The law on hunting is not fit for purpose – it's time for a radical rewrite

Gregory Gordon, Criminal and animal welfare barrister at Guildhall Chambers, Bristol

At a glance

This article will:

- Outline the current legal framework for hunting offences.
- Explain the challenges in mounting successful prosecutions.
- Explore the moral and welfare questions in prosecuting hunting offences.
- Make a radical suggestion for strengthening the law.

The law is broken

The Hunting Act 2004 (the 2004 Act) was set up to fail. Tony Blair called it 'a masterly British compromise' by which hunting was 'banned in such a way that, provided certain steps are taken to avoid cruelty when the fox is killed, it isn't banned. So it's banned and not quite banned at the same time.'[1] Whatever the rights and wrongs of hunting, cynical legislative drafting has had real world consequences.

Section 1 of the 2004 Act (which covers England and Wales) is ostensibly unambiguous: 'A person commits an offence if he hunts a wild mammal with a dog, unless his hunting is exempt.' Section 1(1) of the Protection of Wild Mammals (Scotland) Act 2002 (the 2002 Act) appears similarly straightforward: 'A person who deliberately hunts a wild mammal with a dog commits an offence'. The statutory exemptions – which include allowing the use of dogs to flush an animal so that it can be shot; using dogs in connection with falconry; and, under the 2004 Act, hunting mammals for the purpose of 'research and observation' – make prosecuting offences under the Acts anything but. Although in Northern Ireland public support for fox hunting and deer hunting is low, at 18% and 4% respectively,[2] it remains legal.

The High Court in *DPP v Wright*[3] considered the question of when an illegal hunt begins under the 2004 Act. The answer didn't please anti-hunting activists. Illegal hunting doesn't encompass the search for a mammal to hunt and kill; there is, ruled the court, no offence of 'going equipped for hunting', and an illegal hunt doesn't begin until a wild mammal is found and chased by the hounds. Though a huntsman may have every intention of killing a fox, and encourage the hounds to the best of their ability to do so, no offence is committed until the fox is found and pursued by the hounds. The 2002 Act doesn't suffer from this problem: section 10(1) states that '"to hunt" includes to search for or course'.

While the decision in *Wright*, and the various statutory exemptions can be prosecutorially problematic, it is the minimalist drafting of section 1 that has been exposed as the fundamental flaw in both Acts. Because no-one sought to define 'hunting', hunts suspected of lawbreaking have been free to claim that what they do is not real hunting, but something which just happens to look like hunting. Meanwhile the killing of wild mammals continues relatively unabated.

'Trail hunting' as a practice didn't exist before 2004. Instead of casting hounds to search for the scent of a wild mammal, hunts have claimed to be searching for an artificial scent which has been pre-laid earlier in the day. Hunts may designate a specific 'trail layer' for the day, who will ride on horseback or quadbike, carrying a rag dipped in aniseed or soaked in animal urine, and drag the scented rag through the fields, creating several different scent 'lines' for the hounds to find and follow. If the hounds miss the artificial scent, and instead hunt the scent of a wild mammal? Well, accidents will happen. Some hunts suffer as many as three accidents in a single day.[4]

Trail hunting was specifically designed and promoted by the Masters of Foxhounds Association to 'simulate traditional hunting as practised before the ban.'[5] Whilst no doubt highly attractive for fox hunting's adherents to be able to carry on much as before, from an investigative perspective it makes the job of distinguishing the malignant from the benign extremely difficult, and the cynicism of anti-hunt activists runs deep. 'Sometimes they may actually do proper trail hunting,' I was told by Jordi Casamitjana, when he was the Campaigns and Enforcement Manager for the International Fund for Animal Welfare, 'we just happen to have never seen it.'[6]

Successful convictions have been obtained against hunters who claimed to have been trail hunting. Three members of the College Valley and North Northumberland hunt were convicted of unlawful hunting, contrary to the 2004 Act, despite claiming that they were following artificial, pre-laid trails of fox urine. In convicting three members of the Crawley and Horsham Hunt, the court found that a fake trail was laid 'for the benefit of the cameras.'[7] When the huntsman and terrierman of Leicestershire's historic Fernie Hunt had their convictions for illegal hunting upheld on appeal, Leicester's Resident Judge, Michael Pert QC, found that both defendants had used the

'cover of trail hunting as a cynical subterfuge.'[8]

Such cases, however, are the exception. When illegal hunting is alleged, that the hunt may have been trail hunting remains difficult to disprove, as one prosecution from earlier this year demonstrates. When interviewed by the police the defendant, a huntsman, had given a brief prepared statement in which he claimed that he was hunting a pre-laid trail. Because illegal hunting is a summary offence in both England and Wales and in Scotland, there is no requirement to serve a defence statement, or to provide any notice of the specifics of the defence relied upon. In this case, that meant that the defendant was able to call as a witness the person who purported to be the trail layer on the day in question, and who in turn produced for the court a map detailing where the trails were said to be laid – all of this only after the prosecution had closed its case. In the world of hunting, ambush defences are very much alive.

