

# GOOD BADGER, BAD BADGER: THE IMPACT OF PERSPECTIVE ON WILDLIFE LAW AND POLICY

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## I. INTRODUCTION

The United Kingdom is considering embarking on an unprecedented revision of its wildlife laws. The Law Commission of England and Wales<sup>1</sup> is examining how it might update the pastiche of governmental policies, statutory measures, and caselaw governing wildlife which dates to pre-Victorian times. The wildlife consultation provides an extraordinary opportunity not only to rationalize and update the existing patchwork of measures affecting wildlife in England and Wales, but also to establish a more coherent and transparent framework with which to address wildlife issues for many years to come and to also serve as a model to other common law jurisdictions.

The Law Commission's Consultation Paper on Wildlife<sup>2</sup> describes a project that is simultaneously very ambitious, and at the same time quite circumscribed by the practicalities of the task. Thus, there is an inherent tension between whether the project is aimed at merely codifying the existing status quo, or whether it could more broadly provide the basis for a new approach to dealing with wildlife related issues that reflects the most recent developments in the field and those that might reasonably be anticipated to occur in the near future. That is not to suggest that the focus of this wildlife reform effort should necessarily be aimed at changing existing policies and practices (except where that might already be required by deficiencies in existing law), and indeed the Law Commission's remit for this project is that

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<sup>1</sup> The Law Commission of England and Wales is an independent governmental body, established (along with a similar separate Law Commission for Scotland) by the Law Commissions Act 1965. Its function is to make recommendations to Parliament regarding the systematic development, reform, and codification of the law; the elimination of anomalies; the repeal of obsolete and unnecessary enactments; and to generally promote the simplification and modernization of the law. *See* Law Commissions Act, 1965, c. 22 (Eng.).

<sup>2</sup> *Consultation Paper No. 206: Wildlife Law*, Law Commission of England and Wales (2012), available at [http://lawcommission.justice.gov.uk/docs/LCCP206\\_Wildlife\\_law\\_consultation\\_paper\\_for\\_web.pdf](http://lawcommission.justice.gov.uk/docs/LCCP206_Wildlife_law_consultation_paper_for_web.pdf) [hereinafter "CP No. 206"].

it should not do so. However, that does not preclude giving thought to providing policy makers with the appropriate tools to deal with modern issues which may also be useful when circumstances make policy changes appropriate. In other words, at the outset, the question occurs as to whether this reform effort is primarily a backward-looking purely technical codification exercise, or one that also endeavors to anticipate the future needs of policy makers and regulators?

Further complicating this effort is the wide range of perspectives regarding how we should relate to wildlife and the natural environment in the 21<sup>st</sup> century. While there have always been divergent views on how humans relate to the natural world, especially among those advocating particular interests, continued urbanization over the last half century means that the vast majority of the population has lost much of its connection to the wild. As a result, the public perspective on what policies and legal measures are appropriate and deserving of support also changed, and the debates over wildlife issues are now increasingly framed by popular stereotypes and images rather than by direct sustained experience with wildlife and the natural world.

As New York Governor Mario Cuomo noted in a speech to wildlife officials meeting in the Adirondack Mountains, this shift affects advocates as well as the public.

From the beginning, hunters, fishers, and trappers have played a key role in preserving [wild places such as] the Adirondack Park, and they have been leaders in . . . efforts to clean up our air and water, to protect wetlands, and to restore and maintain healthy populations of fish and wildlife. Long before ecology and environment became part of our daily vocabulary, sportsmen and women were in touch with the workings of nature. They realize that if wildlife and the landscapes that support it were not properly managed and protected, not only would wildlife population suffer, the larger systems that are the foundation for all life would be irreparably damaged.

Wildlife conservation groups and environmental groups have been our natural allies in efforts to protect our environment . . . . We have had a productive coalition, but recently we have seen an expanding fault line between traditional conservation groups and newer environmental organizations, particularly at the grassroots level.

This rift has many causes. The conservation community has roots in rural, agricultural America. The environmental community—born in the late 60s and early 70s—is largely an urban movement. The conservation community learned about the out-of-doors out in the woods. In many cases, learning for the environmentalists has come from more abstract sources usually found indoors—books and other media.

Separate languages have developed. Hunters talk about habitat; environmentalists, ecosystems.

Here ... and elsewhere ... that rift has been aggravated by the willingness of some people to push to extremes, to demonize the views of others until the gulf between them seems too great to cross. These differences are worsening, I believe, in part from the separation of a growing segment of our citizens from the land. As we become an increasingly urban and suburban society, we've lost our sense of nature and our ties to it. Television and video games, suburban lawns and swimming pools, foster in youth an understanding of the world that is different from those who are checking out what [is] under rocks in streams.

This misunderstanding shows itself in the annual cacophony over legislative proposals that once brought sportsmen and women together with environmentalists. It shows itself in the lack of understanding that game sports are not only important pastimes, but that they are also appropriate tools for managing wildlife populations. And it shows itself in the breakup of the constituency for wildlife habitat protection.<sup>3</sup>

The highly contentious debate over whether badgers need to be culled in order to help control bovine tuberculosis in the United Kingdom further illustrates both the clash of perspectives addressed in Governor Cuomo's comments, and the added importance of the newest player in these debates, the animal welfare movement. However, the portrayal of the badger as "good" or "bad" in connection with the spread of bovine tuberculosis is by no means unique—and has been seen time and time

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<sup>3</sup> *Proceedings of the 83rd Convention, 1993 INT'L ASS'N OF FISH AND WILDLIFE AGENCIES* 8-9.

again with many different species—as various wildlife policies, issues, and measures are debated. What is perhaps new, in today’s world, is the degree to which popular support for one or another position advanced by interested parties depends not upon actual experience with nature and wildlife but rather with the popular public image of the wildlife at issue.

Moreover, addressing the increasingly complex range of human interactions with wildlife in today’s world, where very little remains that is still truly untouched and “wild,” also means that new ways of thinking about wildlife issues would be useful. The traditional emphasis upon the beneficial or detrimental aspects of particular species, and the proper way for humans to interact with that species, tends to minimize interconnections with similar issues associated with other species. Rather than perpetuating this somewhat vertical, species specific, approach—as seen in the current debate over badgers in the U.K.—the wildlife law reform project provides the Law Commission with an opportunity to reframe the law with a more horizontal, cross-cutting, approach that reflects the various human interests at issue when dealing with all types of wildlife. Doing so would not only achieve the objective of making the current legal framework more coherent, but provide a significant model for the future.

## II. GOOD BADGER—BAD BADGER

Badgers enjoy a prominent and privileged position in the U.K., where they are now regarded as something of a charismatic animal, although this has not always been the case. Until relatively recently badgers were regarded much more ambivalently, albeit with an enduring mixture of fondness and respect that is perhaps unique.

While for many today their first encounter with the badger is likely to be in Kenneth Graham’s children’s novel *The Wind in the Willows*, historically, badger-baiting, digging, and hunting were popular activities dating back hundreds of years. Under the Vermin Acts in the 16<sup>th</sup> century badgers were among the nuisance animals which fetched the highest possible bounty.<sup>4</sup> In former times, badgers were also used for food, in magical charms, and their pelts contributed to a variety of useful common items such as shaving brushes.

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<sup>4</sup> The Vermin Acts consisted of the Destruction of crows, etc. Act (An Act made and ordained to destroy Choughs, Crows and Rooks). 1532, 24 Hen. 8, c.10, and the Preservation of grain Act 1566, Eliz., c.15. Together these measures established a legal framework for the destruction of animals and birds which were deemed a threat to food supplies.

In folklore and literature, badgers are found as far back as 11<sup>th</sup> century Anglo-Saxon riddle poems, where the animal is depicted as nobly protecting his family from diggers.<sup>5</sup> They appear in more recent poetry, notably in examples such as John Clare's 19<sup>th</sup> century work "The Badger," which graphically deals with the practice of badger baiting,<sup>6</sup> and Philip Edward Thomas' early 20<sup>th</sup> century poem "The Combe," which declares that badgers are "[t]hat most ancient Briton of English beasts."<sup>7</sup> Indeed, fossils show badgers inhabited the British Isles 25,000 years ago, and the famous Domesday Book from 1086 documents badger setts (i.e. burrows) that are still occupied today.<sup>8</sup> Badgers appear in countless other works of all types, and the appearance of the animal across a wide range of types of literature goes well beyond the kindly Mr. Badger of *The Wind and the Willows* or the nefarious Tommy Brock from Beatrix Potter's *The Tale of Mr. Tod*, who steals baby rabbits to keep in his oven for dinner. Lists of badgers in literature can run into hundreds of entries.<sup>9</sup> Merlin turns the young Arthur into a badger in *The Sword and the Stone*;<sup>10</sup> in C.S. Lewis's *Prince Caspian: The Return to Narnia* the badger Trufflehunter saves Caspian's life, fights alongside him, and becomes a Knight in the Order of the Lion;<sup>11</sup> and in the twenty-one volumes of James Brian Jacques' *Redwall* series of children's books badgers help (along with other anthropomorphic animals) with the struggle for good over evil.<sup>12</sup> They also appear in numerous television, video and internet productions, such as in the "Badger, Badger, Badger" flash animation.<sup>13</sup>

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<sup>5</sup> Marie Nelson, "Badger": *An Early Example Of Mock Heroic*, 59 NEOPHILOLOGUS 447-50 (1975).

<sup>6</sup> See Robert Pinsky, "The Self-Consumer of My Woes" *The enigmatic and enduring art of John Clare, a mad pauper and brilliant poet*, SLATE, August 17, 2010, available at [http://www.slate.com/articles/arts/poem/2010/08/the\\_selfconsumer\\_of\\_my\\_woes.html](http://www.slate.com/articles/arts/poem/2010/08/the_selfconsumer_of_my_woes.html).

<sup>7</sup> PHILIP EDWARD THOMAS, COLLECTED POEMS 18 (1921).

<sup>8</sup> *Why Protect Badgers?*, THE BADGER TRUST 1 (2008), available at [http://www.badger.org.uk/\\_Attachments/Resources/51\\_S4.pdf](http://www.badger.org.uk/_Attachments/Resources/51_S4.pdf).

<sup>9</sup> See, e.g., *List of Fictional Badgers*, available at [http://en.wikipedia.org/wiki/List\\_of\\_fictional\\_badgers](http://en.wikipedia.org/wiki/List_of_fictional_badgers).

<sup>10</sup> T.H. WHITE, THE SWORD IN THE STONE (1938).

<sup>11</sup> C.S. LEWIS, PRINCE CASPIAN: THE RETURN TO NARNIA (1951).

<sup>12</sup> See, REDWALL ABBEY: THE OFFICIAL BRIAN JACQUES WEBSITE, available at <http://www.redwallabbey.com/>. (last visited Dec. 1, 2013).

<sup>13</sup> Badgers (animation), [http://en.wikipedia.org/wiki/Badgers\\_\(animation\)](http://en.wikipedia.org/wiki/Badgers_(animation)). Badger Badger Badger was listed as one of the "top five internet fads of all time" by PC World. See, <http://knowyourmeme.com/memes/badger-badger-badger>.

The badger's distinctive black and white striped face appears in ancient heraldry (even including that of the fictional House of Hufflepuff in the Harry Potter series of books);<sup>14</sup> forms the basis of the highly recognizable logo for The Wildlife Trusts;<sup>15</sup> and is also used in commercial images such as on the emblem for the Hall and Woodhouse brewery, which has produced Badger Beer since the 18<sup>th</sup> century.<sup>16</sup> Additionally, the badgers' strong attachment to place is also reflected in the common use of their old English and Celtic name "broc" (or variants such as "brock" or "brox") in numerous place names throughout the U.K.<sup>17</sup>

Badgers commonly appear in British folklore, literature, poetry, and the visual arts, and are variously portrayed as either good or bad. "Good badgers" were useful because they ate small rodents, rabbits, wasps, and other bugs. They were also regarded as brave, strong, and family oriented, with an ancient connection to the land that reflected British character and embodied a fierce moral independence romantically associated with the rural English character. The "bad badger" was a nuisance; digging in the fields, destroying crops, taking ground nesting birds, and interfering with foxes and foxhunting.<sup>18</sup>

By the early 20<sup>th</sup> century, the anthropomorphic positive popular image of a gruff but wise, gentle, and civilized "Mr. Badger," as in *The Wind and the Willows*, came to predominate over the perception of badgers as a predatory nuisance animal—a shift which also accompanied increased urbanization in the U.K. and a marked growth in the development of animal welfare movements. This imagery has greatly colored the debate over the need to cull badgers in order to control bovine tuberculosis (bTB) in the U.K. While the positive image of Mr. Badger arguably still prevails, the need to address bTB has led to a resurgence of the negative portrayal of badgers as diseased vermin.<sup>19</sup>

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<sup>14</sup> J.K. Rowling initially considered using a bear, rather than a badger, as the Hufflepuff mascot. She later wrote "[p]erhaps Hufflepuff house would have the respect it deserves from the fans if I'd stayed with my original idea of a bear to represent it?" *J.K. Rowling, Harry Potter and the Philosopher's Stone - with annotations*, THE GUARDIAN, May 18, 2013 available at <http://www.guardian.co.uk/books/interactive/2013/may/18/jk-rowling-harry-potter-philosophers-stone-annotations>.

<sup>15</sup> The Wildlife Trusts form the largest U.K. voluntary organization dedicated to protecting wildlife and wild places. THE WILDLIFE TRUSTS, *Who We Are*, available at <http://www.wildlifetrusts.org/who-we-are>.

<sup>16</sup> See, HALL AND WOODHOUSE, *The Range*, available at <http://www.hall-woodhouse.co.uk/the-range>.

<sup>17</sup> Angela Cassidy, *Vermin, Victims and Disease: UK Framings of Badgers in and Beyond the Bovine TB Controversy*, 52 *SOCIOLOGIA RURALIS* 192, 196 (April 2012).

<sup>18</sup> *Id.* at 202.

<sup>19</sup> *Id.* at 208-09.

*a. Bovine TB and Badgers*

Tuberculosis was a serious problem in the crowded industrial centers of Victorian England. Additionally, the close proximity of large numbers of people in cities with nearby dairy herds facilitated the spread of tuberculosis in cattle, and contaminated milk prior to the development of pasteurization. The disease also spread among other livestock and wildlife.

A voluntary nationwide cattle testing program was instituted to deal with widespread infection in the 1930s, and testing and slaughtering of infected animals became mandatory in the 1950s. As a result, the incidence of bTB declined from over 60% of the nation's cattle herds to less than 1% by 1960. In the 1970s, however, the disease was again seen in a few parts of the southwest of England, and in 1971 a badger was identified on a Gloucestershire farm, which had died of advanced bovine TB. Despite the success managing the disease in the early part of the 20<sup>th</sup> century, the number of infections started to rise again in the 1980s, and now bTB is once again widespread throughout the West and Southwest of England and Wales.<sup>20</sup> Roughly 28,000 cattle were slaughtered 2012 because of bTB, and the disease is estimated to cost taxpayers around £100 million each year.<sup>21</sup>

The disease is spread primarily through the exchange of a bacterium in the respiratory secretions from an infected animal. While a number of mammalian species can harbor the bacteria, with the discovery of the link to badgers they gradually came to be seen by the Government as the most significant reservoir of the disease.<sup>22</sup> As the cattle controls were no longer containing the disease, in 1975 the Ministry of Agriculture, Fisheries, and Food (the predecessor of the current Department for Environment, Food and Rural Affairs) began licensing a series of badger control methods. These methods included gassing, which was used until 1980 when it was deemed to be

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<sup>20</sup> *History of Bovine TB*, TB FREE ENG. available at <http://www.tbfreeengland.co.uk/assets/4148>.

<sup>21</sup> *Bovine TB (bTB)*, FARMERS GUARDIAN, (May 31, 2013), available at [http://www.farmersguardian.com/home/hot-topics/bovine-tb-\(btb\)/32043.article](http://www.farmersguardian.com/home/hot-topics/bovine-tb-(btb)/32043.article) (last visited Dec. 1, 2013); *Bovine TB (tuberculosis): Key Facts and Figures*, DEPARTMENT FOR ENVIRONMENT, FOOD & RURAL AFFAIRS available at <http://www.defra.gov.uk/animal-diseases/a-z/bovine-tb/>.

<sup>22</sup> *Bovine TB Eradication Programme for England*, DEPARTMENT FOR ENVIRONMENT, FOOD & RURAL AFFAIRS (July 19, 2011) available at <https://www.gov.uk/government/publications/bovine-tb-eradication-programme-for-england>.

inhumane.<sup>23</sup> Trapping, caging, and shooting then became the primary methods for killing badgers. Reactive culling, which involves killing badgers on infected farms, and the “clean ring” strategy, where badgers are killed in concentric circles out from an infected farm until no infected badgers are found, were used until 1985.<sup>24</sup> A more limited “interim strategy” was instituted in 1986, which focused on removing and culling badgers only from infected farms where they were determined to be the likely cause of the infection in the cattle.<sup>25</sup> As the disease continued to spread, these efforts were replaced in 1998 with a “Randomized Badger Culling Trial” (RBCT) in areas with the highest rates of bTB to test the effectiveness of proactive culling versus reactive culling.<sup>26</sup> This eight-year trial, overseen by the Independent Scientific Group on cattle TB, ended in 2006, cost more than £53 million, and resulted in the death of over 11,000 badgers. The RBCT concluded that while some reduction in bTB was observed, badger culling “played no meaningful part in the control bovine TB in cattle” and that the cattle themselves contributed significantly to the persistence and spread of the disease.<sup>27</sup>

Nevertheless, the scientific link between badger control and the spread of bTB continues to be vigorously debated, with advocates on all sides pointing to language found in various parts of the RBCT and the earlier Reports. Indeed, part of the Conservative Party’s 2010 election

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<sup>23</sup> The gassing of badgers was terminated, and culling suspended, as Lord Zuckerman began his review of the bTB control efforts which occurred during 1980-1982. Lord Zuckerman also recommended that the issue be reviewed again three years later, in 1985., *History of Badger Control*, DEPARTMENT FOR ENVIRONMENT, FOOD & RURAL AFFAIRS available at <http://www.defra.gov.uk/animal-diseases/a-z/bovine-tb/badgers/history-controls/> (last visited Dec. 1, 2013).

