TOWARD A MORE APPROPRIATE JURISPRUDENCE REGARDING THE LEGAL STATUS OF ZOOS AND ZOO ANIMALS

BY
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I. INTRODUCTION

Zoo animals are currently regarded as objects by the state and federal courts and are perceived as manifesting the legal attributes of amusement parks. The few tort liability cases directly involving zoos tend to view them as markets rather than preserves; the park animals are viewed as dangerous recreational machinery more akin to roller coasters or Ferris wheels than to living creatures.[1] Courts typically treat zoo keepers and owners as the mechanics and manual laborers responsible for the maintenance of these dangerous instrumentalities.[2] Disputes concerning the possession, sale and care of exotic animals, as well as the administration of the habitats in which such animals are housed, have also been treated by the courts in terms of control of materials for public exhibit and entertainment.[3]

Since zoos do in fact operate primarily as centers of entertainment, it is not surprising that they are characterized as such by the judiciary. Moreover, animals in general have historically been considered the property of humans, and that courts consider them as such is a topic well explored by authors from many disciplines, including those published in earlier issues of this journal.[4] With regard to animals as property, most discussions have focused on one of three specific groups: domesticated animals, animals used in scientific experimentation, or wild animals found on public lands.

Zoo animals, on the other hand, occupy a peculiar place in the property law hierarchy; a position not as easily or as regularly assessed as

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1 *See, e.g.*, Normand v. City of New Orleans, 363 So. 2d 1220 (La. 1978), *writ denied*, 366 So. 2d (La. 1979).

2 *Id. See also* O'Keefe v. City of Detroit, 616 F.Supp. 162 (D. Mich. 1985).

3 *See, e.g.*, In Defense of Animals v. Cleveland Metroparks Zoo, 785 F.Supp. 100 (N.D. Ohio 1991).

4 *See* Gary L. Francione, *Animals as Property*, 2 ANIM. L. i (1996).

those describing household pets, or wildlife in national forests. When the "rights" of zoo animals are invoked at all, it is often because public sentiment has become galvanized by circumstantial attention to a specific ecological predicament in which a captive animal has found itself.[5] As property, zoo animals dwell in a legal netherworld, restrained somewhere above the rank of "domestic pet" and below that of "indentured servant"—perhaps at the level of "animal entertainment device." Is the designation the result of deliberate jurisprudential thought, or has it simply arisen incident to history? As the stewards ultimately responsible for the presence or absence of these captives on earth, it behooves us to consciously reflect upon the property laws to be applied to the custody of exotic creatures; and whether the creatures themselves truly are standard products for sale and barter, rare and expensive museum curiosities, or something else entirely.

In this paper, I argue for a reassessment of the ignoble rank to which zoo animals have been relegated by the American courts. In Part II, I trace the historical caselaw treatment of zoo animals as items of personal property, and examine some of the alternative legal positions contemplated for them. In Part III, I propose that as property, zoo animals are more suitably classified as unique entities worthy of historical preservation than mere trade goods. I also suggest that, as historically valuable objects, zoo animals contribute to and affect the public welfare sufficiently to command protection under criminal laws.

II. Historical Perceptions of Zoo Animals as Legal Entities

The first American zoos were established in Philadelphia and Cincinnati in the 1870's. It was not until the early 1900's that the first American court case concerning a zoo was recorded, an action in tort for a camel bite injury.[6] In that case, the California Supreme Court appeared to be of two minds about captive animals: comparing them to confined, domesticated pets while simultaneously presuming them to be generally unpredictable and "naturally ferocious."[7] Since that time, the few published cases which express opinions on laws affecting zoos and zoo animals perpetuate much of the same ambivalence, with only minor refinement in recent times. Existing caselaw on zoos and their inhabitants can be divided into four areas: contract, property, tort and abuse.

A. Contract Cases

In matters of the procurement, retention and relinquishment of zoo animals by private individuals, public institutions and zoological parks, there is little question that the animals involved are deemed to be legally

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[5] *See, e.g.*, San Diego Zoological Society: The Care and Handling of Animals and Other Management Issues, Interim hearing before the California Senate Committee on Natural Resources and Wildlife on July 29, 1988, Escondido, California.