Tim Bonner, CEO of the pro-hunting campaign organisation Countryside Alliance, couldn't be clearer in his endorsement of hunts which push the boundaries of the law. As Bonner has said, 'No one has any problem with people breaking the spirit of the law which came about because of the hatred of the Labour Party backbenchers. … We will push it to the limits in every way that we can.'[9] This view is perhaps unsurprising, given that Bonner views the Acts as 'an attack on a group of people and a way of life and purely a prejudicial political act.'[10]

Cruelty, welfare and the ethics of hunting

Pleas to tradition, a 'way of life', and rural economics were once deployed in defence of badger baiting and cock fighting; they were not enough to save those 'sports', and proved similarly ineffective in helping hunting's cause. In mainstream public opinion, animal cruelty ranks as a higher concern than tradition. Polls consistently place public support for anti-hunting legislation upwards of 80%,[11] and record a majority of the population being less likely to vote for political candidates and parties who support repeal of the Acts.[12]

But what if the public are misled? Can hunting really be cruel, if foxes don't feel fear?

> *'Wild animals, apart from possibly the primates and cetaceans, almost certainly lack the complex brain and mental abilities necessary to perceive the human [concept] of fear.'*[13]

This claim, made by the pro-hunt campaign group Veterinary Association for Wildlife Management (previously 'Vets for Hunting'), might perhaps be considered scientifically regressive in the 21st century. We have known for some time that animals are not unfeeling automatons, reacting without emotion to sensory stimuli. Nevertheless, this view of the natural world is the bedrock on which the pro-hunting lobby builds its defence of hunting, in the name of the 'wildlife management' doctrine.

The wildlife management doctrine takes the circle of life – hunter and hunted co-evolving in bloody harmony – and places humanity in the middle, its benevolent guiding hand outstretched to manage not only the survival, but the improvement of the wild species under its care. The doctrine's stated aim is to 'maintain healthy and balanced populations of wild animals at levels which can be sustained by their local environment, and which are acceptable to farmers, landowners and the overall balance of all other indigenous wildlife.'[14]

For deer, wildlife management means culling local populations to prevent excessive damage to farms, overgrazing of pasture and the transmission of disease, such as the TB outbreak which once ravaged the herd of red deer on the League Against Cruel Sports' wildlife reserve in Exmoor.[15] The difficulty for hunters is that only three staghound packs operate in the UK, all of them in the South West, and hunting stags in Scotland is strictly the preserve of stalkers – it could be difficult for hunts to manage localised animal populations from the other end of the country. For foxes, wildlife management means maintaining a strong and stable population. Hunters, after all, need a ready stock of fit and healthy foxes to hunt.

The UK fox population does not appear to be stable, but in decline.[16] Pro-hunting advocates have pointed to the recently recorded fall in numbers as proof that management is needed. Even before the Acts, Owen Paterson MP was warning that a ban 'would lead to the disappearance of the fox in many parts of the country,'[17] as pro-hunting farmers would turn to indiscriminate shooting of the foxes they once tolerated on their land. Anti-hunt campaigners point out that the population decline appears to have begun in 1995, long before the introduction of the Acts, and that having continued to hunt between 21-25,000 foxes annually[18] is unlikely to have arrested the slide.

Many more foxes are killed on the roads annually (100,000), shot (80,000), or snared (30,000) than were hunted with hounds.[19] Hunting advocates suggest that hunting, compared with the alternatives, is the 'natural' form of control. Hunting enthusiast Roger Scruton is not alone in arguing that 'Hunting with hounds is entirely natural to the four quarry species since it does not use any alien human technology for which the hunted animal has no natural defence.'[20]

It is also suggested by hunting advocates that hunting, unlike shooting, is more likely to target only the old, diseased and weak specimens – the ones who cannot outrun or outfox the hounds. This quasi-

Darwinian view of hunting's place in the natural order, where only the most successful of the species survive, is encapsulated in the concept of the 'testing chase'. Those who escape the jaws of death pass the test.

The theory of hunting's 'natural' quality is challenged by its practice. For centuries, hunts have employed a veritable smorgasbord of ingenious devices to turn the tables against the fox, so that even the fittest may be caught by the hounds. Burrows and badgers' setts – natural bolt holes for a fleeing fox – are 'stopped' with earth to keep the fox above ground. To deal with the foxes who do escape down a hole, 'terriermen' are called who, through a combination of their terrier's teeth and the thrust of a spade, retrieve the fox for the waiting pack. Some foxes are provided with food outside artificial earths, made from buried drainpipes, to encourage them onto land which can be readily hunted. 'Bagmen' are foxes which have been caught, carried in a bag to the hunt meet and released with a short head start, sometimes with their paws cut to slow progress and leave a strong scent for the hounds to follow. Then there are the cubs. Roughly half of the foxes that were killed by hunts before the introduction of the Acts were cubs, newly emerging from the vixen's den, killed by the hunt's young hounds as a training exercise. This year, four members of the South Herefordshire Hunt were convicted of animal cruelty offences under the Animal Welfare Act 2006 for feeding fox cubs to the hunt's hounds.[21] Little of these traditional hunting practices can be said to be natural.

