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Species Justice: The Future Protection of Wildlife and the Reform of Wildlife Laws.

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Introduction

Species justice discourse considers the responsibility man owes to other species as part of broader ecological concerns. Man, as the dominant species on the planet, has considerable potential to destroy nonhuman animals, or, through effective laws and criminal justice regimes, to provide for effective animal protection. Benton suggests that 'it is widely recognized that members of other animal species and the rest of non-human nature urgently need to be protected from destructive human activities' (1998: 149). Wildlife laws are an integral part of species justice and provide a means through which contemporary criminal justice can extend beyond traditional human ideals of justice as a punitive or rehabilitative ideal, to incorporate shared concepts of reparative and restorative justice between humans and non-human animals. However animals, particularly wild animals, are often viewed solely in relation to their economic or property value. Thus legal protection for

wildlife often exists only so far as wildlife use corresponds with human interests in using animals for food or other forms of commercial exploitation (e.g. trade in skins, parts or derivatives).

Wildlife campaigners in the UK , US and across Europe have consistently argued for stronger wildlife laws, reflecting the perception that current wildlife laws are generally inadequate to achieve effective animal protection, and a more punitive regime is required to deal with the criminality inherent in wildlife crime. However, for the most part, wildlife law remains outside the mainstream of criminal justice and is dealt with as an environmental issue primarily the responsibility of government environment departments, rather than being firmly incorporated into the responsibilities of the relevant justice and policing ministries, despite evidence of the links between wildlife crime and other forms of criminality (Lockwood 1997, Linzey 2009).

Currently levels of wildlife protection in the UK and US are being reduced either through proposed changes to wildlife legislation (in the UK) or a reduction in the protection afforded to specific species (in the US). In the specific context of human–animal relationships and species justice, green criminology is uniquely placed to promote new ways of thinking about our attitudes towards and exploitation of animals as an integral part of mainstream criminal justice. White's (2008) green criminology notion of animal rights and species justice deals with animal abuse and suffering, and increased levels of wildlife protection over the last 30 thirty years or so reflect a growing environmental awareness and the efforts of a variety of Non-Governmental Organisations (NGOs) to influence the policy agenda in respect of wildlife crime and wildlife protection. Yet wildlife laws remain outside the remit of mainstream criminal justice and current legislative and policy proposals risk reducing the protection available for wildlife by failing to address specific problems of wildlife criminality and rolling back wildlife protection to serve other interests.

The Politicization of Wildlife Laws

Organ et al. (2012) identify that the increasing politicization of wildlife management threatens the existence of the North American Wildlife Management model which argues

that; wildlife should only be killed for a legitimate purpose, that science is the proper tool to discharge wildlife policy, allocation of wildlife is the responsibility of law, and wildlife should be considered an international resource. Species justice discourse would broadly agree with these principles and it is not too dissimilar from the model adopted in the UK (although it should be noted that some animal rights discourse promotes an absolute prohibition on animal use and killing).

However current wildlife law policy in the UK and US indicates that wildlife law is less about achieving effective species justice and more about perpetuating the use of wildlife and its regulation within an environmental rather than criminal justice context. The UK is currently in the process of reviewing its wildlife law with a view to abolition of the majority of existing law and introduction of a single wildlife management act rather than the current confusing regime of different legislation for different species with different levels of wildlife protection. In the US, NGOs have recently fought against efforts by anti-bison ranchers to remove the last genetically pure bison from the lands of Montana and also fought against the US Fish and Wildlife Service's decision to remove federal protection from grey wolves by making amendments to species listings under the *Endangered Species Act 1973*.

These law reform initiatives highlight the political nature of wildlife law and the difficulties of achieving effective species justice. In the UK, wildlife and environmental regulation is seen by Government as imposing an excessive regulatory regime on business (The Cabinet Office, 2011). Thus UK wildlife law reform proposals take an approach consistent with the UK Coalition Government's view that regulation and criminalisation should be a last resort when dealing with business offending. It is also notable that the *Hunting Act 2004*, which prohibits hunting wild animals with dogs, is excluded from current wildlife law reforms in part because of political sensibilities around the issue. In the US, the conflict between ranching and farming, and environmental protection interests is a factor in some endangered species listings and decisions to allow wolf killing. Thus problem species or at least those perceived as causing an economic problem to countryside interests, risk having their protection removed or at least temporarily reduced.