[6] Gooding v. Chutes Co., 155 Cal. 620 (Cal. 1909).

[7] *Id.* at 624.

transferable objects (i.e., products of sale).[8] Only one court has considered treating zoo animals differently in contract disputes, and that was a relatively casual proposal that certain animals in captivity might be potential third-party beneficiaries of a contract between a zoo and a hospital to provide adequate veterinary services to those animals.[9] The court nevertheless declined to imply contract rights to animals, relying on the procedural technicality that it could find no authority allowing it to appoint a guardian ad litem on behalf of a non-human.[10]

B. Property Cases

Under current American property law, zoo animals are considered dangerous products, goods produced by wresting control of the animal from its natural habitat. The belief that capture allows wild animals to be transformed from natural goods into trade goods has a long history. Originally, the need to control all naturally uncontrollable objects (inanimate as well as animate) was the driving force behind the idea that wild animals must belong to some responsible social entity, be it the state or an individual.[11] Which entity was to be held responsible depended on whether human communities could be considered *res nullius*, composed of property which originally belonged to no one since it had not yet been appropriated by anyone, or *res communes*, composed of property which originally belonged to everyone, having been "given" to all.[12]

Roman law initially adopted the *res nullius* approach: both liability and possessory rights to an animal sat in the possessor alone and evaporated once the animal escaped its owner's control. The rationale for this approach was that at the moment of escape the animal could not realistically be said to be owned by anyone.[13] Perhaps due to the increasing consequences of such escapes (given the ever-growing public forums in which captive animals were being exhibited), American common law eventually came to embrace an opposite conclusion. The *res communes* approach dictates that wild animals are foremost the responsibilities of the state and may be reduced to private ownership by those willing to try to confine them from the public domain.[14] This view, articulated in American courts, remains the prevalent notion today:

> The common law provides that animals *ferae naturae* belong to the state and no individual property rights exist as long as the animal remains wild, unconfined and undomesticated (citations omitted). Unqualified property rights in

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[8] *See, e.g.*, Pedersen v. Benson, 255 F.2d 524 (D.C. Cir. 1958).

[9] Jones v. Beame, 382 N.Y.S.2d 1004 (N.Y. Sup. Ct. 1976), *rev'd in part*, 392 N.Y.S.2d 444 (N.Y. App. Div. 1977), *order aff'd*, 408 N.Y.S.2d 449 (N.Y. 1978). It is interesting to note that this proposition had already been eloquently argued for by Christopher Stone in his acclaimed essay. CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING?: TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS (1972).

[10] *Jones*, 382 N.Y.S.2d at 1012.

[11] 2 W. BLACKSTONE, COMMENTARIES 415-419 (E. Christian edition).

[12] OLIVER WENDELL HOLMES, THE COMMON LAW (1972).

[13] *Id.*

[14] *See* 7 HOLDSWORTH, HISTORY OF THE ENGLISH LAW 491 (1925).

> wild animals can arise when they are legally removed from their natural liberty and made the subject of man's dominion (citations omitted). This qualified right is lost, however, if the animal regains its natural liberty.[15]

To the limited extent that the subject has been considered, American property cases treat exotic animal possession as a reward one earns for undergoing the risks involved with restraint and confinement of the animal, and for assuming the cloak of responsibility which the state sheds at the moment of confinement. Thus, the zoo animal is a proprietary trade good in that rights in its use and enjoyment have been bought and paid for in labor, as well as in the acceptance of personal liability.[16]

C. Tort Cases

Tort liability with respect to zoo animals is historically based on the need to restrict social dangers which have been created by the malfunction or loss of control of another's private possessions. In the caselaw, zoo animals have been placed alongside wild animals and pets as living instruments of potential harm.[17]

The modernized tort rule maintains that the keeper of a wild animal is absolutely liable for damage caused by that animal. This rule remains unaltered by the frequent observation by defendants that the animal causing the harm has usually been fully restrained behind bars. Courts have held that a "zoo exception" cannot reasonably be carved out as the basis for freedom from liability for animal-caused injury.[18] In that sense, zoo animals are treated in a manner similar to and somewhat stricter than that accorded domestic pets by most state legislatures.