<sup>24</sup> Professor Dunnet conducted a follow-up to the Zuckerman Review, and issued his own report in 1986. *Id.*; *History of Bovine TB*, *supra* note 20; *Bovine TB (bTB)*, *supra* note 21.

<sup>25</sup> *History of Badger Control*, *supra* note 23.

<sup>26</sup> *Id.* The RBCT was instituted following another review and report, issued by Professor John Krebs. Tuberculin testing was suspended, however, during the 2001 outbreak of foot and mouth disease. The RBCT covered 30,100 km<sup>2</sup> of England in total, divided into 10 sets consisting of 3 areas called “triplets”. Within each triplet, in one area badgers were repeatedly culled (proactive culling); in the second area badgers were culled in response to bTB outbreaks in cattle (reactive culling); and no culling was employed in the third area, which was only surveyed and tested for bTB.

<sup>27</sup> FINAL REPORT OF THE INDEPENDENT SCIENTIFIC GROUP ON CATTLE TB (June 2007) at 172, 181, available at [http://archive.defra.gov.uk/foodfarm/faranimal/diseases/atoz/tb/isg/report/final\\_report.pdf](http://archive.defra.gov.uk/foodfarm/faranimal/diseases/atoz/tb/isg/report/final_report.pdf). See also, *Brief history of Bovine TB*, THE BADGER PROTECTION LEAGUE available at <http://www.badgerprotectionleague.com/uploads/history.doc> and Lewis Clarke, *A brief history of Bovine TB and badger culling in the United Kingdom*, TIVERTONPEOPLE March 14, 2011, available at <http://www.tivertonpeople.co.uk/news/brief-history-Bovine-TB-badger-culling-United/story-10825818-detail/story.html>.



manifesto was to tackle what it saw as “the most pressing animal health problem in the U.K.” through “a carefully-managed and science-led policy of badger control.”<sup>28</sup> Accordingly, following the election, the Department for Environment, Food & Rural Affairs issued its “Bovine TB Eradication Plan” for England in July 2011,<sup>29</sup> and subsequently explained that:

[f]ollowing a public consultation in 2010 and a consultation of key stakeholders on draft Guidance to Natural England between July-September 2011, the Government has now decided to proceed with a policy of enabling farmers and landowners to cull and/or vaccinate badgers, under licence, in areas of high incidence of TB in cattle.<sup>30</sup>

Although vaccination is mentioned as an option in the Bovine TB Eradication Plan, culling is the Government’s preferred approach for the pilot program. DEFRA notes that it is difficult to distinguish vaccinated cattle from infected cattle, although work is underway to develop new vaccines that don’t generate “false positives” to standard TB diagnostic tests and which would make it possible to differentiate between infected and vaccinated animals. Moreover, the European Commission has instructed DEFRA that currently, “[v]accination against bTB is explicitly forbidden in the EU legislation on disease control (Council Directive 78/52/EEC<sup>31</sup>) and implicitly also in intra-Union trade legislation, as vaccination is not compatible with provisions

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<sup>28</sup> William Surman, *Conservative manifesto tackles badgers and foxes*, FARMERS GUARDIAN, April 13, 2010, available at <http://www.farmersguardian.com/home/latest-news/conservative-manifesto-tackles-badgers-and-foxes/31372.article>.

<sup>29</sup> *Bovine TB Eradication Programme for England*, *supra* note 22.

<sup>30</sup> *The Government’s policy on Bovine TB and badger control in England*, DEPARTMENT FOR ENVIRONMENT, FOOD & RURAL AFFAIRS (December 14, 2011) available at <https://www.gov.uk/government/publications/the-government-s-policy-on-bovine-tb-and-badger-control-in-england>. Natural England is the Government’s statutory advisor on environmental matters, and the licensing body for wildlife management—including the responsibility for licensing for badger culling. See, *Our Work* NATURAL ENGLAND, <http://www.naturalengland.org.uk/ourwork/default.aspx> and *Wildlife Management and Licensing: Badgers*, NATURAL ENGLAND available at <http://www.naturalengland.org.uk/ourwork/regulation/wildlife/species/badgers.aspx>.

<sup>31</sup> See Directive 78/52, of the Council of the European Communities of 13 December 1977 on the Community criteria for national plans for the accelerated eradication of brucellosis, tuberculosis and enzootic leukosis in cattle, 1977 O.J. (L 015), 0034 - 0041.

for testing and herd qualification (Council Directive 64/432/EEC<sup>32</sup>).”<sup>33</sup> While field trials of new vaccines are not prohibited,<sup>34</sup> it is not anticipated that any trials would be completed before 2016, and it may be ten years before vaccines are fully available in accordance with European and international rules.<sup>35</sup> An injectable badger vaccine has been available since 2010, and research is ongoing on a more practical oral vaccine, which may be distributed in bait and would not require trapping the animals.<sup>36</sup> However, vaccinating either cattle or badgers does not cure TB, and the actual efficacy of the vaccines in the field is still debated. As Anne McIntosh MP, and Chair of the House of Commons Committee on the Environment, Food and Rural Affairs recently declared while introducing the Committee’s Report on Bovine TB:

While progress to develop vaccines is clearly being made, debate on this subject has been characterised by lack of clarity for public understanding. The Government must share a great deal of the blame for this.

The Government is right to invest millions of pounds in developing vaccines against bovine TB. We should use every tool to combat this disease, but vaccination alone will not, at least in the short term, provide a complete solution. Vaccines have no impact on already infected animals, offer a range of protection to those that aren’t infected, and will be expensive to deploy.<sup>37</sup>

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<sup>32</sup> See Directive 64/432, of the Council of the European Communities of 26 June 1964 on animal health problems affecting intra-Community trade in bovine animals and swine, 1964 O.J. (L 121), 1977- 2012

<sup>33</sup> *Correspondence: Bovine TB Eradication Program: Letter From The European Commission: Patterson* (January 14, 2013), DEPARTMENT FOR ENVIRONMENT, FOOD & RURAL AFFAIRS, available at <https://www.gov.uk/government/publications/bovine-tb-eradication-programme-letter-from-the-european-commission-to-owen-patterson>.

<sup>34</sup> See REPORT OF THE ENVIRONMENT, FOOD AND RURAL AFFAIRS COMMITTEE, *Vaccination against Bovine TB*, 2013-4, H.C. 258, ¶ 21-8, available at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmenvfru/258/258.pdf>.

<sup>35</sup> See DEPARTMENT FOR ENVIRONMENT, FOOD & RURAL AFFAIRS *supra* note 33.

<sup>36</sup> *Badger Vaccination*, DEPARTMENT FOR ENVIRONMENT, FOOD & RURAL AFFAIRS (November 30, 2012), available at <http://www.defra.gov.uk/animal-diseases/a-z/bovine-tb/vaccination/badger-vaccination>.

<sup>37</sup> *Bovine TB Vaccination No Magic Bullet Say MPs*, HOUSE OF COMMONS SELECT COMMITTEE ON ENVIRONMENT, AND RURAL AFFAIRS (June 5, 2013), available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/environment-food-and-rural-affairs-committee/news/bovine-tb-report-publication/>.

Accordingly, the Government decided to proceed with a pilot badger cull under its bTB Eradication Plan, which began in June 2013 when the licensing authority for protected species, Natural England, issued licenses to cull badgers in the counties of Gloucestershire and Somerset.<sup>38</sup> Moreover, DEFRA announced that its goal is to rid the U.K. of bTB over the next twenty-five years, in a phased program which primarily relies on expanding the badger cull but explores other alternatives such as enhanced testing, vaccination, or contraception, as they become feasible over time.<sup>39</sup>

The plans for the badger cull prompted an emotional response across the country, often generating heated controversy among a complex and constantly shifting mix of politicians, farmers, scientists, animal advocates, environmentalists, and the public, each with a different perspective on whether the badger is good or bad.<sup>40</sup>

To the anti-cull advocates, “[d]eath is always the soft option—at least, it is for those not doing the actual dying. The badger cull is all of the peace slaughter of predators that was all the rage in the 19<sup>th</sup> century and still continues in some places, illegally, today when in doubt, blame a wild creature; and then kill it. Job done.”<sup>41</sup> Brian May, the animal activist and former guitarist with Queen, launched an online petition drive to stop the badger cull which captured this sentiment and received more than a quarter million supporters, making it the highest ranking measure on the Government’s e-petition website.<sup>42</sup> He also led a protest march to the Westminster Parliament.<sup>43</sup> The RSPCA and

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<sup>38</sup> See *infra* text accompanying note 169; see also *infra* text accompanying note 170; see also *infra* text accompanying note 171.

<sup>39</sup> See *Draft Strategy for Achieving “Officially Bovine Tuberculosis-Free” Status for England*, DEPARTMENT FOR ENVIRONMENT, FOOD & RURAL AFFAIRS (July 4, 2013), available at [https://consult.defra.gov.uk/farming/tb/supporting\\_documents/Draft%20%20Strategy.pdf](https://consult.defra.gov.uk/farming/tb/supporting_documents/Draft%20%20Strategy.pdf) (stating that Wales and Northern Ireland are conducting research into vaccinating badgers, Scotland is free of bTB, and The Republic of Ireland has been culling badgers since the 1980s); see also Helen Briggs, *Q&A: The Badger Cull*, BBC NEWS (June 7, 2013), available at <http://www.bbc.co.uk/news/science-environment-22614350>.

<sup>40</sup> See Jon Walker, *Battle To Save Badgers Pits Town Against Country*, THE JOURNAL, (July 3, 2013).

<sup>41</sup> Simon Barnes, *Stop Picking On Mr. Brock: It’s This Silly Cow With TB You Should Be Blaming*, THE TIMES (Oct. 7, 2006), available at <http://www.thetimes.co.uk/tto/opinion/columnists/simonbarnes/article1885320.ece>.

<sup>42</sup> See Brian May, *Stop the Badger Cull e-petition*, HM GOVERNMENT (July 9, 2013), available at <http://epetitions.direct.gov.uk/petitions/38257>; see also *250,000 Anti-Cull*, THE (NEWCASTLE) JOURNAL, (June 20, 2013).

<sup>43</sup> *Badger Cull Protest In Westminster Led By Brian May*, THE HUFFINGTON POST (Jan. 6, 2013), available at [http://www.huffingtonpost.co.uk/2013/06/01/badger-cull-protest\\_n\\_3372032.html](http://www.huffingtonpost.co.uk/2013/06/01/badger-cull-protest_n_3372032.html).

other groups established websites opposing the cull.<sup>44</sup> Opponents of the cull employed a number of other tactics, “naming and shaming” farms and marksmen participating in the cull,<sup>45</sup> and boycotting dairy products from those farms.<sup>46</sup> Other tactics being advocated included hoax phone calls, playing loud heavy metal music, and using vuvuzelas, and flashlights to scatter badgers and disrupt the nighttime culls.<sup>47</sup> DEFRA and local police monitored social media for protest activity, but also advocated a “common sense approach” where they said they would focus their enforcement on acts of illegality rather than inhibiting peaceful protests, and even engaged in “wargames” with activists in order to reach mutually agreeable ground rules in advance.<sup>48</sup> Even so, some cull opponents advocated borrowing more “direct action” tactics from the anti-fox hunting movement; these “cull saboteurs” stated they would put themselves “between the bullets and the badgers.”<sup>49</sup> Others leafleted farms, threatened blackmail, and at least one fire was suspected of being set by anti-cull activists.<sup>50</sup>

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<sup>44</sup> See generally, *Stop the Badger Cull*, RSPCA, available at <http://www.rspca.org.uk/getinvolved/campaigns/wildlife/stop-the-cull/>; *Stop the Cull*, BADGER KILLERS, available at <http://badger-killers.co.uk/>.

<sup>45</sup> ‘Badger Defenders’ Say They Will ‘Name And Shame’ Shooters In Cull, GLOUCESTER CITIZEN 4 (June 11, 2013), available at 2013 WLNR 14350788; *Badger Cull has Begun*, DAILY POST (June 1, 2013), available at 2013 WLNR 13491174.

<sup>46</sup> Charlie Cooper, *RSPCA Calls For Milk Boycott As Farmers Prepare For Badger Cull*, INDEPENDENT (Sep. 20, 2012), available at <http://www.independent.co.uk/environment/nature/rspca-calls-for-milk-boycott-as-farmers-prepare-for-badger-cull-8157382.html>.

<sup>47</sup> *Saboteurs Aim To “Dig Dirt” On Landowners In Gloucestershire To Stop Cull*, GLOUCESTER CITIZEN (June 3, 2013), 2013 WLNR 13653952; *Trying To Stop The Badger Cull - With Vuvuzelas And Loud Music*, WESTERN MORNING NEWS (June 3, 2013), available at <http://www.thisiscornwall.co.uk/Trying-stop-badger-cull-ndash-vuvuzelas-loud/story-19169815-detail/story.html#axzz2qlcOtTFC>.

<sup>48</sup> See *Gloucestershire Police Unveil Plan For Badger Cull*, GAZETTE SERIES UK (June 25, 2013), available at 2013 WLNR 15451744; see also *DEFRA Scans Social Networks To Monitor Rural Protest Plans*, WESTERN MORNING NEWS (June 24, 2013) at 2, available at 2013 WLNR 15422632; see also Damian Carrington, *Badger Cull Activists Can ‘Bend The Rules’ During Protests, Say Police*, GUARDIAN (June 14, 2013), available at 2013 WLNR 14499958.

<sup>49</sup> Sarah Morrison, *We will put ourselves between the bullets and the badgers’*, INDEPENDENT UK (June 15, 2013), available at 2013 WLNR 14664428.

<sup>50</sup> See *Saboteurs Aim To “Dig Dirt” On Landowners In Gloucestershire To Stop Cull*, *supra* note 47; see also *Trying To Stop The Badger Cull - With Vuvuzelas And Loud Music*, *supra* note 47; see also *Cull Opponents Blamed For Tractor Blaze*, GLOUCESTER CITIZEN (July 15, 2013), available at 2013 WLNR 17232729, <http://www.gloucestercitizen.co.uk/Cull-opponents-blamed-tractor-blaze/story-19519861-detail/story.html>; see also Tina Rowe, *Extremists Suspected Of Tractor Arson*, WESTERN DAILY PRESS (July 15, 2013), available at 2013 WLNR 17233166.

Pro-cull advocates, such as the Farmers Union, challenged anti-cull campaign advertisements for deceptive and misleading claims regarding efforts to “exterminate” badgers in complaints to the Advertising Standards Authority.<sup>51</sup> Some farmers and dealers seeking to evade regulatory controls and testing requirements have moved bTB infected animals into disease free herds and falsified their records, which also resulted in the sale of infected meat and milk to consumers and the imposition of fines and suspended jail sentences.<sup>52</sup> The intensity of the pro-cull advocates is perhaps illustrated by this somewhat tongue-in-cheek excerpt from a 2004 piece in *The Times* of London:

So what’s new, I ask of friends in the country. What menace this week stalks the rural acres? ... “Badgers,” was the loud reply.

Not since the Beast of Bodmin, not since the Hound of the Baskervilles, had so awful a creature plagued the countryside. *Meles vulgaris*, something between a weasel and a bear, was overrunning hill and dale. And it was, of course, Labour’s fault. What were the teddy-hugging, town-dwelling, pizza-eating classes going to do about it, I was asked? They would not be content until every rustic parlour was a zoo of free-range foxes, badgers, stags, kites and predatory geese?

I could not argue the damage. Across the landscape meadows were being upheaved, hedges, banks and bridleways subsiding, tennis courts falling into holes. Tunnels of Ho Chi Minh ingenuity were sapping the ancient walls and lawns of England with a verminous Vietcong. These omnivorous monsters were eating lambs and ground-nesting birds. They were the only known predator of the hedgehog. Archaeological sites were being destroyed. The killer brock was prowling at will, cockily secure under the 1992 Protection of Badgers Act. Not a hand could be raised against him.

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<sup>51</sup> *FUW Call For Action Over Anti-Badger-Cull Adverts*, WESTERN MAIL, (July 2, 2013).

<sup>52</sup> See Stuart Winter, *Badger Cull: Farmers Flout TB Cattle Rules*, EXPRESS ON SUNDAY UK (July 7, 2013), available at 2013 WLNR 16469783; see also Louise Gray, *Milk From Cows With TB In Shops As Row Over Infected Meat Intensifies*, DAILY TELEGRAPH UK (July 1, 2013), available at 2013 WLNR 15946222.

Nor is that all. The Act has taken badgers from near endangered status to “a population the size of Bristol”, and growing. Farmers regard it as axiomatic that this growth is the cause of the epidemic of bovine tuberculosis. This disease is threatening cows (and taxpayers) on a scale approaching that of foot-and-mouth. But you will never persuade the wildlife lobby of this ... Public resentment over decades of farm subsidy is now concentrated on protecting every fox, deer and badger extant.

Of one thing I am clear. Sherlock Holmes was right. The most foetid and conspiratorial backstreets of London cannot equal the “smiling and beautiful countryside” for raw conflict ...