While the notion that hunting mammals with hounds is 'entirely natural to the quarry species' might appear superficially plausible for prey animals such as deer, even that is not the case. Cambridge University's late Professor Patrick Bateson conducted a season-long analysis of the activities of the Devon and Somerset Staghounds and found that the deer had suffered the 'severe' effects of 'extreme exhaustion' long before the end of a hunt.[22] Stag hunts can last many hours, a wholly unnatural situation for any deer, akin to 'forcing high jumpers to run a marathon', as Professor Bateson put it to me.[23] As for foxes, pack hunters tend to target prey larger than themselves – think lions taking down a wildebeest – and the vast collective expense of energy made by a pack of hunting hounds just isn't seen in the natural world for so meagre a nutritional reward as a fox.

In the legal world, meanwhile, investigators, lobbyists and lawyers expend no end of energy and expense chasing the meagre rewards to be found in prosecuting under these most flawed of Acts. More of that time, of late, has gone into agitating for change.

Strengthening the law

When David Cameron tabled amendments designed to relax the 2004 Act – amendments which were decried by animal welfare charities as a back-door repeal[24] – the Scottish National Party (SNP)'s threat to vote them down scuppered Cameron's plans, forcing him to withdraw the tortuously named Hunting Act (Exempt Hunting) (Amendment) Order 2015 before the vote.[25] Hot on the heels of the SNP's Westminster success, the Scottish Parliament set up the 'Bonomy Review' of the 2002 Act,[26] intending that it should evaluate and offer measures to strengthen the Scottish law. Completed in 2016, the Bonomy Review found that 'there is a basis for suspecting' that illegal hunting still continues,[27] before proceeding to make a number of sensible suggestions for incremental change to the devolved Scottish legislation. Included among them was consideration of extending the time limit for prosecutions to be instigated beyond the current six-month cut off, but also non-statutory measures, such as a voluntary scheme for hunts to provide police, in advance, with details of the proposed hunting activities and the identities of relevant individuals. Proposals for a system of overt monitoring by a regulated body (as opposed to the ad-hoc covert monitoring currently conducted by employees of the League Against Cruel Sports) received 'cautious approval given … the obvious possibility that [the] behaviour [of huntsmen] might be altered in response to the attendance of a monitor.'[28]

So far, the Scottish government's response to the Bonomy Review has been insipid. A proposal to license hunts is apparently under consideration, as is the suggestion that the number of dogs which can lawfully be used to flush a mammal is reduced from 40 to two[29] (in England and Wales, the maximum number is already two). As of yet, however, no Bill has been tabled.

The Bonomy Review also considered the *mens rea* of the offence: whether an intention to hunt, as currently required, is justified or whether the burden could be reduced to mere recklessness. A bill tabled in June 2019 by Green MSP Alison Johnstone, designed to put pressure on the SNP to fulfil the promise of the Bonomy Review, proposes just that.[30] Another potential formulation of the *mens rea* considered in the Bonomy Review was that a person would be guilty of hunting if he or she 'knowingly causes or permits a dog to hunt a wild mammal,' to mirror similar burdens in the Wildlife and Countryside Act 1981, and elsewhere. This final suggestion – of criminalising the act of 'permitting' hounds to hunt a wild mammal – comes closest to genuine change. Recklessness would likely have little impact in cases where trail hunting is claimed, given the ease with which a huntsman can deny that the hounds were following the scent of a live animal until it was too late to call them back. But if hunting wild mammals is to be seriously addressed, a more radical proposal is required.

The Health and Safety at Work etc. Act 1974 creates general duties for employers to 'ensure, so far as is reasonably practical, the health, safety and welfare' of employees (section 2) and members of the public

(section 3), and creates an offence should any person to 'fail to discharge' such a duty (section 33). In practice, this means that any time a person is injured by a work activity, the duty has been breached. The burden then falls on the employer to prove that it was 'not reasonably practicable to do more than was in fact done' to discharge that duty (section 40). The rationale underlying what might be seen, in effect, as a reversal of the burden of proof, is that when a person makes the choice to conduct a potentially harmful activity for profit or pleasure, they ought first to take reasonable steps to ensure that no-one is harmed by that activity.