This treatment appears to be based again on the concern for establishing a public responsibility for harm caused by wild animals.[19] However, two other elements are also present: the historical presumption of animals' natural ferocity, and human fear of the animal world. This fearful view of animals was expressed by the court in *Blanchard v. City of Bridgeport*: "the degree of care to be exercised by keepers of wild animals

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[15] State v. Bartee, 894 S.W.2d 34, 41 (Tex. 1995) (quoting Jones v. State, 45 S.W.2d 612, 613-614 (Tex. 1931)). Apart from this Texas case, the *res communes* view has also been specifically adopted in Missouri: "[Zoo] animals are regarded as property. Wild animals reduced from the wild state in compliance with applicable law become property of an individual." Animal Protection, Educ. and Info. Found. v. Friends of the Zoo of Springfield, Mo., Inc., 891 S.W.2d 177, 179 (Mo, 1995). "Ownership of [zoo animals as] property comprises numerous different attributes. The chief incidents of the ownership of property are the right to its possession, the right to its use, and the right to its enjoyment, according to the owner's taste and wishes, free from unreasonable interference, usually to the exclusion of all others." *Id.* at 179-80.

[16] *Bartee*, 894 S.W.2d at 41.

[17] Blanchard v. City of Bridgeport, 463 A.2d 553 (Conn. 1983).

[18] Burns v. Gleason, 819 F.2d 555, 557 (5th Cir. 1987); *but see* King v. Blue Mnt. Forest Ass'n, 123 A.2d 151, 154 (N.H. 1956) (finding "no absolute liability vests for possessors of wild animals").

[19] *See, e.g.*, Vredenburg v. Behan, 33 La.Ann. 627 (La. 1881).

to protect visitors from harm must, at the very least, be equal to the coiled spring danger that lurks within the cage."[20]

Although its inhabitants are considered fearsome, a zoo itself is neither feared nor denigrated under tort law as the facility is not considered a nuisance to the surrounding community,[21] nor is risk of serious injury deemed inherent in visiting a zoo.[22] Those propositions remain true, however, only as long as the facility undertakes to completely restrain and confine its exhibits. It seems that zoo animals must be treated as properties for tort purposes because issues of public safety require that they be manipulated like properties. The law's reduction of a zoo animal to the status of object therefore both increases the public's sense of security and assuages its covert fears. Zoo-related tort cases invariably implicate a strong sense of social justice, and by achieving heightened media attention and sizable jury awards, offer a means of private enforcement of public wrongs.[23]

D. Abuse Cases

Although endangerment and anti-cruelty statutes relating to the abuse of zoo animals create, in essence, criminal offenses based on the destruction of property,[24] cases involving the abuse of exotic animals by their caretakers have recognized a distinctly non-property viewpoint that treats animals as independent entities. That viewpoint invokes Article III standing, a concept that animal welfare actions have struggled with for some time.

In one such case, *Humane Society of the United States v. Babbitt*, an animal rights organization attempted to bring suit under the Endangered Species Act against a corporation which bred, trained and exhibited Asian elephants.[25] The action was dismissed on jurisdictional grounds primarily for the plaintiffs' failure to meet the injury requirement supporting standing under the statute. Injury for standing purposes was defined as the invasion of a legally-protected interest which was concrete and particularized, as well as actual or imminent.[26]

While denying that the plaintiffs met those requirements, the court did reflect in dicta that the observation and study of endangered animals may, in some circumstances, support Article III standing. The court cited to cases where standing was granted to environmental organizations that asserted injury because the challenged conduct threatened to diminish or deplete the overall supply of endangered animals available for observation or study.[27] The *Babbitt* case relied in part on an older, influential United States Supreme Court opinion, *Lujan v. Defenders of Wildlife*, which

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20 *Blanchard*, 463 A.2d at 555.

21 *See* City of Louisville v. Munro, 475 S.W.2d 479, 482 (Ky. 1971).

22 *See* Tincani v. Inland Empire Zoological Soc'y, 875 P.2d 621, 633-34 (Wash. 1994).

23 *See Burns*, 819 F.2d. 555.

24 *See, e.g.*, CAL. PENAL CODE § 597 (West 1997).