The cattle tuberculosis epidemic is appalling. Twenty thousand cows were killed last year alone, costing the Treasury close to £100 million in compensation. Incidence is rising by 20 per cent a year, with 4 per cent of the national herd already afflicted. Since badgers are known carriers and their numbers have soared, farmers naturally put two and two together....

The NFU and farm lobbyists are convinced that badgers threaten not just cattle but also the ecological balance of the countryside. They want to be allowed to control numbers. Their foes on the vociferous National Federation of Badger Groups disagree. To them, these appealing creatures are innocent victims of the NFU’s culling fields. Bovine tuberculosis is the result not of badgers but of sloppy cattle husbandry.

To put it mildly these points of view are not compatible.<sup>53</sup>

Kevin Pearce, the head of food and farming at the National Farmers Union, admits a part of the problem is an “image issue.” “A lot of farmers like badgers but we also want to control the disease. If your vector spreading TB was a rat, I’m sure that there’d be no problem for farmers in securing a license to take action.”<sup>54</sup> The public, however,

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<sup>53</sup> Simon Jenkins, *A Verminous Vietcong Stalks The Countryside*, THE TIMES, (May 21, 2004), available at <http://www.thetimes.co.uk/tto/law/columnists/article2047360.ece>.

<sup>54</sup> Tom de Castella, *Badger Cull; Are We Silly To Be So Sentimental?* BBC NEWS (Nov.19, 2010), available at <http://www.bbc.co.uk/news/magazine-11380921>.

appears not to have been as fully convinced that badgers are either as good or as bad as the advocates on either side of the issue might claim. While older surveys suggest as much as two-thirds of the British public oppose culling badgers to control bTB,<sup>55</sup> some more recent polls suggest that public opposition to a cull is much lower, perhaps as low as one-third, and almost matched by those who would support a cull.<sup>56</sup> In some surveys, milk prices and the general plight of the farmers, far outweighed the badgers' role in the spread of bTB—and that few consumers would alter their purchasing habits based upon whether a particular farm or supermarket supported the cull.<sup>57</sup> Moreover, the majority of consumers surveyed would accept a humanely conducted cull as part of the measures needed to address the spread of bTB.<sup>58</sup> This suggests that the characterization of badgers as either good or bad by the advocates on both sides of the bTB issue have yet to convince the public that one view or the other should prevail.

*b. Other examples of “Good” and “Bad” Wildlife*

White-tailed deer offer a comparable example with a similar range of perspectives on these types of issues as they are played out in the United States. The white-tailed deer is among the preeminent symbols of “the wilderness,” and one of the most common charismatic megafauna found in America. But they too, like the badger, are seen from multiple viewpoints, which greatly impacts how humans relate to these wild animals.

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<sup>55</sup> See Richard Black, *UK Public Opposed To Badger Cull, Opinion Poll Suggests*, BBC NEWS (June 8, 2011), available at <http://www.bbc.co.uk/news/science-environment-13684482>.

<sup>56</sup> See Jonathan Riley, *Poll Shows Badger Cull Not Big Issue For Public*, FARMERS WEEKLY (May 31, 2013), available at <http://www.fwi.co.uk/articles/31/05/2013/139295/poll-shows-badger-cull-not-big-issue-for-public.htm>.

<sup>57</sup> Julia Glotz, *Badger Cull? Shoppers Think Low Milk Prices Matter More*, THE GROCER (May 25, 2013), available at <http://www.thegrocer.co.uk/topics/badger-cull-shoppers-think-low-milk-prices-matter-more/343586.article>.

<sup>58</sup> See *Poll Reveals Attitudes to Badger Cull*, NATIONAL FARMERS UNION, (May 31, 2013), available at <http://www.nfuonline.com/news/latest-news/poll-reveals-attitudes-to-badger-cull/> (stating that 55% of consumers accept the cull is necessary or support it as long as it is done humanely); see also Gareth Enticott, *Social Research is Good! But the NFU Badger Cull Survey Is Misleading*, BIOSECURITY RESEARCH (August 20, 2011), available at <http://biosecurityresearch.blogspot.co.uk/2011/08/social-research-is-good-but-nfus-survey.html>.

[W]ildlife watchers lure deer to backyard feeders, locavore foodies trade gourmet venison recipes, antler-obsessed bowhunters perch in tree stands, and millions more hunters spend big bucks in pursuit of big bucks [but at the same time there] are car crashes, Lyme disease, agricultural losses, environmental devastation, and endless hordes of deer invading America's suburbs.<sup>59</sup>

Although the presence of bovine TB in American deer is rare, bTB was identified in deer in New York in 1933, 1937, and 1961. It was subsequently identified in free ranging deer in northern Michigan in 1975, and when it was again documented not only in the same area of Michigan in 1994, but also in neighboring Minnesota, serious concerns arose over deer acting as a reservoir for the bTB bacterium.<sup>60</sup> Additionally, the practice of deer baiting by hunters and the use of feeding stations by deer farmers, which was also common in more than half the states in the country, helped facilitate nose-to-nose transmission of the disease.<sup>61</sup> However, ongoing federal and state governmental TB surveillance and eradication programs have helped to dramatically reduce, but not eliminate, the presence of bTB in cattle in the U.S.<sup>62</sup> For many years, ongoing active surveillance for TB in wildlife was conducted only in Michigan and Minnesota. However, short-term surveillance of wildlife is often conducted in other parts of the U.S. when bTB is detected in domestic livestock and captive deer or similar species.<sup>63</sup>

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<sup>59</sup> AL CAMBRONNE, *DEERLAND: AMERICA'S HUNT FOR ECOLOGICAL BALANCE AND THE ESSENCE OF WILDNESS* vi (2013).

<sup>60</sup> National Wildlife Disease Program, *Bovine Tuberculosis*, APHIS (last visited Nov. 5, 2012), available at [http://www.aphis.usda.gov/wildlife\\_damage/nwdp/tb.shtml](http://www.aphis.usda.gov/wildlife_damage/nwdp/tb.shtml). The Bovine TB bacterium has subsequently been detected, at varying levels, in a wide number of species of North American wildlife, including white-tailed deer, mule deer, elk, bison, moose, raccoons, coyotes, opossums, feral cats, grey fox, black bears, feral swine, gray wolves, red fox, and bobcat.

<sup>61</sup> Some segments of the hunting community, however, assert that baiting is unethical. See JIM STERBA, *NATURE WARS* 103-105 (2012).

<sup>62</sup> See U.S. DEPT. OF AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERV., *National Wildlife Disease Program Annual Report 2011* at 45, available at [http://www.aphis.usda.gov/wildlife\\_damage/nwdp/pdf/2011\\_Annual\\_Report.pdf](http://www.aphis.usda.gov/wildlife_damage/nwdp/pdf/2011_Annual_Report.pdf). See also, STATE OF MICHIGAN, *Emerging Disease Issues, Bovine Tuberculosis; Summary of bovine tuberculosis management in Michigan's wild deer*. Available at [http://www.michigan.gov/emergingdiseases/0,4579,7-186-25804\\_25811-75930--,00.html](http://www.michigan.gov/emergingdiseases/0,4579,7-186-25804_25811-75930--,00.html).

<sup>63</sup> U.S. DEP'T OF AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERV., NAT'L WILDLIFE DISEASE MGMT PROGRAM: BOVINE TUBERCULOSIS, Nov. 5, 2012, *supra* note 60. The surveillance program in Minnesota ended in February 2013. Minnesota Department of Natural Resources, News Release, *No bovine TB found in northwestern Minnesota deer; disease monitoring and management program ended* (Feb. 11, 2013) available at <http://www.highbeam.com/doc/1G1-318589600.html>.



Deer overpopulation is also a much more widespread problem in North America, with population numbers estimated at greater than 30 million animals and growing at a rapid rate.<sup>64</sup> This overpopulation leads to unhealthy animals, the spread of Lyme disease and other diseases, as well as damage to forest vegetation, crops, and wildlife habitat.<sup>65</sup> When combined with increasing urban and suburban sprawl, deer overpopulation also contributes to increasingly significant human interaction, including an estimated 150 human fatalities, 30,000 injuries, and reported insurance payouts of over \$3.8 billion from more than one million annual deer-vehicle crashes.<sup>66</sup> The solution often offered to “the deer problem,” irrespective of whether that is seen as the spread of bTB or overpopulation, is to manage the resource—to cull Bambi.<sup>67</sup>

Since wildlife law and management in the U.S. is much less centralized than in the U.K. the “deer wars” tend to repeatedly play out in a predictable manner in local communities across the country; these conflicts play out with the “same characters, same anger, same arguments, same questions, same certainty, same ignorance, same grief,” that is, with the same range of perspectives, but asserted by different casts.<sup>68</sup> In 1997, two scientific researchers satirized this process describing a meeting in the fictional town of East Overshoe.

The adventure begins, usually, when a group of residents from the Town of East Overshoe calls one of us and begs for help in saving their urban deer from a planned hunt or cull. These are generally nice people who dislike the killing of animals in general, and in their backyards in particular. The first and most consistent characteristic we notice about them is that they have absolutely no legal authority to do anything about the deer. . . . The town meeting is a reliably consistent phenomenon. Its parti-

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<sup>64</sup> D.R. McCullough, *Lessons from the George Reserve, Michigan*, L.K. Halls, *WHITE-TAILED DEER: ECOLOGY AND MANAGEMENT*, 211 (1986) (indicating further that, under optimal conditions, deer populations can double every two years).

<sup>65</sup> See, e.g., Stephen B. Horsley, Susan L. Stout, & David S. deCalesta, *White-Tailed Deer Impact On The Vegetation Dynamics Of A Northern Hardwood Forest*, 13 *ECOLOGICAL APPLICATIONS* 98 (2003).

<sup>66</sup> See Max Watman, *The White-Tailed Menace*, WALL ST. J., May 31, 2013, available at <http://online.wsj.com/news/articles/SB10001424127887323744604578474892342924414>; and CAMBRONNE, *supra* note 59.

<sup>67</sup> See INTERNET MOVIE DATABASE, BAMBI, <http://www.imdb.com/title/tt0034492/>. “Bambi” is well known as the 1942 Disney Academy Award winning animated film, based upon Felix Salten’s book, “Bambi, A Life in the Woods” (1923), about a young deer that grows up in the woods after off-screen human hunters kill Bambi’s mother.

<sup>68</sup> STERBA, *supra* note 61, at 112.

cipants include; (1) those who want to save “their” particular deer, (2) those who object to hunting in general, (3) those who object to management of any kind, (4) those who hate deer for eating their shrubbery or defecating on their lawns, or who believe that the deer will give them Lyme disease or wreck their cars, (5) some township and county officials who want to be re-elected, (6) at least one representative from the state fish and wildlife agency, (7) some shotgun hunters, (8) some bow hunters, (9) a representative from either an animal rights or an animal-welfare organization, and (10) the media.<sup>69</sup>

The authors then describe the various participants’ positions and arguments with humorous detail, positions that are sometimes serious and sometimes irrelevant to the discussion –they are especially critical of the role of the media in the process. That is because their experience shows that “few of the published ‘facts’ regarding the science...are correct; [as] the media focuses on the interpersonal conflicts rather than the substantive issues... . In general, the media merely inflames the issues and offers nothing constructive to the community in the way of education.”<sup>70</sup> The fictional East Overshoe town meeting “finally ends after exchanges become hostile and insults frequent, without decisions by anyone with legal authority to act on the problem.”<sup>71</sup> The authors conclude their parable observing that:

The deer are in this fix because people put them there. We suburbanized their historic habitat. Then we built up humanity all around them, so they couldn’t get out even if they wanted to. We owe them a solution. Working together we can find it: the solution will most certainly be a compromise. But until we put aside our egotism, territorialism, and defensiveness and sort through the facts as a focused interdisciplinary team, all of us and the deer will suffer.<sup>72</sup>

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Our lessons have been that obstacles to [the] deer [problem] are social and political, not a lack of science.<sup>73</sup>

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<sup>69</sup> Jay F. Kirkpatrick & John W. Turner, Jr., *Urban deer contraception: the seven stages of grief*, 25 WILDLIFE SOCIETY BULLETIN 515-17 (1997).

<sup>70</sup> *Id.* at 517.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 519.

<sup>73</sup> *Id.* at 518.

Over the years, other commentators have observed the same story actually unfold in numerous communities across the U.S. The author of “Nature Wars” also notes:

because these fights are local, there is virtually no learning curve from one place to another, from one community to the next. The vested interests, on the other hand, long ago honed their arguments and march them from one fight to the next. Local bow hunters can solve the problem, cheap, if only given the chance. Fertility control is just around the corner. Meanwhile, the magnificent white tailed deer, a visual treasure to behold, becomes a long-legged rat.<sup>74</sup>

Other examples abound. Although populations of Canadian geese were once much reduced due to over-hunting and habitat loss, following successful reintroduction and management programs they are now abundant across North America—especially around human engineered landscapes such as golf courses, city lakes, and parks, which provide food, water, and protection for the birds.<sup>75</sup> The rapid increase of local breeding populations over the last 50 years, combined with the mixing of resident birds with winter migrants, now results in the geese being regarded as a problem in more than 100 urban areas across 37 states because of their droppings, crop damage, impact upon water quality, sometimes-aggressive behavior towards humans, and accidents with aircraft.<sup>76</sup> This leads to calls to manage or cull the geese.<sup>77</sup> Although some advocates dispute the claims that the geese pose a threat to public health,<sup>78</sup> calls to manage the birds, including by lethal means if necessary, increased following the crash landing of US Airways Flight 1549 in New York’s Hudson River after a flock of geese struck the plane on take off.<sup>79</sup>

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<sup>74</sup> *Id.* at 117.

<sup>75</sup> Thomas B. Mowbray, Craig R. Ely, James S. Sedinger & Robert E. Trost. 2002. *Canada Goose (Branta canadensis): Conservation and Management*, THE BIRDS OF NORTH AMERICA ONLINE (A. Poole, Ed.). Ithaca: Cornell Lab of Ornithology; Retrieved from the Birds of North America Online, available at <http://bna.birds.cornell.edu/bna/species/682>.

<sup>76</sup> *Id.*

<sup>77</sup> See 16 U.S.C. § 703 *et seq.* (noting, however, that Canadian geese are among the species protected by the Migratory Bird Treaty Act of 1918, which brought the regulation of migratory game birds and feathers under federal, rather than state, control and was one of the first environmental/conservation laws in the U.S.).

<sup>78</sup> See, e.g., *Canadian Geese as a Suburban Wildlife Issue: Public Health*, COALITION TO PREVENT THE DESTRUCTION OF CANADA GEESE available at <http://www.canadageese.org/doc3c.html>.

<sup>79</sup> Simon Akam, *For Culprits in Miracle on Hudson, the Flip Side of*

According to at least one former wildlife scientist at the U.S. Department of Agriculture, “[t]he bottom line with Canad[ian] geese is that they truly are the most hazardous species of bird that poses a threat to aviation.”<sup>80</sup> The challenge for wildlife managers, of course, is to achieve a balance between too few and too many geese, while maintaining the diversity of this species throughout its range in North America.<sup>81</sup>

Numerous other species of wildlife in North America, such as bears,<sup>82</sup> beavers,<sup>83</sup> coyotes,<sup>84</sup> wild pigs,<sup>85</sup> wild turkeys,<sup>86</sup> among others, pose issues that are subject to similar debates over whether they represent “good” or “bad” wildlife. However, perhaps nothing in the U.S. comes quite as close to matching the emotional tenor generated by the badger cull in the U.K. as the efforts to address exploding feral cat populations, particularly in urban areas.

Although cats may not immediately be associated with wildlife and wildlife management issues, feral cats are listed as among the world’s top 100 “invasive species” by the World Conservation Union’s Invasive Species Specialist Group because they “threaten native birdlife and other fauna,” both as predators and as reservoirs for disease.<sup>87</sup> Cats are blamed for the extinction of thirty-three species; according to a recent study by the Smithsonian Conservation Biology Institute and the US Fish and Wildlife Service, “free-ranging domestic cats kill [between] 1.4-3.7 billion birds and 6.9–20.7 billion mammals annually” in the United States.<sup>88</sup> The fact that cats kill more wildlife than other human-related

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*Glory*, N.Y. TIMES (Oct. 2, 2009) available at [http://www.nytimes.com/2009/10/03/nyregion/03geese.html?\\_r=2&partner=rss&emc=rss&](http://www.nytimes.com/2009/10/03/nyregion/03geese.html?_r=2&partner=rss&emc=rss&).

<sup>80</sup> *Id.* See also, 50 CFR § 21.49 (authorizing federal control and management activities including both direct and indirect strategies such as trapping and relocation, nest and egg destruction, gosling and adult trapping and culling programs, or other lethal and non-lethal control strategies).

<sup>81</sup> MOWBRAY ET AL., *supra* note 75.

<sup>82</sup> See, e.g., Darcy Frey, *The Bears Among Us*, N.Y. TIMES, MAGAZINE (Nov. 25, 2007).

<sup>83</sup> See, e.g., Cornelia Dean, *Return of the Once-Rare Beaver? Not in My Yard*, N.Y. TIMES, June 8, 2009, at D1.

<sup>84</sup> See, e.g., Kristy Sucato, *A Close Call, and a Sign of a Thriving Animal World*, N.Y. TIMES, May 6, 2007, at 14NJ.

<sup>85</sup> See, e.g., Patricia Leigh Brown, *It’s Always Fair Game for Wild Pigs*, N.Y. TIMES, Sept. 30, 2005, at F1.

<sup>86</sup> See, e.g., Peggy Orenstein, *Nature, Nuisance, or Worse?*, N.Y. TIMES, Dec. 7, 2008 at MM1.