However, these approaches to wildlife law reform risk ignoring the individualistic nature of much wildlife offending (Nurse 2011) that requires an effective criminal justice approach to resolve. The approach adopted in the UK is one of amending the existing regime on the

grounds that a suitable one already exists (Law Commission 2012) thus there is no need for a new regime. Similarly, review of wildlife protection in the US is primarily based around amendments to existing law and a belief in the existing system as broadly controlling wildlife crime problems. However despite the existence of federal enforcement in the shape of the US Fish and Wildlife Service, NGOs such as Earthjustice and Defenders of Wildlife have raised concerns about the continued illegal persecution of species such as wolves, bears and bison and about decisions to remove legal protection from certain species via *Endangered Species Act 1973* listings. In 2011, Defenders of Wildlife identified that the (then) US Congress had 'introduced more than a dozen bills or legislative proposals to undermine the Endangered Species Act' (2011: 3) arguing that such legislative moves either chipped away at the foundation of the Act or singled out species no longer deemed worthy of protection. The basis of such legislative movement was often economic considerations. Wildlife protection and compliance with wildlife legislation could potentially be a costly issue for business, and Government, keen to reduce the regulatory burden on business, has sought to streamline or reduce wildlife protection.

Problems of Wildlife Law Enforcement

Considerable research evidence indicates that existing wildlife law regimes do not work in their implementation rather than in their basic legislative provisions. Practical enforcement problems are endemic to the UK's wildlife law system as identified by Nurse (2003, 2009, 2011 and 2012) and Wellsmith (2011) in their respective analyses of the UK's wildlife law enforcement regime which identified an enforcement regime consisting of legislation inadequate to the task of wildlife protection, subject to an equally inconsistent enforcement regime (albeit one where individual police officers and NGOs contribute significant amounts of time and effort within their own area) and one that fails to address the specific nature of wildlife offending. Wildlife law is often a fringe area of policing whose public policy response is significantly influenced by NGOs (Nurse 2012) and which continues to rely on NGOs as an integral part of the enforcement regime. White (2012) identifies that third parties such as NGOs often play a significant role in investigating and exposing environmental harm and offending and have become a necessity for effective environmental law enforcement. In wildlife protection, NGOs are an essential part not only of practical enforcement regimes,

but also the development of effective policy. NGOs act as policy advisors, researchers, field investigators, expert witnesses at court, scientific advisors, casework managers, and, in the case of a small number of UK and US organisations, prosecutors playing a significant practical role in policy development and law enforcement.

One difficulty with wildlife legislation is its intended use as conservation or wildlife management legislation rather than as species protection and/or criminal justice legislation. For several years, academics, investigators, NGOs and wildlife protection advocates have voiced concerns about the perceived inadequacy of US and UK enforcement regimes (Defenders of Wildlife 2011, Wilson et al, 2007, Nurse 2003). NGOs have highlighted inadequacies in individual legislation such that legislation intended to protect wildlife often fails to do so and ambiguous or inadequate wording actually allows animal killing or fails to provide adequate protection for effective animal welfare (Parsons et al, 2010). Such confusion also causes problems in the investigation of wildlife crime with investigators and prosecutors needing to understand a complex range of legislation, powers of arrest and sanctions.

Wildlife crime is currently enforced reactively, in the UK this means relying on charities to do the bulk of the investigative work into wildlife crime and to receive the majority of crime notifications. While the UK has an excellent network of Police Wildlife Crime Officers, many of these officers carry out their duties in addition to their 'main' duties (Roberts et al, 2001 and Kirkwood 1994) and both public and seemingly Governmental perception is that charity support is an integral part of the enforcement system. But while in the form of the Fish and Wildlife Service, the US has the federal and dedicated enforcement body that many UK NGOs desire, US NGOs have expressed dissatisfaction with their system ranging from issues with poor wildlife management through to bad legislation (including delisting of endangered species). Concerns have also been raised about cuts to the Fish and Wildlife Service's budget and its possible affect on wildlife law enforcement. In addition, wildlife law enforcement is primarily based upon a socio-legal model which relies on use of existing law and an investigation, detection and punishment model rather than the use of target-hardening or other forms of preventative action (Wellsmith 2010). Thus the policy approach adopted in wildlife law and its enforcement is primarily one of dealing with wildlife crime after it has happened, albeit through an under-resourced regime which often fails to

recognise the varied criminality that exists in wildlife crime (Nurse 2011) or which does not adequately reflect the nature and impact of this area of crime in its sentencing and remediation provisions (Lowther et al. 2002).

Enforcement Options and Regulatory Approach

The failures of existing regimes raise the question of how should wildlife laws be enforced. What is needed is to take what is good in existing wildlife law and to develop proper effective legislation and an effective enforcement regime that recognises wildlife crime as part of mainstream criminal justice, and does not continue to see it solely as a purely environmental problem.