25 Humane Soc'y of the United States v. Babbitt, 46 F.3d 93 (D.C. Cir. 1995).

26 *Id.* at 96.

27 *Id.* at 97. In addition, the court stated, again in dicta:

stated that although observing an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for standing purposes, the injury in fact test requires a plaintiff to be directly affected apart from his or her special interest in the subject.[28]

It is possible to characterize the issue of animal standing as concern for whether an injured animal may directly appeal to the court for reparation through the voice of a human benefactor. Ultimately, however, it is apparent that standing decisions are based on the utility or enjoyment which humans are able to obtain from the animal in question, namely, the animal's intrinsic or extrinsic value as property. Christopher Stone made a strong argument in favor of conferring participant status to animals in abuse cases, declaring that standing should be granted to animals as it has been granted to human property in the past, such as corporations.[29] However, the perception of the captive animal as manipulatable property seems firmly rooted. The most progressive argument for construing captive wild animals as entities other than property was offered in an abuse action which did not involve a zoo animal per se.[30] In *Jett v. Municipal Court*, a state prosecutor made an attempt to equate ownership of a giant tortoise with the relationship between a parent and child in an effort to offer the court any possible procedural foothold to intervene and prevent the tortoise's abuse. The court took the analogy as a jest and rejected it, observing that while parents have custody of children, people simply own animals outright.[31] The court declared the issue to be outside of its realm stating: "If ownership of animals is to be divested by reason of cruel treatment, the remedy lies with the Legislature, not with us."[32]

The fact that a court may blanch at holding a person to be *in loco parentis* to a wild animal is undoubtedly a reflection of the historical traditions discussed above. Zoo animals may certainly benefit from the exercise of some human rights, if not parental ones: a right to view animals free from "excessive harvesting" or "inhuman treatment" has been promoted,[33] and personal injury to persons has been predicated on the forced viewing of the despoliation of animals.[34] Currently, the animals them-

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> [W]e can imagine a situation where a frequent zoo visitor's systematic observation of an animal species might be sufficiently threatened by the removal of some or even one animal from the zoo to make out a cognizable claim for standing purposes . . . [N]o court has yet considered whether an emotional attachment to a particular animal (not owned by plaintiff) based upon the animal being housed in a particular location could form the predicate of a claim of injury [to meet standing requirements] . . . [A] person who had made a particular study of . . . the elephant over a period of time might be able to claim injury from her sudden departure from the zoo. .

Id. at 97-9.

[28] Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992).

[29] *See* STONE, *supra* note 9.

[30] Jett v. Municipal Court, 177 Cal.App.3d 664, 670 (Cal. 1986).

[31] *Id.* at 671.

[32] *Id.*

[33] Animal Welfare Inst. v. Kreps, 561 F.2d 1002, 1007 (D.C. Cir. 1977), *cert. denied sub nom*, Fouke Co. v. Animal Welfare Inst. 434 U.S. 1013, 98 S.Ct. 726 (1978).

[34] Humane Soc'y of the United States v. Hodel, 840 F.2d 45, 52 (D.C. Cir. 1988).

selves, because they are not recognized as legal personages, continue to incur no direct benefit, compensation or vindication from the exercise of those rights. They are, for all purposes, objects of material value alone.

III. A Proposal to Classify Zoo Animals as Objects For Historical Preservation And Criminalize Their Mistreatment as a Public Welfare Offense

There seems little need to ponderously recount the unjust treatment which many animals have undergone in the name of captivity and exhibition, or to delineate the extent to which harmful situations have gone woefully unredressed under the statutory remedies. What might be more productive is exploration of a legal philosophy which provides an alternative to equating zoo animals to captured prizes, sale goods or dangerous instrumentalities.

One such alternative is simply to accept the underlying assumption and work creatively within it. If zoo animals are to be treated as personal properties—and it seems that there is no sensible justiciable alternative to the designation at present—then perhaps their unique circumstances can be better recognized under existing areas of property law. This treatment is appropriate as such laws function to categorize and protect particular objects for ownership by virtue of their particular social importance.