<sup>87</sup> INTERNATIONAL UNION FOR CONSERVATION OF NATURE, *Global Invasive Species Database: Felis Catus*, available at <http://www.issg.org/database/species/ecology.asp?si=24&fr=1&sts=&lang=EN>.

<sup>88</sup> Scott R. Loss, Tom Will, & Peter P. Marra, *The Impact Of Free-Ranging Domestic Cats On Wildlife Of The United States*, 4 NATURE COMMUNICATIONS 1, Jan. 29, 2013, <http://www.nature.com/ncomms/journal/v4/n1/pdf/ncomms2380.pdf>.

causes prompted the study to conclude that free-ranging cat populations are the “top threat to US wildlife.”<sup>89</sup> Accordingly, commentators have noted that

the domestic cat occupies a dominant and unthreatened niche; its few natural enemies, like coyotes, are no match for tens of millions of free-roaming cats, including beloved pets and feral cats . . . Most of the killing is done by stray or feral cats, and there is no easy way to reduce that population. Programs that trap and neuter feral cats and then release them may actually encourage more people to abandon cats to the wild. Conservationists in Australia, where the feral cat problem is perhaps even more serious, have experimented successfully with allowing the cat’s natural predator there—the dingo—to rebound in numbers. But most Americans will never put up with a burgeoning coyote population, which leaves euthanasia for feral cats as the unpalatable response to reducing the wildlife slaughter.<sup>90</sup>

While feral cats may not have owners, they, like badgers, do have vocal defenders and lobbyists, such as Alley Cat Allies (ACA)<sup>91</sup> and more than 350 local feral cat protection charities which advocate “trap-neuter-return” (TNR) programs as a humane alternative to euthanasia.<sup>92</sup> Indeed, ACA studies show that while virtually all stray cats are killed in shelters, most Americans oppose using public funds to euthanize strays, which has helped lead to a tenfold increase in local government support for TNR programs over the past decade.<sup>93</sup> Advocates of these programs assert that they stabilize the population of feral colonies, and lead to

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<sup>89</sup> *Id.* *Contra* Alley Cat Allies Press Release, *Alley Cat Allies Delivers 55,000 Signatures To Smithsonian To Protest Flawed Study On Cats And Birds*, (May 1, 2013) available at <http://www.alleycat.org/page.aspx?pid=1445> (challenging the Smithsonian study’s methodology and conclusions).

<sup>90</sup> Editorial, *Soft and Deadly*, N.Y. TIMES, Jan. 31, 2013, at A22.

<sup>91</sup> See ALLEY CAT ALLIES, ABOUT US, available at <http://www.alleycat.org/page.aspx?pid=616>. Alley Cat Allies is “the only national advocacy organization dedicated to the protection and humane treatment of cats. An engine for social change, Alley Cat Allies was the first organization to introduce and advocate for humane methods of feral cat care, particularly Trap-Neuter-Return, in the American animal protection community.”

<sup>92</sup> STERBA, *supra* note 61, at 253.

<sup>93</sup> Alley Cat Allies Press Release, *Support For Trap-Neuter-Return For Cats Rose Ten-Fold Among Local Governments Over Past Decade*, (May 16, 2013) available at <http://www.alleycat.org/page.aspx?pid=1448>.

their eventual decline, while protecting cats' lives and avoiding the "vacuum effect" created with catch-and-kill or relocation programs.<sup>94</sup>

Opponents of TNR programs, such as the American Association of Wildlife Veterinarians (AAWV), point out that "the maintenance of feral cat colonies (with food and health care following the TNR procedure) does not eliminate predation on native birds and small mammals by feral cats." TNR programs generally address neither the potential for the spread of zoonotic diseases by feral animals nor establish guidelines for assuring the quality of life within the colony. Indeed, even People for the Ethical Treatment of Animals (PETA) has similar concerns and generally oppose TNR programs as not being in the cats' best interests.<sup>95</sup> Accordingly, the AAWV called for the elimination of feral cat colonies on public lands and discouraged their maintenance on private property.<sup>96</sup> Similarly, freelance conservationist Ted Williams wrote in *Audubon Magazine* in 2009 that "[w]ith something like 150 million free-ranging house cats wreaking havoc on our wildlife, the last thing we need is Americans sustaining them in the wild," and he continued to note that feeding feral cats could potentially contravene portions of the Migratory Bird Treaty Act and the Endangered Species Act while observing that enforcement of those provisions is politically unpalatable.<sup>97</sup> In other words, the concern expressed by the Audubon Society,<sup>98</sup> the American Bird Conservancy,<sup>99</sup> and others is that "TNR has been approached largely as an animal welfare issue instead of being recognized as a broad environmental issue with a range of impacts on species conservation, the physical environment, and human health."<sup>100</sup>

This is especially evident when the welfare interests of individual animals, such as cats, directly compete with the broader aim of protecting the habitat or another species, and particularly the need to protect endangered species. For example, the ground-nesting piping

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<sup>94</sup> The "vacuum effect" refers to new animals moving into the original territory as a result of the opportunity created by the control efforts. Alley Cat Allies, *The Vacuum Effect: Why Catch and Kill Doesn't Work* <http://www.alleycat.org/page.aspx?pid=926>.

<sup>95</sup> PETA, *Animal Rights Uncompromised: Feral Cats*, available at <http://www.peta.org/about/why-peta/feral-cats.aspx>.

<sup>96</sup> *AAWV Position Statement on Feral Cats*, AMERICAN ASSOCIATION OF WILDLIFE VETERINARIANS July 1996, available at <http://www.aawv.net/AAWVFERALCATPOSITIONSTATEMENT.doc>.

<sup>97</sup> Ted Williams, *Felines Fatales: Feral Cats Take a Horrific Toll on Wild Birds*, *AUDUBON MAGAZINE* (September-October 2009), available at <http://archive.audubonmagazine.org/incite/incite0909.html>.

<sup>98</sup> See, Audubon Society, *Audubon Comments on Bird and Cat Safety*, available at <http://www.audubon.org/audubon-comments-bird-and-cat-safety>.

<sup>99</sup> See, American Bird Conservancy, *Cats Indoors*, available at <http://www.abcbirds.org/abcprograms/policy/cats/index.html>.

<sup>100</sup> Williams, *supra* note 97.

plover is an endangered shorebird species at the center of recurring controversies between feral cat advocates and conservationists. When James Stevenson, a birding enthusiast and founder of the Galveston Ornithological Society, killed a feral cat, which he claimed was stalking endangered piping plovers in the Galveston sand dunes, and was arrested, indicted, and tried for animal cruelty, there was an outcry across the country among both feral cat advocates and birders. Stevenson subsequently declared, “[t]hese birds . . . are protected by state and local laws. Do we ignore what is happening with these stray cats, or do we finally stand up and do something about it? Sometimes you get pushed to a point where you can no longer ignore a situation.”<sup>101</sup> In response the prosecution’s chief witness, John Newland, who provided food for the feral colony, replied, “[t]here are a lot of cat lovers. . . . Unfortunately, I’ve found that there are also cat haters.”<sup>102</sup> Stevenson was both reviled across the Internet as a “diabolical monster” and hailed as a hero for taking action to deal with the “terrible menace” that feral cats posed to birds. The jury also reflected this dichotomy of perspectives when it deadlocked after two days of deliberation, resulting in dismissal of the charges against Stevenson.<sup>103</sup>

In another example illustrating this clash of perspectives, Ted Williams was removed from the post which he had held for 33 years as a freelance editor-at-large for Audubon Magazine following a March 2013 editorial in the Orlando Sentinel which declared that TNR programs make the feral cat problem worse and advocated euthanasia. Although this was a familiar theme in his writing, cat advocates were particularly outraged by Williams’ assertion in the editorial that over-the-counter medications, including Tylenol, would be a humane way to kill cats. Alley Cat Allies mounted a campaign which generated tens of thousands of emails demanding Williams’ dismissal, in part because Tylenol is neither approved nor registered for use in euthanizing cats.<sup>104</sup> The Audubon Society stated that it “absolutely reject[ed] the notion of

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<sup>101</sup> Miguel Bustillo, *Cat’s Death Was For Good Cause, Birder Accused Of Cruelty Says*, SOUTH FLORIDA SUN-SENTINEL (November 26, 2006) at 18A.

<sup>102</sup> Miguel Bustillo, *Alleged Cat Slayer Says He’s Martyr For Birds*, LA TIMES (November 25, 2006) at 15.

<sup>103</sup> See, Kate Murphy, *Birder Admits Killing Cat, But Was It Animal Cruelty?* NY TIMES (November 14, 2007) at A16; Bruce Barcott, *Kill the Cat that Kills the Bird?* NY TIMES MAGAZINE (December 2, 2007) at 646. Since one of the issues in the Stevenson case was whether the cat “belonged” to someone, the case also prompted a change in Texas law to protect all cats, regardless of whether they have an owner. The cat that was killed was part of a feral colony that was fed and supported by John Newland, but Newland was not the “owner” of the cats in the colony. Kate Murphy, *Judge Declares a Mistrial in Cat Killing Case*, NY TIMES (November 17, 2007) at A12.

<sup>104</sup> Christine Haughney, *Writer, and Bird Lover, at Center of a Dispute About Cats Is Reinstated*, NY TIMES (March 27, 2013) at B3.

individuals poisoning cats” and suspended Williams.<sup>105</sup> The Orlando Sentinel modified the op-ed piece on its website, and Williams also added a correction and apology, which stated that while his statements were “not inaccurate, it was unwise because readers might construe it as a suggestion to go out and start poisoning feral cats. What’s more, the statement could be, indeed was, manipulated by feral-cat advocates into something I didn’t write or intend.”<sup>106</sup> However, bird advocates and journalists also mounted a counter-campaign, and Williams was reinstated ten days later.<sup>107</sup> Somewhat ironically, Williams’ 2009 article in Audubon Magazine observed that “[t]he political power of wildlife advocates is dwarfed by that of the feral cat lobby” and further went on to quote the Audubon Society’s Director of Bird Conservation as saying that, “[u]nfortunately, the cat people have an emotional appeal with the public that’s superior to anything we bird people have.”<sup>108</sup>

Indeed, there is perhaps no greater public relations problem for wildlife managers than attempting to deal with a cute furry “pest”—especially one that reminds us of a pet even though it’s also recognized that feral unsocialized animals are unsuitable as human companions.<sup>109</sup> This makes TNR, or other non-lethal means of control, tremendously attractive. Ultimately, however, these debates are not really about badgers, deer, geese, cats, or birds, but rather about the nature of human relationships to wild animals.

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<sup>105</sup> *Id.*

<sup>106</sup> Ted Williams, *Trap, Neuter, Return Programs Make Feral-Cat Problem Worse*, ORLANDO SENTINEL (Mar. 14, 2013) available at [http://articles.orlandosentinel.com/2013-03-14/news/os-ed-feral-cats-031413-20130313\\_1\\_feral-cats-feral-cat-problem-alley-cat-allies](http://articles.orlandosentinel.com/2013-03-14/news/os-ed-feral-cats-031413-20130313_1_feral-cats-feral-cat-problem-alley-cat-allies).

<sup>107</sup> *Id.*; Stephen J. Bodio, *The Crazy Cat Lobby*, STEPHEN BODIO’S QUERENCIA (Mar. 21, 2013) available at <http://stephenbodio.blogspot.com/2013/03/the-crazy-cat-lobby.html>; David Petersen, *Feral Kat Krazies Eat Audubon Star Reporter Ted Williams*, THE HUFFINGTON POST (Mar. 25, 2013) available at [http://www.huffingtonpost.com/david-petersen/ted-williams-feral-cats\\_b\\_2935206.html](http://www.huffingtonpost.com/david-petersen/ted-williams-feral-cats_b_2935206.html).

<sup>108</sup> Williams, *supra* note 97.

<sup>109</sup> See, *Feral and Stray Cats: An Important Difference*, ALLEY CAT ALLIES, available at <http://www.alleycat.org/page.aspx?pid=712>.



### III. THE EXISTING FRAMEWORK FOR WILDLIFE LAW IN ENGLAND & WALES

“No animal enjoys better protection than the badger, though few need it less. Uniquely, it has its own Act of Parliament to defend its wellbeing, yet—unlike hundreds of much more poorly safeguarded species—it is not at all endangered.”<sup>110</sup> As the Law Commission noted in its consultation paper, the legal regimes dealing with wildlife are inextricably intertwined with socio-economic structures. Accordingly, English law historically treated wildlife as an economic or leisure resource that is something to be controlled rather than something to be protected in its own right.<sup>111</sup> In particular, it focused on the creation and protection of rights over wildlife associated with particular interests in land. Following the Saxon and Norman invasions, lands were parceled out to the nobility, and those that were not parceled out were reserved as royal forests and fisheries. Thus, the sovereign had both the exclusive right to hunt in these royal preserves, and to allocate the ability (and the means<sup>112</sup>) to pursue wild animals elsewhere. While royal power gradually gave way to Parliament, that authority was exercised primarily through “qualification” statutes and game laws, which effectively allowed only prominent citizens to take game, possess certain weapons, and ultimately to consume certain animals.<sup>113</sup> Over time, the idea that wild animals belonged to the sovereign which could allocate the privilege of hunting<sup>114</sup> eventually evolved into the notion that the government in Parliament, as the political embodiment of the people’s will, had a duty

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<sup>110</sup> Geoffrey Lean, *Bovine TB: An ill wind blows for Mr Badger*, THE TELEGRAPH (January 22, 2010) available at <http://www.telegraph.co.uk/earth/earthcomment/geoffrey-lean/7054939/Bovine-TB-An-ill-wind-blows-for-Mr-Badger.html>. The statement that badgers are “unique” in having protection under their own Parliamentary Act is inaccurate. See *infra* notes 123-129 and accompanying text.

<sup>111</sup> CP No. 206, *supra* note 2, at 1. See also, MICHAEL J. BEAN & MELANIE J. ROLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 7-10 (3rd ed. 1997).

<sup>112</sup> One commentator has observed that early English game laws “were originally made with the view of taking arms out of the hands of the common people, or at least with the design rendering them inexpert in the use of them.” S. PURLWENT, *A DIALOGUE BETWEEN A LAWYER AND A COUNTRY GENTLEMAN UPON THE SUBJECT OF GAME LAWS* 14 (3<sup>rd</sup> ed. 1771) quoted in THOMAS A. LUND, *AMERICAN WILDLIFE LAW* 112 (1980).

<sup>113</sup> Lund, *supra* note 12 at pp. 7-10. Land ownership, wealth, and profession were the principal qualifications criteria. The qualification statutes remained in effect until as late as 1831.

<sup>114</sup> Some commentators dispute this conclusion and assert that there is little evidence that the King of England had any important property interest in wildlife, at least after the early medieval period. See e.g. Dean Lueck, *Wildlife Law*, THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, (P. Neuman ed. 1998) at p. 697; Dean Lueck, *The Economic Nature of Wildlife Law*, 18 JOURNAL OF LEGAL STUDIES 291 (1989).

to conserve and protect wildlife as a public good. This is reflected in the gradual evolution of legal protections afforded to badgers and other wild animals.

Martin's Act in 1822 famously became the first piece of legislation specifically intended to prevent cruelty to animals.<sup>115</sup> This was followed by a prohibition within the City of London on animal baiting and fighting in 1833,<sup>116</sup> which was extended to the rest of the country in 1835 with Pease's Act, and specifically addressed fighting and baiting badgers, bears, bulls, and a variety of other animals.<sup>117</sup> Pease's Act was in turn replaced and further expanded with the Prevention of Cruelty to Animals Act in 1849<sup>118</sup> and the Cruelty to Animals Act of 1876.<sup>119</sup> However, these animal cruelty measures only applied to domestic animals and did not protect wild animals at all, even when held in captivity,<sup>120</sup> such as in zoos or as performing animals.<sup>121</sup> This was partially remedied with

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<sup>115</sup> "An Act to prevent the cruel and improper Treatment of Cattle"(1822), 3 Geo. IV, c. 71. Martin's Act made it an offense for anyone to wantonly and cruelly beat, abuse, or ill-treat any horse, mare, gelding, ass, ox, cow, heifer, steer, sheep, or other cattle.

<sup>116</sup> "An Act for the more effectual Administration of Justice in the Office of a Justice of the Peace in the several Police Offices established in the Metropolis" (1833), 3 & 4 Will. IV, c. 19.

<sup>117</sup> "An Act to consolidate and amend the several Laws relating to the cruel and improper Treatment of Animals, and the Mischiefs arising from the driving of cattle" (1835), 5 & 6 Will. IV, c. 59. Pease's Act repealed and reenacted the protections of Martin's Act and extended the anti-cruelty prohibition to bulls, calves, lambs, dogs, and other domestic animals.

<sup>118</sup> "An Act for the more effectual Prevention of Cruelty to Animals" (1849), 12 & 13 Vict., c. 92. The 1849 Act made it an offense cruelly to beat, ill-treat, overdrive, abuse, or torture any animal, and removed the requirement found in the earlier legislation that the offense be committed both wantonly and cruelly. Additionally, the act made it an offense to cause unnecessary pain or suffering while transporting an animal, which significantly represents a broader concept of Cruelty which focuses upon the condition of the individual animal rather than the attitude or conduct of the perpetrator. Lastly the act introduced a definition of the term "animal" as encompassing any "horse, mare, gelding, bull, ox, cow, heifer, steer, calf, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal."

<sup>119</sup> "Cruelty to Animals Act" (1876), 39 & 40 Vict., c. 77. The 1876 Act also made it an offense to perform experiments on living animals unless they were carried out to advance medical knowledge or alleviate suffering. It required the use of anesthesia and provided for regulatory oversight administered by the Home Secretary.

