer. 5 Geo. 1, c. 28, § 1 (1719). See also 10 Geo. 2, c. 32, § 7 (1737).

140. *State v. Campbell*, 1 T.U.P. Charlt. 166, 166-67 (Ga. Super. 1808).

141. C. LONG, *supra* note 15, at 43.

142. See, e.g., WYO. STAT. ANN. § 23.1-77(a) (Supp. 1975) ("No person shall take and leave, abandon or allow any game bird, game fish, or game animal except trophy game animal, or edible portion, to intentionally or needlessly go to waste").

143. This controversy has recently surfaced in the dispute generated by the television special *The Guns of Autumn* and its sequel *Echoes of the Guns of Autumn*. See Brown, *CBS Hunting Show Loses Ads After Gun Club Calls*, N.Y. Times, Sept. 6, 1975, at 1, col. 2 (late city ed.); O'Connor, "The Guns of Autumn" Hunted the Hunter, N.Y. Times, Sept. 14, 1975, § 2, at 25, col. 1 (late city ed.); O'Connor, *T.V.: "Guns of Autumn" Draws a Bead on Hunting*, N.Y. Times, Sept. 5, 1975, at 59, col. 1 (late city ed.).

144. COLORADO STATE UNIVERSITY, DEPARTMENT OF FISHERY AND WILDLIFE BIOLOGY, *FISH AND WILDLIFE RESOURCES ON THE PUBLIC LANDS 148* (1969) [hereinafter *COLORADO STATE UNIVERSITY REPORT*].

145. See *Hearings on S. 2951, S. 3212 Before the Senate Comm. on Commerce*, 90th Cong., 2d Sess., pt. 1, at 83 (1968) (statement of Dr. Alfred Etter):

[F]ew game and fish agencies are making a determined effort to obtain broader public support. Hunting and fishing interests want to preserve the special position they acquire through payment of the lion's share of the costs through license fees. They are also afraid that if the entire public contributed to the support of wildlife activities the hunter's voice would often be drowned out by the percentage of the population that does not hunt.

hunting have secured both state and federal protection for species that only recently were not only hunted, but were subject to bounties.<sup>146</sup> Protectors have also succeeded in excluding hunting from many national parks and wildlife reserves.<sup>147</sup> Future legislative development should consciously balance the interests of these two groups rather than accede to the demands of either.

Moreover, the extremists of both sides might reassess their positions. So malodorous a precedent are the qualification laws that those who would dedicate wildlife to a single interest ought to take stock of the current of history to which they belong. They should consider whether the relationship between humans and animals merits more concern than relationships between people. The conflict between hunters and protectors benefits neither because it dissipates resources needed by both groups to marshal against other historic dangers. Destruction of wildlife habitat threatens the interests of both far more than do their internecine disputes.<sup>148</sup> To meet this threat of irreversible harm to wildlife, each group needs the other's support.

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L. Glasgow, former Assistant Secretary of the Interior for Fish, Wildlife, and Parks, has stated:

The emphasis in the States has been on the bird, animal or fish which the license buyer can kill and take home. And you [state wildlife officials] have most hunters and fishermen in your corner. But you are losing the great majority who neither hunt nor fish. They are anything but a silent majority. You had better do more to enlist them in your cause.

(And before the Chair entertains a dozen requests from the floor, I want to hurry to add that I remember where money comes from in States for land purchase, research and management. And I have not forgotten for a minute whose payday is made possible through purchase of hunting and fishing licenses.

...)

REPORT OF THE 60TH CONVENTION OF THE INTERNATIONAL ASSOCIATION OF GAME, FISH AND CONSERVATION COMMISSIONERS 31-32 (1970).

146. According to the U.S. Bureau of Sport Fisheries and Wildlife, the following threatened predators among others have received various forms of protection: northern rocky mountain wolf (protected in Yellowstone and Glacier National Parks); eastern timber wolf (having declined because of hunting and trapping pressure for bounties, this species is now protected in Michigan, and bounties have been reduced to only a localized basis in Minnesota); grizzly bear (complete protection in Washington, Colorado, and Idaho, as well as federal protection in national parks); and Florida panther (protected by law in Florida since 1966). U.S. BUREAU OF SPORT FISHERIES AND WILDLIFE, DEPT. OF THE INTERIOR, THREATENED WILDLIFE IN THE UNITED STATES 207-74 (1973).

147. See PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 130, at 164; COLORADO STATE UNIVERSITY REPORT, *supra* note 144, at 39-41.

148. See Comment, *Vanishing Wildlife and Federal Protective Efforts*, 1 *ECOLOGICAL L.Q.* 520, 528-29 (1971):

In addition to his attempts to capture or kill wildlife, man also threatens species when his actions directly or indirectly alter the natural environment in which animals live. Such habitat alteration is usually even more destructive than [direct efforts to kill or capture wildlife] because in addition to being almost impossible to restore affected areas, all animal forms within the ecosystem are affected. Ecosystem alteration is, in fact, the principal cause of the loss of species.

The Forest Jurisdiction represents a more sophisticated compromise of economic interests with wildlife production than any legal system since adopted. The king's policy flowed from both his fervor as a hunter and his belief that he was responsible toward more than just his human subjects. Economic threats to wildlife can be surmounted by hunters and protectors only if they can join together in a comparable unity of purpose.