Specifically, it may be worthwhile to consider treating zoo animals as culturally invaluable properties, perhaps as national treasures. At the very least, this approach might take some of the sting out of a caselaw tradition steeped in fear and mistrust of animal wildlife, and may reinstill a sense of environmental context within which our need to maintain areas of animal captivity originally arose. Rather than passing new legislation, it would be much easier to simply incorporate zoo animals into existing legislation through a two-step process: the placement of zoo animals into the national historic landmarks program, and the consequent criminalization of their mistreatment as an offense impacting the public welfare.

A. Zoo Animals as National Historic Landmarks

The National Historic Preservation Act (NHPA) is designed to protect properties of exceptional value to the nation.[35] Listing under the program makes the owners of the property eligible for federal grants and loan guarantees for historic preservation and deferential federal tax treatment.[36] A monitoring system is provided to make sure that designated properties are well cared for and not abandoned to disuse.[37]

Under the NHPA, the Secretary of the Interior is authorized to maintain a National Register of Historic Places which is comprised not only of buildings and structures, but also of "objects significant in Ameri-

[35] National Historic Landmarks Program, 36 C.F.R. § 65.2(a) (1996).

[36] *Id.* §§ 65.2(c)(3)-(4).

[37] 16 U.S.C. § 470a(b) (1994).

can . . . culture."[38] Properties and objects which meet the statutory criteria are designated as National Historic Landmarks, listed in the Federal Register, and protected under a comprehensive statutory scheme.[39] Supporting regulations define "object" as "a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment."[40]

Zoo animals, and the major institutions which house them, readily comport with many of the standard criteria used to gauge the propriety of preservation status for objects.[41] First, they are undoubtedly of national importance, existing as easily identifiable landmarks in every major metropolitan city. Second, zoos have made a significant contribution to, and are identified with, American culture. In fact, from the 1800's on, the nation has been pre-occupied with acquisitions and alterations in the structure of most major zoos.[42] Third, zoos yield information of major scientific importance by educating the public on animals and plants.[43] Finally, zoos are specific environments because they are unique and innovative mechanisms for enclosing exotic locales within urban areas. Indeed, an underground pool of water, and the desert fish which inhabit it, have been deemed "objects of historic or scientific interest" worthy of inclusion under the program.[44] It is no large philosophical stretch to include some even more valuable, interesting and rare aboveground counterparts.

If any properties represent cultural resources which desperately need to be protected for the inspiration and benefit of future generations, it is the creatures which have been taken from their native habitats and placed in this nation's zoos. It is a hard idea to accept that an animal as strange and wonderful as a giraffe can currently be bought and sold with only slightly more difficulty and hardly any more deference than that accompanying the purchase of a pair of shoes.[45] Under the auspices of the historic preservation program, such a facile transaction would no longer be possible. The intervention of federal agency overview and the intercedence of national cultural interests in each acquisition, divestment or exchange would undoubtedly provide some much-needed weight to the process. Holding the business relationship between zoos and their animal stock under the scrutiny commonly applied to sales of items of national cultural importance might bring legal perceptions of zoo animals in relation to humans into a sharper and more thoughtful focus.

B. History of Public Welfare Offenses

A second step to the proposed reconsideration of zoo animals under the law involves giving their new designation some jurisprudential teeth.

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38 *Id.* § 470a(a)(1)(A).

39 *Id.* § 470a(a)(1)(B).

40 36 C.F.R. § 65.3(l) (1996).

41 36 C.F.R. §§ 65.4(a)(1)-(6) (1996).

42 *See, e.g.*, COLIN TUDGE, LAST ANIMALS AT THE ZOO (1991).

43 *See generally*, H. MARKOWITZ, BEHAVIORAL ENRICHMENT IN THE ZOO (1982).

44 Cappaert v. United States, 426 U.S. 128, 142, 96 S.Ct. 2062, 2071 (1976).

45 *See, e.g.*, Pedersen v. Benson, 255 F.2d 524 (D.C. Cir. 1958).

One way of doing so, outside of (or perhaps in addition to) completely overhauling the prudish penalties associated with the historic preservation program, is to simply criminalize mistreatment of zoo animals as offenses to the public welfare.