<sup>120</sup> Courts applying these statutes struggled with trying to distinguish between wild animals tamed to serve some useful purpose and those that were merely wild animals in confinement. For example, trained decoy birds were considered domestic animals, *Colam v. Pagett* [1893] 12 Q.B.D. 66, but rabbits caught and kept to be used for coursing with dogs were still wild. *Aplin v. Porritt* [1893] 2 Q.B. 57.

<sup>121</sup> In holding that five full grown lions used in a traveling performance were not within the ambit of the Anti-Cruelty Acts, J. Cave noted, "[t]he mere caging and keeping in captivity a wild animal is not enough to make it a domestic animal." *Harper v. Marks* [1894] 2 Q.B. 319, 322.

the Wild Animals in Captivity Protection Act in 1900,<sup>122</sup> and a handful of other statutes aimed at providing a measure of protection to certain species in the wild, primarily birds.<sup>123</sup> The Protection of Animals Act of 1911 consolidated and expanded much of the anti-cruelty legislation dating back to Martin's Act. While it focused primarily upon domestic animals, it also expressly included captive animals within its scope—and significantly expanded liability for acts of omission or the failure to exercise reasonable care or supervision in preventing cruelty.<sup>124</sup>

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<sup>122</sup> Wild Animals in Captivity Protection Act, 1900, 63 & 64 Vict., c. 33 (U.K.). [Rule 20,1, T2.42] The Act makes it an offense to wantonly or unreasonably cause or permit any unnecessary suffering to a captive, maimed, pinioned, or imprisoned animal, or to cruelly abuse, infuriate, tease, or terrify such an animal. It broadly applies to any non-domestic animal of whatsoever kind or species—including fish or reptiles—and therefore expands beyond Parliament's traditional focus on mammals and birds. Hunting and coursing (i.e. using dogs to pursue game), however, were expressly excluded from the Act's coverage.

<sup>123</sup> Prior to passage of the Wild Animals in Captivity Protection Act there had been several measures aimed at conserving wild birds, and one which protected hares. The Sea Birds Preservation Act, 1869, 32 & 33 Vict., c. 17 (U.K.), first introduced statutory closed seasons for hunting seabirds, which was subsequently extended first to designated species of wild birds and fowl, and then to all wild birds in order to preserve their numbers. *See* Wild Birds Protection Act, 1872, 35 & 36 Vict., c. 78 (U.K.); An Act for the Preservation of Wild Fowl, 1876, 39 & 40 Vict., c. 29 (U.K.); Ground Game Act, 1880, 43 & 44 Vict., c. 47 (U.K.). The Hares Preservation Act, 1892, 55 & 56 Vict., c. 8 (U.K.), was the only measure passed during this period addressing wild mammals. While it did not address killing hares it prohibited their sale during five months of the year. The Wild Birds Protection Act, 1894, 57 & 58 Vict., c. 24 (U.K.), provided additional protection by prohibiting taking or destroying wild birds' eggs.

<sup>124</sup> Protection of Animals Act, 1911, 1 & 2 Geo. 5, c. 27 (U.K.). The Act makes it an offense to "cruelly beat, kick, ill-treat, over-ride, over-drive, over-load, torture, infuriate, or terrify any animal", or to "cause or procure, or, being the owner, permit any animal to be so used, or shall, by wantonly or unreasonably doing or omitting to do any act, or causing or procuring the commission or omission of any act, cause any unnecessary suffering, or, being the owner, permit any unnecessary suffering to be so caused to any animal". It also prescribes, among other things, "assist at the fighting or baiting of any animal", or managing the premises where such activities occur. Furthermore, that act states that "an owner shall be deemed to have permitted cruelty within the meaning of this Act if he shall have failed to exercise reasonable care and supervision in respect of the protection of the animal therefrom". Hunting and coursing were still generally excluded from the Act's coverage unless a captive animal used in hunting or coursing "is liberated in an injured, mutilated, or exhausted condition". The Act was also amended in 1921 to eliminate the hunting and coursing exclusion in circumstances where the animal is "in an enclosed space from which it has no reasonable chance of escape". Protection of Animals Act (1911) Amendment Act, 1921, 11 & 12 Geo. 5, c. 14 (U.K.). While much of the Protection of Animals Act is now superseded, the provision requiring anyone setting a spring trap which is likely to ensnare a rabbit or hare must check the trap daily between sunrise and sunset. *Id.* at § 10. *See also* CP No. 206, *supra* note 2, at p.42.

Thus, by the early 20<sup>th</sup> century, the legal framework, while still largely a patchwork of ad hoc measures dealing with particular issues, began to consider the effect of an act or omission on individual animals rather than focusing exclusively on the behavior of individuals accused of an offense.

Animal issues were then largely sidelined until the late 1960s by two world wars and momentous changes on both the domestic and international levels, which occurred during the first half of the 20<sup>th</sup> century. Externally, this period saw the growth of a number of new international regimes affecting the environment and wildlife, including those with tangential impact such as: the 1951 International Plant Protection Convention,<sup>125</sup> the 1971 Convention on Wetlands of International Importance (Ramsar Convention),<sup>126</sup> the 1982 United Nations Convention on the Law of the Sea,<sup>127</sup> or those which directly address wildlife issues as part of their core objectives such as the 1973 Convention on the International Trade in Endangered Species,<sup>128</sup> and the

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<sup>125</sup> The IPPC, which was reformatted in 1997, aims to secure coordinated, effective action to prevent and to control the introduction and spread of pests of plants and plant products. Although the agreement focuses upon plants, it also addresses standards to regulate “pests,” which include “any species, strain or biotype of plant, animal or pathogenic agent injurious to plants or plant products” and therefore impacts wildlife that is regarded as an invasive non-native species. See International Plant Protection Convention, Arts. 2, 8, available at <https://www.ippc.int/about/convention-text>.

<sup>126</sup> Convention on Wetlands 1971, available at [http://www.ramsar.org/cda/en/ramsar-documents-texts/main/ramsar/1-31-38\\_4000\\_0\\_\\_](http://www.ramsar.org/cda/en/ramsar-documents-texts/main/ramsar/1-31-38_4000_0__). While the Ramsar Convention primarily deals with wetlands habitats it, like the IPPC, the parties to the Convention have also addressed invasive non-native species and the steps to take to “identify, eradicate and control” such species. See, *Resolution VII:14, 7th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands (Ramsar, Iran, 1971)* San José, Costa Rica, 10-18 May 1999, available at [http://www.ramsar.org/pdf/res/key\\_res\\_vii.14e.pdf](http://www.ramsar.org/pdf/res/key_res_vii.14e.pdf); and *Resolution VIII:18, 8th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands (Ramsar, Iran, 1971)* Valencia, Spain, 18-26 November 2002, available at [http://www.ramsar.org/pdf/res/key\\_res\\_viii\\_18\\_e.pdf](http://www.ramsar.org/pdf/res/key_res_viii_18_e.pdf).

<sup>127</sup> UNCLOS, replaced four earlier treaties when it came into full effect in 1994, and defines the rights and responsibilities of nations in their use of the world’s oceans, establishing guidelines for businesses, the environment, and the management of marine natural resources. Accordingly, it addresses a range of issues affecting the marine environment, as well as specifically addressing “the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto.” United Nations Convention on the Law of the Sea, 1982, 1833 U.N.T.S. 397, art. 196(1), available at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf).

<sup>128</sup> CITES is one of the oldest and largest international conservation agreements, which establishes a framework for individual parties to implement in their national legislation in order to regulate trade in listed species so that their survival in the wild is not threatened. Convention on International Trade in Endangered Species of Wild Fauna and Flora, June 22, 1979, 27 U.S.T. 1087, available at <http://www>.

1992 Convention on Biological Diversity,<sup>129</sup> among others. Similarly, a variety of regional European measures also impact British wildlife law and policy as a result of the U.K.'s membership in European Union. This notably includes the 1979 Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention).<sup>130</sup> Additionally, the Treaty on the Functioning of the European Union (TFEU)<sup>131</sup> provides the EU with competence to act on environmental matters in addition to its powers to legislate for the common market, and specifically addresses the need to consider animal welfare in formulating and implementing particular EU policies.<sup>132</sup> Accordingly, there are a variety of European directives and regulations that affect what the U.K. does with wildlife domestically, including, for example, the Wild Birds Directive<sup>133</sup> and the Habitats Directive.<sup>134</sup> Moreover, internally, Parliament's role also changed during this period with a dramatic increase in the use of delegated legislation or regulation by administrative agencies, as well as in response to these new "external" developments.

These influences can be seen in the current framework for addressing wildlife in English law. Badgers provide an example of a purely domestic, and perhaps "older-style," effort at species protection,

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[cites.org/eng/disc/text.php](http://www.cites.org/eng/disc/text.php). CITES currently calls for varying levels of protection to more than 34,000 species of plants and animals. For the UK and other EU member states, the obligations CITES imposes are found in EU *Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein*, OFFICIAL JOURNAL L 61/1 of March 3, 1997.

<sup>129</sup> The CBD imposes a range of obligations on contracting states, including developing national strategies for the conservation and sustainable use of biodiversity, and for the prevention, eradication, or control of invasive non-native species. *See e.g.* Convention on Biological Diversity, Arts. 6, 8, *available at* <http://www.cbd.int/convention/text/default.shtml>.

<sup>130</sup> The Council of Europe's Bern Convention covers most of the natural heritage of European continent and some African states. It aims to conserve wild flora and fauna and their natural habitats and to promote European cooperation to protect endangered habitats and species including migratory species. Its detailed structure and provisions form the backdrop for a great deal of EU legislation, including the Wild Birds and Habitats Directives. *See* Convention on the Conservation of European Wildlife and Natural Habitats, Bern, September 19, 1979, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/104.htm>.

<sup>131</sup> *Consolidated Version Of The Treaty On The Functioning Of The European Union*, OFFICIAL JOURNAL C 83/47, March 30, 2010.

<sup>132</sup> *Id.* at arts. 13, 26-27, 191-193.

<sup>133</sup> Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OFFICIAL JOURNAL L103/1 of April 25, 1979. Original Directive and amendments consolidated in Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OFFICIAL JOURNAL L 20/7 of January 26, 2010.

<sup>134</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OFFICIAL JOURNAL L 206/7, July 22, 1992.

whereas many of the other British wildlife measures are more obviously influenced or driven by this proliferation of external influences and the growth of public awareness of a broader range of conservation, environmental, and animal welfare issues.

Despite the laws against animal baiting, badger digging remained popular, and concerns over their population decline led to the “Look Out for the Badger” campaign and passage of the Badger Act of 1973,<sup>135</sup> which was twice amended in 1991.<sup>136</sup> The Act was designed to stop the persecution of badgers, while allowing the Ministry of Agriculture, Fisheries and Food to license individuals to kill badgers suspected of spreading disease recalling that a badger had died of bovine tuberculosis in 1971. This legislation protected badgers but not their setts so the Protection of Badgers Act of 1992<sup>137</sup> consolidated the earlier anti-cruelty measures together with new protections for their setts.<sup>138</sup> Accordingly, unless specifically permitted or licensed, it is an offence to wilfully kill, injure, or take a badger, or to attempt such acts; to cruelly ill-treat a badger; to use badger tongs or to dig for a badger; and to interfere with or disturb a badger sett. It is also an offence to possess, sell, or offer to sell a badger. There are, however, exceptions for harming badgers or their setts when necessary to prevent serious damage to the land, crops, poultry or other property, or which could not be avoided when incidental to a lawful operation, or when hunting foxes with hounds.<sup>139</sup>

As public attitudes towards the environment, conservation, and animals increasingly changed over the latter part of the 20<sup>th</sup> century, a variety of other domestic legislative measures were also passed. Among the notable measures promulgated on the domestic level were the Wildlife and Countryside Act of 1981,<sup>140</sup> the Wild Mammals (Protection) Act of 1996,<sup>141</sup> the Hunting Act 2004,<sup>142</sup> the Animal Welfare Act of 2006,<sup>143</sup>

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<sup>135</sup> Badgers Act, 1973 c. 57 (U.K.). (repealed October 16, 1992). The 1973 Act was also modified by The Wildlife and Countryside Act, 1981 c. 69 (U.K.) (repealed October 16, 1992), and The Wildlife and Countryside (Amendment) Act, 1985, c. 31 (U.K.) (repealed October 16, 1992).

<sup>136</sup> Badgers (Further Protection) Act, 1991, c. 35 (U.K.) (repealed October 16, 1992); Badgers Act, 1991, c. 36 (U.K.) (repealed October 16, 1992).

<sup>137</sup> Protection of Badgers Act, 1992, c. 51 (U.K.).

<sup>138</sup> Doug Lucyshyn, *The Problem with Britain's Badgers*, INTERNATIONAL GAME WARDEN MAGAZINE (2008) at 16.

<sup>139</sup> Protection of Badgers Act, 1992, c. 51 (U.K.).

<sup>140</sup> Wildlife and Countryside Act, 1981, c. 69; Wildlife and Countryside (Amendment) Act, 1985, c. 31 (U.K.); Wildlife and Countryside (Amendment) Act, 1991, c. 39 (U.K.).

<sup>141</sup> Wild Mammals (Protection) Act, 1996, c. 3 (U.K.).

<sup>142</sup> Hunting Act, 2004, c. 37 (U.K.).

<sup>143</sup> Animal Welfare Act, 2006, c. 45 (U.K.).

and the Conservation of Habitats and Species Regulation 2010.<sup>144</sup> These measures in large part form the core of the current framework to protect wildlife in England and Wales.

The Wildlife and Countryside Act addresses the treatment and management of scheduled protected species including birds, mammals, reptiles, fish, invertebrates, and plants. While the Act has a wider scope, it is nevertheless also one of the principal means through which the U.K. implements its obligations under the European Union's Wild Birds Directive,<sup>145</sup> although the country's obligations specifically regarding game birds were already deemed addressed in the pre-Victorian Game Acts.<sup>146</sup> The Wildlife and Countryside Act makes it an offence to intentionally or recklessly kill, injure, or take a scheduled species that is living wild at the time; to use certain methods or means of killing or taking (e.g. self-locking snares, automatic weapons, etc.) a wild animal; or to possess, sell, or advertise for sale a scheduled species; or to damage, destroy or obstruct access to the place of refuge used by the protected species.<sup>147</sup> It also outlines a scheme to address the introduction of non-native species.<sup>148</sup>

The Wild Mammals Protection Act Protects prohibits the intentional infliction of unnecessary suffering by specified acts of wilful cruelty, such as beating, stabbing, burning, or drowning any wild

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<sup>144</sup> The Conservation of Habitats and Species Regulations 2010, S.I. 2010 No. 490. The 2010 "Habitats Regulations" consolidate and update the Conservation (Natural Habitats, & c.) Regulations 1994, S.I. 1994 No.2716.

<sup>145</sup> Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OFFICIAL JOURNAL L103/1 of April 25, 1979. Original Directive and amendments consolidated in Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OFFICIAL JOURNAL L 20/7 of January 26, 2010.

<sup>146</sup> See e.g. Game Act 1831, 1 & 2 Will. 4, c. 32 (Eng.). Accordingly, game birds—such as pheasants, partridges, grouse (or moor game), black (or heath) game, or ptarmigan—are generally excluded from the Wildlife and Countryside Act, with the exception of the provisions prohibiting certain methods of taking or killing wild species. The Act also excludes poultry—domestic fowls, geese, ducks, guinea-fowls, pigeons and quails, and turkeys—from its coverage as these are not deemed to be wild birds. Wildlife and Countryside Act, 1981, c. 69, § 27 (U.K.). Finally, the protection afforded to wild birds does not include any bird shown to have been bred in captivity, unless the bird has been lawfully released into the wild as part of a repopulation reintroduction program. Wildlife and Countryside Act, 1981 c. 69, § 1(6) (U.K.).

<sup>147</sup> Wildlife and Countryside Act, 1981, c. 69, § 1-11 (U.K.). Badgers are specifically listed as a species which is protected from being taken or killed by the means proscribed by section 11 of the Act. Wildlife and Countryside Act, 1981, c. 69, Sch. 6 (U.K.).

<sup>148</sup> Wildlife and Countryside Act, 1981, c. 69, § 14-15 (U.K.).

mammal not covered by the Animal Welfare Act of 2006.<sup>149</sup> However, there is currently an exception for the humane killing of a wild mammal injured by lawful shooting, hunting, coursing, or pest control activity, and a further exception for the otherwise legal use of traps, poisons, and birds of prey or dogs.<sup>150</sup>

The Hunting Act makes it an offence to hunt wild mammals with dogs, or for someone who knowingly permits their dogs or land to be used for such an activity; or similarly participates, attends, or facilitates in hare coursing events.<sup>151</sup> There are exemptions, however, for stalking or flushing an animal from cover for food, to prevent or reduce serious damage that the mammal might cause, or for field trial competitions; for falconry; and hunting rats or rabbits; as well as for recapture, rescue, or research purposes.<sup>152</sup>

The Animal Welfare Act is primarily directed at domesticated vertebrate species and does not generally apply to wild animals. However, even animals that are not commonly domesticated become “protected animals” when they are not living independently in the wild or become subject to human control, an approach which was specifically intended to have a broader scope than the term “captive animal” used in the Protection of Animals Act of 1911.<sup>153</sup> The Act’s aim is to prevent unnecessary suffering and generally promote animal welfare. It does so by creating a number of offences for acts or omissions, by those responsible for animals, which fail to promote animal welfare.<sup>154</sup> With regard to animal fighting offenses, the Animal Welfare Act also builds upon the anti-cruelty provisions of the Protection of Animals Act of 1911, and covers a variety of activities related to animal fighting including keeping the premises or possessing necessary equipment; training the animals; publicizing or participating in the fights; betting or handling monies; and making, supplying, or showing recordings of animal fights.<sup>155</sup>

The 2010 Habitats Regulations were promulgated under the European Communities Act of 1972,<sup>156</sup> and are the principal means

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<sup>149</sup> Wild Mammals (Protection) Act, 1996, c. 3, § 3 (U.K.). The Animal Welfare Act defines a protected animal as one that is commonly domesticated in the British Islands, or under the control of man whether on a permanent or temporary basis, or not living in a wild state. Animal Welfare Act, 2006, c. 45, § 2 (U.K.).