The UK Law Commission's enforcement approach for the new regime is based on a mixture of criminal and civil sanctions suggesting that 'criminalising regulatory transgressions may not always be the appropriate way of ensuring beneficial outcomes. It may be better to provide the non-compliant individual or organisation with advice or guidance' (Law Commission 2012). This is consistent with the UK Coalition Government's belief in 'risk-based regulation' in accordance with the Hampton Principles (2005) and which suggests that regimes for achieving compliance with business regulations through regulatory inspections and enforcement are generally complex and ineffective. The Commission identifies that the government's approach is generally that regulation should only be resorted to where 'satisfactory outcomes cannot be achieved by alternative, self-regulatory, or non-regulatory approaches' (Law Commission 2012).

However while the risk-based, prosecution-as-last-resort regulatory approach is consistent with government policy and its approach to 'light touch' regulation there are potential flaws with this approach, not least the possibility that offenders could engage in repeat offending before any use of criminal sanctions is considered or begins to bite. Given academic and policy research on the nature of criminality in wildlife law violations the advice and guidance/decriminalisation approach proposed within the UK wildlife law reform proposals raises species justice concerns. While in principle the Hampton risk-based regulation approach may be an appropriate model to deal with regulatory crime, in practice the

implementation of these principles is problematic in the face of the persistent law-breaking that characterises much wildlife crime.

Academic research on the use of civil sanctions as an approach to consumer problems conducted on behalf of the (then) Department for Business Enterprise and Regulatory Reform (BERR) in 2008 noted both a lack of willingness on the part of enforcers to use civil sanctions and the increased resources required for this approach to be effective where criminality was an inherent problem that needed to be addressed (Peysner and Nurse 2008). Thus doubt was cast on the effectiveness of civil sanctions in certain circumstances. In addition, while the UK's Law Commission refers to the US Environmental Protection Agency's (EPA) use of administrative penalties, these have often been ineffective as a solution to wildlife crime and environmental non-compliance, resulting in US NGOs challenging the ineffectiveness of EPA enforcement activity which has persistently failed to address problems and allowed ongoing non-compliance. Thus while civil sanctions may be attractive politically as a way of reducing the regulatory burden and decriminalising legitimate business activity they are often ineffective in dealing with environmental/wildlife criminality. The UK wildlife law reform consultation documents suggest that the current wildlife law regime is too reliant on criminalisation. But a different view emerges from research evidence suggesting instead that a weak enforcement regime allows a wider range of criminality and transfer of criminality from mainstream crime into wildlife crime.

The Future Protection of Wildlife: A Preliminary View

Despite improvements in law and high profile publicity for wildlife crime it is still not seen as serious crime within the context of mainstream criminal justice. This allows offenders such as gamekeepers or ranchers caught poisoning, shooting or trapping protected wildlife to deny that they are criminals although they can easily admit and identify criminality in others such as poachers. They may deny that their actions are a crime, explaining them away as legitimate predator control or a necessary part of their employment or may accept that they have committed an 'error of judgment' but not a criminal act. Matza's (1964) drift theory applies to these offenders who drift in and out of delinquency, fluctuating between total

freedom and total restraint, drifting from one extreme of behaviour to another. While they may accept the norms of society they develop a special set of justifications for their behaviour which allows them to justify behaviour that violates social norms. These techniques of neutralisation (Sykes and Matza 1957) allow them to express guilt over their illegal acts but also to rationalise between those whom they can victimise (e.g. animals) and those they cannot (other humans) rationalising when and where they should conform and when it may be acceptable to break the law. As an example, for those offenders whose activities have only recently been the subject of legislation, the legitimacy of the law itself may be questioned allowing for unlawful activities to be justified. Many fox hunting enthusiasts, for example, strongly opposed the *Hunting Act 2004*, which effectively criminalised their activity of hunting with dogs, as being an illegitimate and unnecessary interference with their existing activity, thus their continued hunting with dogs is seen as legitimate protest against an unjust law and is denied as being criminal (Prado and Prato 2005).

Wildlife laws often fail to deal with such attitudes and frequently view wildlife crime as outside the mainstream of criminal justice and often as purely technical offending. While options for prison sentences exist in some wildlife legislation; a *potential* effect of the UK Law Commission's proposals and of the US Fish and Wildlife Service's delisting approach to certain species is to allow for an increased ability to exploit wildlife through a relaxation of the regulatory regime and reduced scrutiny of 'authorised' animal killing. Wildlife laws are often broadly adequate to their purpose as conservation or species management legislation but are inadequate to fulfil their role as effective criminal justice legislation due to their reliance on a reactive enforcement regime that in practice is often ineffective and lacking resources.

The future protection of wildlife requires not only robust legislation that actually *protects* wildlife but also an effective enforcement regime that contains mechanisms for dealing with wildlife criminality and reduces repeat wildlife crimes. Thus reviewing wildlife laws requires providing a coherent system of protection for all wildlife as part of mainstream criminal justice system, rather than relying on the expertise of environmental enthusiasts, charities and volunteers.

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