The definition of criminal conduct has traditionally required a wrongful intent, without which a criminal offense could not exist.[46] However, since the mid 1800's the development of special crimes called public welfare offenses has steadily eroded the *mens rea* requirement.[47] Offenses based upon conduct alone, without reference to the mind or intent of the actor, have come to characterize a peculiar class of modernized crimes, the majority of which were reported in the early 1920's as cases enforcing "police regulations."[48]

By definition, all public welfare offenses share the common element of proscribing a social rather than an individual danger. Traditionally, social dangers legislated against in this manner concerned the most basic threats to the safety of the masses including: violations of liquor and narcotic laws,[49] sale or distribution of adulterated or impure food or drink,[50] or the placement of dangerous goods in open commerce.[51] The subjects of the crimes have been of three types: necessities (such as food or drink), uncommon and dangerous products (such as explosives), or natural resources harnessed to act in the public benefit (such as electrical power stations).[52] The targets of such legislation are therefore the businesses and corporations which distribute or are responsible for production of these goods, and which must be restrained from abusing the privilege.[53]

Public welfare crimes reflect the social desire to impose liability upon those seeking to profit from the mass consumption of basic, unusual or difficult to obtain goods. Because of this public policy emphasis, the proscribing statute is usually considered to be of a regulatory nature. The conduct is considered criminal only if the injury addressed is itself of a widespread and public character. This is particularly true in cases where the ascertainment and proof of guilty knowledge would be so difficult that requiring it would practically prevent convictions.[54]

The development of public welfare offenses originated from the expansion of an increasingly complex social order earlier in this century

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[46] *See, e.g.*, State v. De Wolfe, 93 N.W. 746 (Neb. 1903).

[47] Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

[48] *See, e.g.*, Groff v. State, 85 N.E. 769 (Ind. 1908); People v. Ruthenberg, 201 N.W. 358 (Mich. 1924), *error dismissed*, 273 U.S. 782, 47 S.Ct. 470 (1927); People v. McClennegen, 195 Cal. 445 (Cal. 1925); State v. Kahn, 182 P. 107 (Mont. 1919); State v. Gilbert, 169 N.W. 730 (Minn. 1918), *aff'd*, 254 U.S. 325, 41 S.Ct. 125 (1920).

[49] *See, e.g.*, Barnes v. State, 19 Conn. 398 (Conn. 1849).

[50] *See, e.g.*, Commonwealth v. Nichols, 10 Allen 199 (Mass. 1865).

[51] *See, e.g.*, Commonwealth v. Gray, 23 N.E. 47 (Mass. 1889).

[52] Sayre, *supra* note 47.

[53] *See, e.g.*, People v. High Ground Dairy Co., 151 N.Y.Supp. 710 (N.Y. 1915) (holding that considering the intent of the maker of the nuisance would defeat the purpose of such legislation since "how could it be shown that one would so conduct such business with the purpose of doing what the law forbids and punishes?").

[54] *See, e.g.*, Groff v. State, 85 N.E. 769 (Ind. 1908).

which required quick and efficient regulations of an administrative character, unencumbered by the heavy burden of resolving nebulous questions of personal guilt.[55] This quest for simplicity has made prominent collective, as opposed to individual, interests, and a wide range of conditions necessary to preserve public prosperity have come within the public welfare law's embrace.

The American judiciary presently confronts growing public awareness of the fragility of the earth's ecosystems. The courts, in turn, seem to be increasingly receptive to recognizing widespread social injury to encompass more sophisticated harms than simply those related to physical consumption.[56] The concept of "environmental consumption" has entered the language of the courts, and substantial legal responsibilities are increasingly being placed on those who would interfere with the health of the nation's biological landscape.[57] Nevertheless, no public welfare offenses have yet been created in which the underlying public policy which has been offended is an intangible rather than a purely physical harm.

C. A New Public Welfare Offense

The idea that intellectual, aesthetic and environmental interests require effective legal protection is well accepted. It has also been demonstrated that there is a comprehensive federal scheme for the preservation and protection of national cultural artifacts which may reasonably include animals. The difference between the treasured relics which humans have created, and the exotic animals which humans have captured, studied, enjoyed and bred, is in every sense a slender reed by which to divide the protected from the exposed.