<sup>150</sup> Wild Mammals (Protection) Act, 1996, c. 3, § 1-2 (U.K.).

<sup>151</sup> Hunting Act 2004, 2004, c. 37, ss. 1-5 (U.K.).

<sup>152</sup> Hunting Act 2004, 2004, c. 37, sched. 1 (U.K.).

<sup>153</sup> Thus, typically “wild” species which escape from a zoo or circus would be covered. *See*, Animal Welfare Act 2006, 2006, c. 45, ss. 1-2 (U.K.).

<sup>154</sup> Animal Welfare Act 2006, 2006, c. 45, ss. 4-9 (U.K.).

<sup>155</sup> Animal Welfare Act 2006, 2006, c. 45, s. 8 (U.K.).

<sup>156</sup> European Communities Act 1972, 1972, c. 68, s. 2(2) (U.K.).



by which European Union's Habitats Directive<sup>157</sup> is transposed into domestic law for England and Wales and their adjacent territorial seas. The Habitats Directive was aimed at preserving biodiversity at significant European sites. Accordingly, it obligates European member states to take measures to maintain or restore the natural habitats and wild species found on Special Protection Areas or Special Areas of Conservation. The Directive and the U.K.'s implementing Regulations also identify particular "European Protected Species", which include a variety of plants, insects, reptiles, fish, birds, and mammals—but not badgers.<sup>158</sup> With regard to protecting scheduled wildlife, the Regulations generally make it an offense to deliberately disturb, injure, capture, or kill protected species of animals; to take or destroy their eggs; to possess, transport, sell or offer to sell such species or their eggs, or any part of a protected species; or to damage or destroy their breeding or resting places.<sup>159</sup> The Regulation also restricts or prohibits the means by which a wide range of other animals may be caught or captured.<sup>160</sup> Additionally, the deliberate introduction (from those onboard a ship) of new species whose natural range does not include Great Britain is also made an offense where that might damage the natural marine habitat.<sup>161</sup>

Other notable acts include the Conservation of Seals Act of 1970,<sup>162</sup> which makes it an offense to kill or take seals with poison or a firearm, and the Salmon and Freshwater Fisheries Act of 1975<sup>163</sup> which, not unlike the Game Acts, establishes closed seasons, prohibits the use of certain means of taking or killing, and creates a licensing scheme to pursue the listed species. The Deer Act of 1991 also regulates the killing and taking of deer by establishing closed seasons and prohibits the use of certain methods such as specified firearms or spears. It also makes it an offense to kill, take, or injure deer on another's land without the permission of the owner or occupier.<sup>164</sup>

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<sup>157</sup> See Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OFFICIAL JOURNAL L 206/7, July 22, 1992.

<sup>158</sup> Directive Annex IV(a); The Conservation of Habitats and Species Regulations 2010, S.I. 2010, No. 490. Regulation 40, and Schedule 2 lists European Protected Species of Animals, and European protected species of plants are addressed in Schedule 5. Badgers, unlike otters or bats found on the European Protected Species list for example, are protected solely as a matter of domestic UK law and policy.

<sup>159</sup> The Conservation of Habitats and Species Regulations 2010, S.I. 2010, No. 490. Reg 41.

<sup>160</sup> Directive Art 15 & Annex V(a); The Conservation of Habitats and Species Regulations 2010, S.I. 2010 No. 490. Regulation 43, and Schedule 4.

<sup>161</sup> The Conservation of Habitats and Species Regulations 2010, S.I. 2010, No. 490. Reg 52.

<sup>162</sup> Conservation of Seals Act 1970, 1970, c. 30.

<sup>163</sup> Salmon and Freshwater Fisheries Act 1975, 1975, c. 51.

<sup>164</sup> Deer Act 1991, 1991, c. 54.

Each of these acts provides for a range of exceptions and defenses. So, for example, hunting wildlife outside of a closed season may be permitted<sup>165</sup> and specific persons may be authorized to take otherwise prohibited acts to tend to sick or injured wildlife;<sup>166</sup> to preserve public health or safety; to prevent the spread of disease; or to prevent serious damage to livestock, food supplies, and so on.<sup>167</sup> Additionally, an otherwise prohibited action may be taken under an approved license in appropriate circumstances, which are often detailed in the legislation, especially where the act to be taken is incident to some other lawful operation and there is no other reasonably available or satisfactory alternative.<sup>168</sup>

Accordingly, the pilot badger cull in West Gloucestershire and West Somerset under the Government's bTB Eradication Plan, which began in June 2013, was authorized by licenses for each County issued by the licensing authority for protected species, Natural England.<sup>169</sup> Under the terms of Natural England's pilot program, licensed farmers agree to attempt to intensively cull 70% of the badgers within particular areas during an initial six-week season, and then to maintain that population level with subsequent annual seasons over the duration of the four-year pilot. The licenses also establish closed seasons during which particular types of control operations may not take place: controlled shooting operations may not take place between February 1 and May

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<sup>165</sup> See e.g., Wildlife and Countryside Act 1981, 1981, c. 69, s. 2.

<sup>166</sup> See e.g., Wildlife and Countryside Act 1981, 1981 c. 69, ss. 4, 10; The Conservation of Habitats and Species Regulations 2010, S.I. 2010, No. 490, Reg. 42; Wild Mammals (Protection) Act 1996, 1996, c. 3, s. 2; Conservation of Seals Act 1970, 1970 c. 30, s. 9;

<sup>167</sup> See e.g., Wildlife and Countryside Act 1981, 1981, c. 69, s. 4; Deer Act 1991, 1991 c. 54, s.7.

<sup>168</sup> See e.g., Wildlife and Countryside Act 1981, 1981, c. 69, s. 16; The Conservation of Habitats and Species Regulations 2010, S.I. 2010, No. 490, Reg. 53; Conservation of Seals Act 1970, 1970, c. 30, s. 10; Deer Act 1991, 1991, c. 54, s.8.

<sup>169</sup> Natural England, *Final authorisation of badger control licences in west Gloucestershire and west Somerset* (February 27, 2013), available at [http://www.naturalengland.org.uk/about\\_us/news/2013/270213.aspx](http://www.naturalengland.org.uk/about_us/news/2013/270213.aspx). (Natural England is an Executive Non-departmental Public Body responsible to the Secretary of State for Environment, Food and Rural Affairs which, in addition to issuing licenses, serves as the Government's institutional advisor on the natural environment); see, Natural England, *About Us; What We Do* available at [http://www.naturalengland.org.uk/about\\_us/whatwedo/default.aspx](http://www.naturalengland.org.uk/about_us/whatwedo/default.aspx). (The licenses were first issued in September 2012, but the initial cull was postponed until the summer of 2013 following various legal challenges to the cull and as the direct result of a request by the National Farmers' Union, who determined they were not then in a position to be able to successfully cull desired percentage badger population in the targeted areas); Department for Environment, Food & Rural Affairs, *Press Release: Badger cull to proceed next year*, (October 23, 2012), available at <https://www.gov.uk/government/news/badger-cull-to-proceed-next-year>.

31, cage trapping and shooting may not occur between December 1 and May 31, and cage trapping and vaccination operations may not occur between December 1 and April 30.<sup>170</sup> Only two culling methods are permissible, either controlled shooting of badgers in the field, or cage trapping followed by shooting, although trapping and vaccinating badgers is also listed as an alternative licensable control method. The number of licenses is limited, and those engaging in the cull must demonstrate their competence with the method to be employed under their particular Badger Control Plan. Furthermore, they are also subject to governmental monitoring and must observe DEFRA's Best Practices Guidance and are subject to its Enforcement Policies for any breach of the license terms.<sup>171</sup>

The stated objective of DEFRA's Best Practices Guidance (hereafter "the Guidance") on "controlled shooting of badgers in the field under license to prevent the spread of bovine TB in cattle" is to ensure a humane cull.<sup>172</sup> The Guidance establishes rifle marksmanship standards and training requirements, specifies the type and size of weapons and ammunition to be used, and envisions that shooting may occur while searching for these nocturnal animals over an area with a spotlight or night vision device, when shooting over a fixed bait point. It further directs that shots at a badger in the field "must only be taken when the animal is stationary, when the target area is clearly visible in the animal is more or less broadside on, so the shooter is confident of an accurate shot" of the small heart/lung area.<sup>173</sup> Additionally, "bait points must be at least 30 m from the nearest sett (i.e. burrow) and must be far enough from dense cover, where a badger might be lost, to avoid the risk of a wounded animal getting away."<sup>174</sup> Shooting at bait points is the only method where shotguns may be used. The aim is to kill the animal quickly with the first shot. While a single leashed dog may be used to track badgers, dogs are not to be used to flush or drive badges from

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<sup>170</sup> Natural England, *Final authorisation of badger control licences in west Gloucestershire and west Somerset* (February 27, 2013), available at [http://www.naturalengland.org.uk/about\\_us/news/2013/270213.aspx](http://www.naturalengland.org.uk/about_us/news/2013/270213.aspx).

<sup>171</sup> *Guidance to Natural England: Licences to kill or take badgers for the purpose of preventing the spread of bovine TB under section 10(2)(a) of the Protection of Badgers Act 1992*, DEPARTMENT FOR ENVIRONMENT, FOOD & RURAL AFFAIRS (Dec. 14, 2011), available at <https://www.gov.uk/government/publications/guidance-to-natural-england-preventing-spread-of-bovine-tb>.

<sup>172</sup> Department for Environment, Food & Rural Affairs, *Controlled shooting of badgers in the field under licence to prevent the spread of bovine TB in cattle* (May 2013), ¶s 1,3, available at <https://www.gov.uk/government/publications/controlled-shooting-of-badgers-in-the-field-under-licence-to-prevent-the-spread-of-bovine-tb-in-cattle>.

<sup>173</sup> *Id.* ¶¶ 23-36.

<sup>174</sup> *Id.* ¶¶ 44-51.

their setts.<sup>175</sup> DEFRA similarly issued Best Practice Guidance on “cage trapping and shooting of badgers under license prevent the spread of bovine TB in Cattle,” which additionally details the caging equipment to be used, the placement, baiting, setting of the traps, when they should be checked, and how the animal should be shot, in order to meet its humane standards.<sup>176</sup> However, although permitted by the licensing scheme and Best Practices Guidance, controlled shooting in the field is the preferred method for the pilot cull, and badgers will not be cage-trapped before shooting.<sup>177</sup>

Unlike the RBCT, these pilot culls are industry-led, not government-led, and cover a much a wider area with culling only carried out in areas surrounded by hard barriers to prevent perturbation—the spread of disease to other areas due to the targeted animals roaming outside their usual territories.<sup>178</sup>

#### IV. THE WILDLIFE LAW REFORM EFFORT

##### *a. Choice of Perspective*

The badger cull, and the Law Commission’s much broader wildlife law reform project, highlights the different perspectives that can be brought to wildlife issues. The wildlife law reform project advocates codifying and rationalizing the complex existing legal framework into a single statute to meet the needs of the 21<sup>st</sup> century. As the Law Commission notes in its wildlife consultation paper, four general perspectives have characterized the development of wildlife law, and these views sometimes compete or conflict with one another.<sup>179</sup>

Older laws emphasized issues associated with the “exploitation” of wildlife as a resource, and the “control” of wildlife when it interferes with human activities—both of which tend to emphasize specific interests in land. In the late 20th century, “conservation” and environmental concerns increasingly prompted domestic and international wildlife measures focused on species protection as part of the common heritage of humanity or as part of the global commons. These measures tend to

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<sup>175</sup> *Id.* ¶¶ 10-12, 53.

<sup>176</sup> Department for Environment, Food & Rural Affairs, *Cage-trapping and shooting of badgers under license to prevent the spread bovine TB in cattle* (May 2012), available at <https://www.gov.uk/government/publications/cage-trapping-and-shooting-of-badgers-under-licence-to-prevent-the-spread-of-bovine-tb-in-cattle>.

<sup>177</sup> *Badgers: the debate continues*, BRITISH ECOLOGICAL SOCIETY, available at <http://www.britishecologicalsociety.org/blog/2013/04/25/badgers-the-debate-continues/>.

<sup>178</sup> *Id.*

<sup>179</sup> CP No. 206, *supra* note 2, ¶¶ 1.9 to 1.19.

focus on specific species or ecosystems themselves, as distinct from the interests of particular owners or occupiers of land.<sup>180</sup> And most recently a new perspective has gained momentum, especially in Europe and the U.K., which focuses on the “welfare” of individual animals as opposed to broader concerns regarding an entire species.

The bulk of the existing legal framework, and consequently the bulk of the Law Commission consultation paper and recommendations, focuses on legal measures dealing with the exploitation or control, and to a lesser degree on the conservation, of wildlife.

While the Law Commission did attempt to consider the need to conserve and protect particular species, it excluded general habitat protection from the scope of its project.<sup>181</sup> Although the need to do so in order to keep the project manageable may be self-evident, modern wildlife issues are so inextricably intertwined with habitat that maintaining this position is problematic. For example, as noted below, the Law Commission consultation paper regards fungi as part of the flora and fauna comprising wildlife, but dealing with fungi without regard to habitat is difficult. It is similarly difficult to deal with issues regarding both protected and invasive species without regard to habitat.

The Law Commission further recognized that one of the project’s principal tasks is to ensure that various EU measures addressing wildlife are properly implemented within England & Wales.<sup>182</sup> However, key measures, such as the Habitat<sup>183</sup> and Wild Birds<sup>184</sup> Directives, go beyond the species-specific focus chosen for the wildlife project to also address environmental or habitat related issues associated with wildlife.

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<sup>180</sup> One of the aims of the conservation movement is to deal with the “Tragedy of the Commons,” the social dilemma created when individuals acting in their own self-interest over-use a shared resource to the detriment of all—which represents a shift from focusing, for example, only on the interests of particular landowner in exploiting wildlife found on their property. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, (Dec.1968), available at <http://www.sciencemag.org/content/162/3859/1243.full>.

<sup>181</sup> CP No. 206, *supra* note 2, ¶¶ 1.24, 5.5 and Provisional Proposal 5-1. Wildlife’s connection to agriculture and public health is similarly excluded from the scope of this project. *Id.* at ¶ 1.29.

<sup>182</sup> The CP does note that Wales is endeavoring to take a broad approach to reforming its devolved environmental, planning, wildlife management, and habitat protection laws as part of its Natural Environment Framework. *Id.* at ¶¶ 1.33 to 1.37.

<sup>183</sup> Council Directive 92/43, on the conservation of natural habitats and of wild fauna and flora, 1992 O.J. (L 206) 7 (EC).

<sup>184</sup> Council Directive 79/409, 1979 O.J. (L 103) 1 (EC) on the conservation of wild birds, Original Directive and amendments consolidated as Directive 09/147 of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, 2010 O.J. (L 20) 7 (EC).

Additionally, apart from noting that animal welfare is also a concern or theme in modern wildlife law, and describing the current provisions of the Animal Welfare Act 2006 and the Wild Mammals (Protection) Act 1996,<sup>185</sup> there is little focus in the Law Commission consultation paper on animal welfare as an emerging driver for the future of wildlife law. Indeed, the Law Commission consultation paper's proposed new statute would generally exclude welfare concerns from its coverage.<sup>186</sup>

As a consequence, the Law Commission's wildlife reform project is focusing on a conception of wildlife law, which emphasizes the older more species-specific "exploitation" and "control" perspectives, rather than newer trends. Since much of the law that needs to be updated was also initially crafted with those same perspectives in mind, that focus is entirely appropriate. However, to the degree that newer challenges in the field of wildlife law will be addressed from a conservationist/environmentalist or welfarist perspective, excluding or minimizing these themes misses an opportunity to create the sort of framework policy makers and regulators may need in the future.

*b. The animal welfare perspective*

The absence of greater focus on animal welfare is perhaps one of the more striking aspects of the Law Commission's wildlife law reform project. Acknowledging and including the animal welfare perspective may not only play well to popular sentiment (as seen in the badger cull debate) thereby helping to enhance support for any reforms which are eventually adopted, but doing so in the broader wildlife law reform effort is perhaps also easier and less disruptive to the project than might first appear. Moreover, there may be arguments that European law requires considering the welfare of wild animals in some circumstances.

Eurobarometer surveys have shown that respondents in the U.K. tend to be more concerned with animal welfare issues than the average European respondent, and that a majority would agree that humans have a duty to protect the rights of animals "whatever the cost".<sup>187</sup> In other words, animal welfare is a popular topic in the U.K., as further reflected in the multiplicity of interest groups supporting badgers and a

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<sup>185</sup> CP No. 206, *supra* note 2, ¶¶ 3.108 to 3.121.

<sup>186</sup> *Id.* at ¶ 5.5. However, Proposal 5-2 does ask whether welfare offenses should be included in the new single act.

<sup>187</sup> See *Commission Special Eurobarometer 238: Risk Issues* (Feb. 2006), available at [http://ec.europa.eu/food/food/resources/special-eurobarometer\\_riskissues20060206\\_en.pdf](http://ec.europa.eu/food/food/resources/special-eurobarometer_riskissues20060206_en.pdf); *Commission Special Eurobarometer 225: Social Values Science and Technology*, (June 2005), available at [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_225\\_report\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_225_report_en.pdf).

wide range of other species. It is also seen in the number of responses the Law Commission received to its consultation paper urging stiffer penalties and greater enforcement for wildlife offences. Acknowledging, rather than excluding, the welfare theme in dealing with wildlife should therefore help garner popular support for the proposal—and incidentally help promote greater support for the enforcement of any subsequent legislation based upon the proposal.