A revision to the Acts could use this as a framework: requiring huntsmen to ensure, so far as reasonably practical, that no mammal is hunted by dogs, and placing the burden on them to prove that they have done everything reasonably practicable to discharge that burden. Whether there is genuine political appetite for such change is unclear. North of the border, the SNP are stalling; in Westminster, although Labour back a 'recklessness' amendment,[31] they have more significant electoral concerns to address, and Conservatives appear more likely to repeal the 2004 Act than strengthen it. But this suggestion has the potential to right a legislative wrong. After all, when a huntsman takes on a day's hunt for pleasure and a wage, ought they not first be able to demonstrate that they have taken all reasonably practicable steps to ensure that no wild mammal will be killed for their entertainment?

Gregory Gordon is a criminal barrister at Guildhall Chambers, Bristol, and a recognised specialist in hunting legislation. He advises government bodies and independent charitable organisations on the investigation and prosecution of animal welfare offences.

Endnotes

1 Tony Blair, *A Journey*, (Random House 2001).
2 'Hunting Poll Northern Ireland 2015' *Ipsos MORI* (16 September 2015)
3 [2009] EWHC 105 (Admin), [2010] QB 244.
4 'Belvoir Hunt: Police launch investigation after three foxes killed by hounds' *Leicester Mercury* (5 December 2016).
5 Thomas Easby, 'Notes on Trail Hunting' *Masters of Foxhounds Association* (14 December 2012).
6 Jordi Casamitjana, personal conversation.
7 Rebecca Evans, 'Guilty: three Crawley and Horsham hunters convicted of illegal fox hunting' *The Argus* (15 May 2012).
8 'Judge dismisses hunt pair appeal' *Leicester Mercury* (15 October 2011).
9 Jonathan brown, 'Dodging the ban: hunts flush foxes for owls to kill' The Independent (1 November 2005).
10 'Boxing Day fox hunts draw 250,000, say the Countryside Alliance, The Guardian (26 December 2016).
11 'Attitudes to Hunting 2017' *Ipsos MORI* (26 December 2017).
12 'Rural values and activities poll' *Survation* (5 July 2019).
13 'Hunting, Wildlife Management and the Moral Issue' *Veterinary Association for Wildlife Management* (December 2011).
14 'Hunting, Wildlife Management and the Moral Issue' *Veterinary Association for Wildlife Management* (December 2011).
15 Lynne O'Donnell 'Deer sanctuary increases concern over TB scourge' *The Guardian* (26 December 2004).
16 Dario Massimo, Sarah Harris and Simon Gillings, 'Evaluating spatiotemporal trends in terrestrial mammal abundance using data collected during bird surveys' (October 2018) Biological Conservation 226, 153-167.
17 Damian Carrington, 'Can shooting badgers be right if shooting foxes is wrong?' *The Guardian* (10 July 2013).
18 Final Report of Committee of Inquiry into Hunting with Dogs in England and Wales (9 June 2000), at Summary and Conclusions paragraph 6.
19 Piran White et al., 'Burns Inquiry: Report on Contract 5, Management of the Population of Foxes, Deer, Hares and Mink and the Impact of Hunting with Dogs, and, Report on Contract 6, Methods of Controlling Foxes, Deer, Hare and Mink, For Lord Burns' Committee of Inquiry into Hunting with Dogs' (2004) at paragraph 2.4.2.2.
20 Roger Scruton, 'Ethics and welfare: the case of hunting' (2002) Philosophy 77, 543-564.
21 'Fox cruelty: South Herefordshire Hunt pair found guilty' *BBC News* (10 June 2019).
22 Patrick Bateson and Elizabeth Bradshaw, 'Physiological Effects of Hunting Red Deer (*Cervus elaphus*)' (1997) Proceedings: Biological Sciences 264, 1707-1704.
23 Patrick Bateson, personal conversation.
24 Robbie Marsland (International Fund for Animal Welfare), 'The government are trying to sneak fox hunting in through the back door' *The Independent* (9 July 2015)
25 Rowena Mason, 'Government shelves foxhunting vote after SNP opposition' *The Guardian* (14 July 2015).
26 Iain Bonomy, Report of the Review of the Protection of Wild Mammals (Scotland) Act 2002 (November 2016).
27 Iain Bonomy, Report of the Review of the Protection of Wild Mammals (Scotland) Act 2002 (November 2016), at paragraph 2.4; see also paragraph 6.14.
28 Iain Bonomy, Report of the Review of the Protection of Wild Mammals (Scotland) Act 2002 (November 2016), at paragraph 7.4.
29 'New legislation on fox hunting' *Scottish Government* (9 January 2019).
30 Tom Gordon, 'Green MSP bids to ban fox and hare hunting with new bill' *The Herald* (24 June 2019).
31 Emilio Casalicchio, 'Labour promises to toughen up law on illegal fox hunting' *Politics Home* (26 December 2018).