Moreover, the U.K. has long been a leader in developing the field of animal welfare science. While animal welfare science focuses heavily on farm animal welfare and agricultural industries, where human activity tends to impact the greatest number of animals, this is not the field's exclusive focus. U.K. leadership in animal welfare dates back to the Universities Federation for Animal Welfare (UFAW) development of the "Three Rs" in the late 1950s advocating the reduction of reliance upon animals in scientific experimentation;<sup>188</sup> the Brambell Report on farm animal welfare in 1965;<sup>189</sup> and the Farm Animal Welfare Council's reformulation of that work into a statement of the "Five Freedoms."<sup>190</sup> While the Five Freedoms and the Three Rs are now regarded as rather

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<sup>188</sup> The "Three Rs" call for the Replacement, Reduction, and Refinement of animal testing. See *Highlights from UFAW's History*, UFAW, available at <http://www.ufaw.org.uk/highlights.php>.

<sup>189</sup> TECHNICAL COMMITTEE TO ENQUIRE INTO THE WELFARE OF ANIMALS KEPT UNDER INTENSIVE LIVESTOCK HUSBANDRY SYSTEMS, REPORT, 1965, (UK).

<sup>190</sup> The FAWC states that "any animal kept by man must at least be protected from unnecessary suffering. We believe that an animal's welfare, whether on farm, in transit, at market or at a place of slaughter should be considered in terms of 'five freedoms'. These freedoms define ideal states rather than standards for acceptable welfare. They form a logical and comprehensive framework for analysis of welfare within any system together with the steps and compromises necessary to safeguard and improve welfare within the proper constraints of an effective livestock industry."

The Five Freedoms are:

1. Freedom from Hunger and Thirst—by ready access to fresh water and a diet to maintain full health and vigour.
2. Freedom from Discomfort—by providing an appropriate environment including shelter and a comfortable resting area.
3. Freedom from Pain, Injury or Disease—by prevention or rapid diagnosis and treatment.
4. Freedom to Express Normal Behaviour—by providing sufficient space, proper facilities and company of the animal's own kind.
5. Freedom from Fear and Distress—by ensuring conditions and treatment which avoid mental suffering.

*Five Freedoms*, FAWC, available at <http://www.fawc.org.uk/freedoms.htm>.

basic statements of the tenets of animal welfare science, which has continued to develop a more scientific basis under the direction of figures such as Professor Donald Broom at Cambridge University's Centre for Animal Welfare and Anthrozoology,<sup>191</sup> these statements nevertheless helped influence international standards issued by the World Organization for Animal Health (OIE)<sup>192</sup> and the development of the EU's Animal Welfare Strategy for 2012 to 2015.<sup>193</sup>

Given the U.K.'s leadership in developing a scientific rather than an emotional or anecdotal basis to assess animal welfare, it is somewhat ironic that so much of the current badger cull debate revolves around competing claims regarding the scientific findings pertaining to the welfare aspects of the cull. Both proponents and opponents of the cull point to the 1998-2006 RBCT, and similar studies, to support their respective positions. For example, the Government and the National Farmers' Union extrapolate from the RBCT to conclude that the pilot cull should lead to as much as a 16% net reduction in the incidence of bTB.<sup>194</sup> This contrasts with assertions by Team Badger, a coalition of sixteen of the largest animal and wildlife protection groups, which point to the RBCT findings showing that while culling reduced badger numbers it actually increased the prevalence and spread of bTB within the remaining badger population,<sup>195</sup> and the explicit finding in the RBCT Final Report that "badger culling cannot meaningfully contribute to the control of cattle TB in Britain."<sup>196</sup> They also cite the Report's "further conclu[sion] from the scientific evidence available, that the rigorous application of heightened control measures directly targeting cattle will reverse the year-on-year increase in the incidence of cattle TB and halt

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<sup>191</sup> See, *Professor Donald M. Broom*, ANIMAL WELFARE INDICATORS, available at <http://www.animal-welfare-indicators.net/site/index.php/professor-donald-m-broom>.

<sup>192</sup> See *The OIE's Achievements in Animal Welfare*, WORLD ORGANIZATION FOR ANIMAL HEALTH, available at <http://www.oie.int/animal-welfare/animal-welfare-key-themes>.

<sup>193</sup> See *European Union Strategy for the Protection and Welfare of Animals 2012-2015*, COM (2012) 6 final (Feb. 15, 2012) ; and the accompanying Impact Assessment, at ¶2.1, SEC(2012) 55 final (Jan. 19, 2012).

<sup>194</sup> See *The Government's policy on Bovine TB and badger control in England*, *supra* note 30, at ¶'s 4.1-4.11; Alastair Driver, *NFU restates commitment to badger cull after MP vote*, FARMERS GUARDIAN (October 26, 2012), available at <http://www.farmersguardian.com/nfu-restates-commitment-to-badger-cull-after-mp-vote/50842.article>.

<sup>195</sup> *Backing Badgers: Why the cull will fail*, TEAM BADGER (June 5, 2013) at 16, available at <http://www.rspca.org.uk/ImageLocator/LocateAsset?asset=document&assetId=1232733074865&mode=prd>.

<sup>196</sup> THE INDEPENDENT SCIENTIFIC GROUP ON CATTLE TB, FINAL REPORT , 2007, at 181, available at [http://archive.defra.gov.uk/foodfarm/farmanimal/diseases/atoz/tb/isg/report/final\\_report.pdf](http://archive.defra.gov.uk/foodfarm/farmanimal/diseases/atoz/tb/isg/report/final_report.pdf).



the geographical spread of the disease.”<sup>197</sup> Moreover, opponents of the cull also point to notable figures such as Lord Krebs, who designed the RBCT, as saying that, “[t]he scientific case is as clear as it can be: this cull is not the answer to TB in cattle. I have not found any scientists who are experts in population biology or the distribution of infectious disease in wildlife who think that culling is a good idea. People seem to have cherry-picked certain results to try and get the argument they want.”<sup>198</sup>

However, despite Lord Krebs’s assertion, the British Veterinary Association publicly stated that it supports the badger cull, in part, on the grounds that the scientific link between badgers and bTB needs to be further addressed:

As the open season for shooting badgers begins... the British Veterinary Association (BVA) is reiterating its support for the planned badger cull pilots as part of the overall bovine TB eradication strategy in England... The BVA pointed to the evidence base behind the policy—data from the Randomised Badger Culling Trials (RBCTs)—which shows that bovine TB in cattle can be reduced by around 16% in areas where a targeted, humane badger cull has taken place. The pilot culls will use different culling methods to the RBCTs and are therefore being monitored by the Independent Expert Panel made up of experts in veterinary pathology, animal welfare physiology, wildlife ecology, badger behaviour, wildlife management, ecological theory, statistics, and marksmanship... Peter Jones, President of the BVA, said[,] “We accept that there is a gap in our knowledge, which is whether controlled shooting can deliver a badger cull humanely and safely, and to the same degree of effectiveness as cage trapping and shooting. That is what the pilots are designed to address and why is it important that they are allowed to go ahead unhindered. We understand that this is a highly emotional issue but we must be able to gather the evidence to enable future policy decisions to be based on science.”<sup>199</sup>

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<sup>197</sup> *Id.*

<sup>198</sup> Lord Krebs comments on BBC Radio *Today* (October 12 2012) quoted in *Backing Badgers*, *supra* note 195, at 15.

<sup>199</sup> *Badger cull pilots the right scientific approach, says BVA*, BRITISH VETERINARIAN ASSOCIATION, (May 31, 2013), available at <http://www.bva.co.uk/news/3431.aspx>; *See also Badger cull delay: science has not changed, say vets*, BRITISH VETERINARIAN ASSOCIATION, (October 23, 2012), <http://www.bva.co.uk/news/badgerculldelaysciencehasnotchangedsayvets.aspx>.

The BVA's endorsement of the badger cull prompted Alasdair MacMillan, the former chief scientific officer at the RSPCA, Mark Jones, the executive director of the Humane Society International, along with several members of the BVA, to publish a letter fiercely criticizing the BVA's leadership because:

[t]heir support comes in spite of the overwhelming scientific opinion that culling badgers will not help to reduce TB in cattle, and amidst grave concerns over the impact that culling will have on the welfare of badgers and the future of many populations ...

The British Veterinary Association reached its position of support for the Government's pilot culls without consulting its full membership, and has ignored subsequent calls from veterinarians and one of its own member societies for it to reconsider. The public needs to understand that the BVA's position is not necessarily representative of majority veterinary opinion, and that many vets oppose or have serious reservations about the policy.

Rather, it represents the position of an organisation that, in our view, has lost touch with its key purpose of providing leadership and guidance on animal welfare on this issue and whose judgment is being influenced by a close historic alignment with the farming industry. Their failure to respond to very serious concerns raised over the humaneness assessment is damning.

We are saddened that this episode brings shame upon the profession ... That some vets in positions of influence appear to have abandoned precaution for the sake of what appears to be political and perceived economic expedience, casts a dark shadow over our profession. In our opinion these actions damage the credibility of the profession and bring it into disrepute.

We can only hope that its future leaders will adopt a more precautionary, independent, science-led and, most importantly, empathetic and welfare-led approach to the issues facing all of the animals with whom we share our world.<sup>200</sup>

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<sup>200</sup> *Letters: Badger cull has no basis in science*, THE INDEPENDENT, June 5,

Despite this dissention among veterinary scientists over the particulars of the badger cull, the discipline of animal welfare science, which the U.K. helped pioneer, is now well established as an important part of the formal policy process within Europe. One part of the current EU Animal Welfare Strategy is the creation of a new European Animal Welfare Framework Law for all animals kept in the context of economic activity, including wildlife, which would replace the current patchwork of European measures. The new law is also intended to be science based using the OIE principles. The European Parliament has called upon the Commission to present its proposal as soon as the end of 2013 in conjunction with its review of the general welfare measures aimed at farm animals under Directive 98/58/EC.<sup>201</sup>

Moreover, addressing animal welfare may already be legally required for some wildlife related issues. Animal welfare is now addressed in Article 13 of the Lisbon Treaty, which provides that:

in formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.<sup>202</sup>

This provision essentially takes the language of the EU's earlier animal welfare protocol to the Treaty of Amsterdam and elevates it to treaty level language in the TFEU. It is found in the same section (Part II) of the Lisbon Treaty as are several other "provisions of general application"

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2013, available at <http://www.independent.co.uk/voices/letters/letters-badger-cull-has-no-basis-in-science-8644011.html>. The humaneness of the cull, even under DEFRA's Guidelines, has also been criticized. For example Jack Reedy of the Badger Trust states that, "[t]his ... is a trial on whether the method of killing is humane and safe. The badgers are not going to be caged or contained. They are going to shoot a badger and time the length of its squealing. It's the most appalling and brutal thing to do." Jim Greenhalf, *Badgers, to cull or not to cull?*, BRADFORD TELEGRAPH AND ARGUS, June 3, 2013, available at 2013 WLNR 13590434.

<sup>201</sup> Council Directive 98/58, concerning the protection of animals kept for farming purposes, 1998 O.J. (L 221). See also Resolution on the European Union Strategy for the Protection and Welfare of Animals 2012–2015, Eur. Parl. Doc. (2012/2043(INI)) ¶ 61.

<sup>202</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 13., Sep. 5, 2008, 2008 O.J. (C 115) 47.

addressing a range of fundamental objectives such as gender equality,<sup>203</sup> employment and social protection,<sup>204</sup> non-discrimination,<sup>205</sup> religious freedom,<sup>206</sup> and environmental protection.<sup>207</sup> While the animal welfare obligations imposed by the treaty continue to be subject to several exclusions and limitations, which were also found in the earlier protocol, the provision still covers some wild animals.

By its own terms, Article 13 does not apply to all EU policy areas. While Article 13 does impose obligations upon member states to “pay full regard” to animals’ welfare requirements when implementing EU policies on agriculture, fisheries, transport, and the internal market, for example, other pertinent policy areas—notably the environment—are not listed. This means that significant European measures affecting wildlife, such as the Habitat and Wild Birds Directives, do not trigger Article 13.

Nevertheless, some European measures dealing with wild animals are expressly or implicitly aimed at harmonizing the internal market, or other enumerated policies, and therefore would trigger Article 13 on that basis. For example, the EU regulations restricting transactions involving seal products were motivated by concerns over cruel killing practices, and expressly predicated upon a need to harmonize the internal market, rather than any environmental or conservation policy.<sup>208</sup> The EU’s ban on trade in cat and dog fur and related products was similarly motivated by welfare concerns and the need to prevent obstacles to the functioning of the internal market.<sup>209</sup> The EU Directive governing animals kept in zoos (including fish and invertebrates) was also motivated both by conservation concerns and a need to harmonize the standards and treatment of wild animals in captivity, and therefore was deemed to fall within the coverage of Article 13.<sup>210</sup> Similarly, the Leghold Trap Regulation reflects welfare concerns over inhumane trapping methods and a need for uniformity in the EU’s internal and external relations.<sup>211</sup>

There are several more general measures that might apply to wild animals in some circumstances, which also fall within the ambit of

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<sup>203</sup> *Id.* art. 8.

<sup>204</sup> *Id.* art. 9.

<sup>205</sup> *Id.* art. 10.

<sup>206</sup> *Id.* art. 17.

<sup>207</sup> *Id.* art. 11.

<sup>208</sup> Commission Regulation 1007/09, on Trade in Seal Products, 2009 O.J. (L 286) 36 (EC); Commission Regulation 737/10, on Seal Products Regulation Rules, 2010 O.J. (L 216) 1 (EU).

<sup>209</sup> Commission Regulation 1523/07, 2007 O.J. (L 343) 1 (EC).

<sup>210</sup> See Council Directive 1999/22, O.J. (L 94)24 (EC); *Commission Staff Working Paper Impact Assessment*, at ¶ 2.2, SEC(2012) 55 final (January 19, 2012).

<sup>211</sup> See Council Regulation 3254/91, 1991 O. J. (L 308) 1(EC); *Commission Staff Working Paper Impact Assessment*, *supra* note 210.

Article 13. The regulation on the protection of live vertebrate animals during transport specifically references the animal welfare protocol which was subsequently embedded in Article 13 of the Lisbon Treaty, and addresses wild animals in several of its technical rules.<sup>212</sup> The new European Regulation on the protection of animals at the time of killing, which went into effect on January 1, 2013, applies to commercially farmed deer, goats, rabbits, ostriches, ducks, geese, and quail, and similarly references the animal welfare protocol.<sup>213</sup>

The newest such measure, the Directive on the protection of animals used for scientific purposes, is also expressly predicated upon the need to harmonize the internal market, and specifically cites Article 13 of the Lisbon Treaty.<sup>214</sup> Conceptually related to the Experimental Animals Directive are the provisions aimed at reducing or eliminating animal testing found both in the Cosmetics Directive<sup>215</sup> and the REACH (Registration, Evaluation, Authorisation and restriction of Chemical substances) Regulation,<sup>216</sup> which could impact some wild species.

Even if the animal welfare obligations of Article 13 are triggered, those obligations are not particularly onerous—especially when dealing with wildlife. That is because the provision balances the member states' obligation to “pay full regard” to animal welfare against “the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.” Given that much of what the wildlife project is addressing reflects English and Welsh customs, heritage, and traditions regarding wildlife and wildlife management, the substantive impact of Article 13 is perhaps minimal—assuming the more detailed requirements of the various EU Directives and Regulations are met.

Nevertheless, there is perhaps a sufficient domestic and EU dimension to the animal welfare theme in wildlife law and regulation such that it warrants more mention than what currently appears in the Law Commission's current reform proposals.

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<sup>212</sup> Council Regulation 1/2005, 2004 O. J. (L 3) 1(EC).

<sup>213</sup> However, the new Regulation does not apply to farmed fish; nor to poultry, rabbits or hares killed outside of a slaughterhouse for private consumption; nor to the killing of wild or stray animals for population control purposes. Council Regulation 1099/2009, 2009 O. J. (L 303), 1(EC). The Regulation updates and replaces Council Directive 93/119, 1993 O. J. (L 340), 21(EC).

<sup>214</sup> Directive 2010/63, 2010 O. J. (L 276), 33 (EU). The earlier directive 86/609/EC, which the new Directive replaces, was also regarded as a welfare measure. See Commission Staff Working Paper Impact Assessment, *supra* note 210.

<sup>215</sup> Council Directive 76/768 1976 O. J. (L 262) 169 (EC). The animal testing provisions were added in the 7<sup>th</sup> amendment to this original measure by Council Directive 2003/15 2003 O. J. (L 66) 26 (EC). From 11 July 2013 the Cosmetics Directive will be replaced by Council Regulation 1223/2009, 2009 O. J. (L 342) 59 (EC), which incidentally specifically cites Article 13 of the Lisbon Treaty.

<sup>216</sup> Regulation 1907/2006, 2006 O. J. (L 396) 1 (EC).

*c. Species and the definition of “wildlife”*

The welfare discussion, while focused on animals, implicitly highlights a number of definitional problems associated with the broader question of what actually constitutes “wildlife,” and the Law Commission consultation paper identifies further issues. The Law Commission’s reform project obviously focuses on the legal use of the term, but “wildlife” has scientific or cultural connotations as well. In the world of science, specifically in taxonomy, all living things are categorized based upon their biology; for example as plants, animals or fungi, among other categories. However, scientists are concerned with genetic and biologic structure and relationships rather than cultural or legal conceptions such as what is wild, endangered, or a pest. Under the microscope or on the dissection table it typically makes no difference whether a badger, bird, or rabbit was raised in a cage or taken from a field.

Culturally, there is a wide range of views as to what constitutes wildlife. Typically the term refers to animals (and sometimes plants) in their natural habitat that are not within the possession or control of humans, although they might be managed or hunted by humans. So, for example, badgers may more easily fit within a popular conception of wildlife than feral cats. Wildlife law, on the other hand, is a system that must address issues created by the whole range of interaction of human interests and control over plants, animals, and fungi—rather than either biology or popular perceptions alone—and this contributes to the complexity of the existing laws and regulations.

The Law Commission consultation paper states that it takes a wide view of wildlife and includes consideration of wild animals, plants and fungi within its scope. However, it generally excludes both agriculture and commercial fishing and their associated Common Fisheries and Common Agricultural Policies. The consultation paper also limits its marine focus to territorial waters, but a number of responses made the case that the marine extent of the project should be expanded.<sup>217</sup> A

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<sup>217</sup> See CP No. 206, *supra* note 2, at Question 1-1. The wildlife law reform project considered laws applicable out to 12 nautical miles (NM) from the baseline, the territorial waters of England and Wales. *Id.* at ¶ 1.30 Consequently, the Wildlife and Countryside Act 1981, the Conservation of Habitats and Species Regulations 2010 and the Conservation of Seals Act 1970 are within the scope of the project. Outside the scope of the project are the Offshore Marine Conservation Regulations 2007, SI 2007 No 1842. Responses from consultees such as the Marine Management Organisation, the Institute of Ecologists and Environmental Managers, and individual environmental consultants, all suggested that the scope of the project should extend out to 200NM and unifying all the wildlife species management provisions within that reach, including the Offshore Marine Conservation Regulations 2007. [There should be a cite here] This would allow for consideration of a single regulatory and licensing regime covering the entire marine environment, which might be of particular

“species specific” approach is central to the Law Commission’s approach to the wildlife law reform project,<sup>218</sup> which generally aligns with the bulk of existing wildlife laws. This reflects not only the historical emphasis placed on the exploitation and control perspectives, but also the decision made to deemphasize the conservation/environmental perspective in this project to the degree that implicates broader issues such as habitat.

Thus, the Law Commission consultation paper envisions a new “single wildlife statute dealing with species specific provisions for wildlife conservation, protection, exploitation and control” and that this new law will “continue to be organized by reference to individual species or groups of species.”<sup>219</sup> This could be characterized as a traditional vertical approach tied to particular issues historically posed by specific types of plants and animals as opposed to an arguably more horizontal approach that looks at the impact of all types of wildlife upon particular human interests.

This vertical, species specific, approach is also influenced by being analyzed primarily through the lens of existing legislation—which goes back to the issue of whether the project should primarily be regarded as a backward-looking or forward-looking exercise. Perpetuating the existing regulatory approach may not be essential to maintaining current polices and levels of protection. The alternative would be to address wildlife issues horizontally with an interest-based framework as discussed below in connection with possible options for structuring the new law.

The Law Commission notes that under the existing laws and regulations some animals, plants or fungi receive more or less protection than others simply by virtue of their membership in a particular species. This is the case with the legal regime protecting badgers, for example. Additionally, some existing legal measures only apply to members of a species that are actually in the wild and exclude animals or game being bred or reared in captivity whereas other measures would apply to all members of a given species.<sup>220</sup>

Thus, the species specific approach necessarily results in different treatment purely based upon the category in which the animal, plant or fungi is placed. This categorization decision may be problematic, especially at the margins as, for example, when dealing with hybrid species—irrespective of whether the hybridization occurs with or without human intervention.

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use when licensing offshore wind farms, or other offshore installations and activities; extending the Protection of Seals Act 1970 out to 200NM; establishing closed seasons in the complete marine environment if that were thought necessary in the future; and facilitate harmonizing the invasive non-native species’ framework out to 200NM.

<sup>218</sup> CP No. 206, *supra* note 2, at ¶ 1.20.

<sup>219</sup> *Id.* at Proposals 5-1 and 5-7.

<sup>220</sup> *Id.* at ¶¶ 5.4 to 5.18

In addition wildlife law introduces a multiplicity of additional terms and definitions of what might be “wild,” “domestic,” “captive,” or “controlled.” These legal categorizations which further refine species-specific regulation may not always suit their intended purpose. For example, language and concepts that may work well when dealing with animals might be problematic when applied to plants, and even more problematic when applied to fungi.<sup>221</sup>

“Species” is much more of a scientific than legal concept, and therefore further issues with species based regulatory schemes may be caused by scientific developments in taxonomy. Law typically adapts to change more slowly than science. Not only do concepts such as species evolve and change over time, but the legal use of the terms might not be scientifically accurate. For example, the assumption implicit in many laws that fungi can be treated the same as plants fails to reflect the scientific recognition of fungi as part of an entirely different taxonomic “kingdom” with an entirely different biology.<sup>222</sup> Accordingly, terms commonly used to outline an offence such as “taking,” “planting,” or “disturbing,” or even the notion of what constitutes an individual organism in regulatory or statutory language may be ill suited to dealing with fungi. This simply illustrates how laws based upon non-legal concepts can be overtaken by other developments—posing numerous drafting difficulties.

Moreover, emphasizing the manner in which species are handled in existing wildlife law and regulation can miss significant emerging developments such as the increasing recognition of the need to address wildlife kept as exotic pets<sup>223</sup> or cloned, transgenic, or genetically modified or engineered flora and fauna as part of the effort to manage invasive non-native species.<sup>224</sup> Grappling with emerging issues such as

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<sup>221</sup> See e.g. *id.* at ¶¶ 8.85 to 8.93.

<sup>222</sup> See e.g., R.H. Whittaker, *New Concepts of Kingdoms or Organisms. Evolutionary relations are better represented by new classifications than by the traditional two kingdoms*, 63 *SCIENCE* 150 (January 1969).

<sup>223</sup> See e.g., *Opportunity or Threat: the Role of the European Union in Global Wildlife Trade*, TRAFFIC Europe 2007, at 30 (TRAFFIC, an international nongovernmental organization that monitors wildlife trade, conducted a study in 2005 which showed the EU was the world’s leading importer of live reptiles); See also Convention on Biological Diversity Ad Hoc Technical Expert Group, *Addressing the Risks Associated with the Introduction of Alien Species as Pets, Aquarium and Terrarium Species, and as Live Bait and Live Food*, UNEP/CBD/AHTEG-IAS/2/2 (7 Feb 2011); ENDCAP, *Wild Pets in the European Union* (3 Oct. 2012), available at [http://www.bornfree.org.uk/fileadmin/user\\_upload/files/zoo\\_check/reports/Endcap\\_Wild\\_Pets\\_EU\\_Report\\_0812\\_ROUGH\\_v10.pdf](http://www.bornfree.org.uk/fileadmin/user_upload/files/zoo_check/reports/Endcap_Wild_Pets_EU_Report_0812_ROUGH_v10.pdf).

<sup>224</sup> In June 2012 the European Food Safety Authority launched a public consultation on the possible environmental impact of genetically modified animals, which includes their risk of becoming invasive. See, EFSA, *Public consultation on the draft Guidance Document on the Environmental Risk Assessment of Genetically Modified Animals*, available at <http://www.efsa.europa.eu/en/consultationsclosed/>



those presented by exotic pets and GMOs as potential invasive non-native species challenges traditional conceptions of wildlife, control/ownership, and even species. The application of new developments in genetic science to plants and animals represents yet a further extension of the challenges facing species based regulatory schemes initially posed by selective breeding and hybridization. The plant world has struggled with questions regarding GMOs for a number of years, and they are now increasingly an issue with regard to animals as well. One current notable example is provided by the pending application in the U.S. for approval to patent and market AquaAdvantage® salmon, a genetically engineered fish specifically designed to grow to market size in half the time of conventional salmon.<sup>225</sup> It is also quite possible that the anticipated EU directive on invasive non-native species will address both the exotic pet trade and GMOs in some fashion.<sup>226</sup> The Convention on Biological Diversity already imposes an international obligation to control or eradicate invasive alien species, which potentially poses a direct conflict between the aims of conserving and preserving biodiversity and the welfare interests of animal species deemed to invasive.<sup>227</sup>

*d. Structure for the new wildlife law*

Determining how to balance all these competing perspectives in structuring a new comprehensive wildlife law will be a challenging task for Parliamentary Counsel. It is also inextricably intertwined not only with the political process but also with complex issues regarding what is appropriate for primary and secondary legislation, the scope of government authority in a non-federal system, and the role of judicial oversight in the English legal system.

The Law Commission consultation paper states that the objective is to maintain current polices and the levels of protection afforded to particular species unless a change is required by EU law.<sup>228</sup> What

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call/120621.htm; see also EFSA, *Cloning*, <http://www.efsa.europa.eu/en/topics/topic/cloning.htm>.

<sup>225</sup> AquaBounty Technologies, *AquaAdvantage Fish*, available at <http://www.aquabounty.com/products/products-295.aspx>. The popular press both in the US and Europe refers to this genetically engineered salmon as the “Frankenfish.”

<sup>226</sup> See, Wildlife and Countryside Link, *Invasive Non-Native Species Task and Finish Group: Update* (last updated Oct. 31, 2013), available at <http://www.wcl.org.uk/invasive.asp>.

<sup>227</sup> See, Convention on Biological Diversity (1992), Art. 8(h), available at <http://www.cbd.int/convention/articles/default.shtml?a=cbd-08>; *Strategic Plan for Biodiversity (2010), Aichi Biodiversity Targets*, Target 9, available at <http://www.cbd.int/sp/targets/>.

<sup>228</sup> Additionally, the provisions of the Hunting Act 2004 are not within the scope of the wildlife reform project. CP No. 206, *supra* note 2 ¶¶ 1.25 to 1.27.

is envisioned, however, is maintaining the species-specific vertical approach of the existing legislative framework in a new single statute. Much of the existing legislation focuses on conduct with respect to particular species that should be considered a criminal, particularly when failing to properly exercise control over wildlife or interfering with another's right to exploit a wildlife resource.

This approach presents its own web of definitional issues regarding the general prohibition at the core of any given offence along with various "excuses" from liability in the form of derogations, exceptions, defences, and licenses. The broader the definition of the core offence, the more likely it becomes that extensive excuse provisions in some form are required. Additionally, the more these excuse provisions are required, the more complex the law becomes—which arguably also makes the law more specialized and less comprehensible to the regulated public, which is one of the criticisms of the current scheme. While it is less likely that extensive excuse provisions are needed with narrowly defined offences, that perhaps presents a greater possibility that regulatory objectives will not be achieved due to oversimplification.

In other words, despite the often repeated maxim that under English law everything is permitted that is not expressly prohibited by law,<sup>229</sup> the dependence upon criminalization in the existing framework for wildlife legislation is a classic example of a "stop until I tell you to run" regulatory scheme. That is, one which is based upon prohibitions accompanied by various excuses from liability for the core offences. Such a regulatory scheme is effectively a "top down" set of controls, primarily dependent at its core upon legislated predicate offences. The Law Commission consultation paper consciously perpetuates this species-specific vertical approach, and continues to emphasize criminalization at the core of a top down regulatory scheme.<sup>230</sup>

Would it not be possible to still meet the objective of maintaining current policies and levels of protection with more of a "run until I tell you to stop" regulatory scheme? In other words, structuring the new wildlife statute as a "bottoms up" regulatory scheme, which minimizes criminal prohibitions. This would also be in line with the Law Commission's earlier exploration the dramatic growth in criminal offences in recent years, and the limits of criminalization in its consultation paper on *Criminal Liability in Regulatory Contexts*,<sup>231</sup> and other commentary

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<sup>229</sup> See e.g., *Malone v. Comm'r for the Metropolitan Police* (no.2) 69 Cr. App. R. 168 (Ch. 1979) .

<sup>230</sup> CP No. 206, *supra* note 2, chs. 5-9. However Proposal 9-2 does suggest that the "full range of civil sanctions" should augment the wildlife offenses outlined in the paper. [citation needed]

<sup>231</sup> Law Commission of England and Wales, Consultation Paper No. 195; *CRIMINAL LIABILITY IN REGULATORY CONTEXTS* (2010).

such as Professor Richard Macrory's report on *Regulatory Justice: Making Sanctions Effective*.<sup>232</sup>

The result would be a more horizontal system, one where the key factor would be the human interests being pursued rather than the species at issue. The four themes or perspectives identified at the outset of the Law Commission consultation paper might provide a starting point for this interest analysis. For example, the exploitation theme essentially deals with issues of controlling access to wildlife resources—primarily for the benefit of landowners; the control theme deals with issues where wildlife harms or interferes with other activities—but are not necessarily tied to an ownership interest either in land or in the wildlife at issue; the conservation theme shifts to a focus on broader societal interests; and the welfare theme does not prevent wildlife exploitation but tempers that ability with a duty on humans to avoid imposing unnecessary suffering on animals.

Individual licensing would only be required where some level of control is required in order to ensure that a proper balance is maintained between competing interests (e.g. balancing landowners' exploiting game, and the need to conserve the species or the welfare of the game at issue). In essence, the aim would be to create a regulatory management system focused on three categories of human behavior, where given actions or behaviour are either permitted, licensable, or prohibited,<sup>233</sup> and the controls would then largely be separated from the species being regulated. Commercial transactions affecting these various interests should also be factored into the licensing matrix, although this is not a major feature of the Law Commission consultation paper. Controls on transactions in wildlife or wildlife-related products already infuse many EU measures mentioned above and are central to managing invasive species.

Incorporating a range of administrative control "tools" into a licensing matrix also facilitates making the regime more flexible and forward-looking. That is, the various tools could be selectively invoked to match the political requirement to maintain current policies and levels of protection, but then provide the means to more easily adapt to new circumstances when future changes are required, without the need for new legislation. One further advantage of a horizontal focus upon the interests at issue rather than species specific offences is that it should make managing issues that cut across species lines easier and minimize

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<sup>232</sup> Richard Macrory, REGULATORY JUSTICE: MAKING SANCTIONS EFFECTIVE (Final Report, November 2006).

<sup>233</sup> This three category system envision fewer options than described in the consultation paper. See CP No.206, *supra* note 2, ¶¶ 5.64 to 5.98 and Question 5-13. Tailoring this framework to the needs of particular circumstances or species would be accomplished primarily by a listing matrix similar to the one already described in Chapter 5 of the Law Commission consultation paper. See *id.* at ¶¶ 5.50 to 5.59.

the disruption caused by changes in taxonomy. These would be addressed by administrative listing changes and revisions to the matrix.

Thus, the focus of the regulatory regime would be on affirmative statements of licensing requirements rather than providing for criminal offences. Licensing requirements would be backed up with administrative and civil sanctions with criminal sanctions used only for behaviour that is always proscribed or abusive violations of the regulatory regime.

This obviously represents a much greater change in the regulatory approach than presently envisioned and would require a great deal more work and thought to match the detail found in the existing regime and the current approach reflected in the Law Commission consultation paper. But it might also serve as a creative new approach to managing wildlife regulation in England and Wales.

## V. CONCLUSION

Since the 19<sup>th</sup> century, industrialization has led to a more urban society. Moreover, in more recent years the shift has been from urbanization to suburban sprawl. This has changed the way we perceive and relate to animals.

In the early years of the conservation and environmental movements the task was to protect and restore animals, birds, and other species that were at risk and create habitats where they would survive and thrive. In the U.K., and also in the US and many other countries, these efforts often focused on species attractive to sport hunters, but habitat restoration and preservation helps other species—such as the badgers—as well. While wildlife managers were focusing on maintaining healthy populations, animal welfare and protection advocates were becoming increasingly active and successful in protecting a wide variety of animals from human interference or harm. Simultaneously, large segments of a rapidly growing general population are increasingly becoming separated from the natural environment and wildlife. However, the green belts, parks, preserves, suburbs, and the sprawl which are very much part of modern life are creating new habitats which attract and support a wide range of wildlife. This creates an unprecedented new dynamic where wildlife is increasingly likely to come into contact, if not conflict, with humans at a time when people's general familiarity and tolerance for wildlife outside of a controlled environment may be declining.

Farmers may see badgers as a threat to their livestock and their way of life, and as pests to be eliminated. Animal advocates may see badgers as scapegoats for other problems and seek to prevent or avoid unnecessary suffering for the animals. The general public, however, may find that it is one thing to admire badgers in the forest, on television, in movies, or in children's books, and yet altogether another thing when

one's garden has been dug up. Thus, apart from advocates directly concerned with the issues, for many "wildlife" may be more of an abstract concept—and the ambivalence of not being comfortable with wildlife encounters yet also being troubled by wildlife control efforts.

This creates a conundrum for advocates, policy makers, and legislators in democratically elected governments because, as commentators have noted, it "is a formidable task [to get the balance right] for a suburbanized human population that is generally poorly informed about nature and wildlife dynamics and is largely opposed to the most ready means of wildlife regulation: hunting and trapping."<sup>234</sup> Whether it is the badger cull, controlling deer overpopulation, maintaining feral cats, or the much wider task of wildlife law reform, effectively addressing the issues requires less focus on whether specific animal species are "good" or "bad," and more attention broader question of how to properly address human relationships and interactions with all forms of wildlife. Getting that balance right and addressing each of the various perspectives is the challenge for wildlife management, reform, and legislation for the coming century.

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<sup>234</sup> David R. Foster, Glenn Motzkin, Debra Bernardos, and James Cardoza, *Wildlife Dynamics In The Changing New England Landscape*, 29 JOURNAL OF BIOGEOGRAPHY 1337, 1351 (2002).