A review of national entertainment and business news from the last decade shows that wild animal parks are a growing industry among entrepreneurs.[58] As with any burgeoning commercial field, regulation should inevitably lead to benevolent interference by interested legislatures. Because what may once have been a purely personal pursuit for the few may be growing into a significant financial incentive for the many, the public's interest in administration and preservation of the properties marketed in zoos should play a greater role in protecting the national heritage. Criminalizing the destruction of historically valuable and irreplaceable properties owned by the national populace is one method of addressing

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55 Sayre, *supra* note 47.

56 *See, e.g.*, El Sereno Neighborhood Action Comm. v. California Transp. Comm'n (C.D. Cal., No. CV 95-6106-KN) (status pending disposition by court). This is one of a series of recent "environmental justice" suits seeking a holding that the right to a healthy environment is a federal civil right under Title VI of the Civil Rights Act.

57 *Id.*

58 *See, e.g.*, Thomas R. King, *Disney's Next Park is For Animals Bigger Than a Mouse*, WALL ST. J., June 21, 1995, at A3 (explaining the $800 million, 500-acre zoological preserve that Walt Disney Co. plans to build in southern Florida).

preservation concerns associated with the flourishing business of wild animal exhibition.[59]

It is worth repeating that while they do attempt to protect against a range of abuse and mistreatment, current animal cruelty laws are severely insufficient as jurisprudential devices to alter the legal status of zoo animals in the courts. The dictates of the Animal Welfare Act (AWA)[60] for example, primarily provide for rules regarding the theft and transportation of exhibition and research animals. The statute is in all respects a licensing scheme, confined to the procedural niceties involving compliance with and revocation of licenses required to transport living properties.[61] Moreover, while the AWA provides penal sanctions for abuse-offenders, courts have so far rejected attempts to create a private right of action under the AWA.[62] Thus, enforcement is left to the discretion of federal prosecutors; a discretion necessarily constrained by regional, political and social restraints which hobble anti-cruelty prosecutions and investigations.[63] It would hardly be a close question to ask whether enforcement of the "damage or destruction" of historically protected objects is in fact more stringent than that of animal abuse; the federal government has shown itself to be highly motivated to protect federal properties, especially historically valuable ones.

The Endangered Species Act (ESA),[64] in turn, has proven to be a vehicle used more to protect animal habitats than animals themselves.[65] The statutory scheme encompassing the ESA would be hard pressed to apply to the complete populations of the nation's zoological parks, primarily because zoos are geographically independent of natural animal habitats. The Act's attention to species facing immediate extinction,[66] and its stated policy of simply encouraging other jurisdictions to develop and maintain conservation programs regarding those species, would not change the manner in which zoo animals are presently treated under the law. A law protecting zoo animals irrespective of their locale or regional habitats, regardless of anyone's intent to harm them, but guided by a clearly-defined public

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59 It would be difficult to envision the states taking on such a task, given the historic lack of interest most states have given to the protection of historically valuable properties. *See, e.g.*, CAL. PENAL CODE § 622½ (WEST 1997) (making the destruction of such properties a misdemeanor, with no public record or published caselaw on enforcement of the crime).

60 Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (1994) (and regulations promulgated thereunder at 9 C.F.R. §§ 1.1-4.11 (1996)).

61 *Id.* §§ 2133-2134.

62 *See* In Defense of Animals v. Cleveland Metroparks Zoo, 785 F.Supp. 100, 103 (N.D. Ohio 1991).

63 Enforcement problems are undoubtedly reflected by the scarcity of prosecutions under the AWA (only three published cases) and the confusion engendered by those which have been brought. *See, e.g.*, Haviland v. Butz, 543 F.2d 169 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 832, 97 S.Ct. 95 (1976) (the definition of "exhibitor" under the Act was read to include carnivals, zoos and circuses, but not fairs or animal shows).

64 16 U.S.C. §§ 1531-1544 (1994).

65 *See* Tennessee Valley Authority v. Hill, 437 U.S. 153, 98 S.Ct. 2279 (1978).

66 *Id.*

policy of property preservation, might achieve through an indirect route what the ESA and the AWA have been unable to accomplish directly.[67]

Significant social progress can be derived from perceiving that not just the abuse, but the simple improper upkeep and insufficient preservation of a zoo animal, is a crime against the public good. It would also be beneficial to assess severe monetary penalties against the animal's custodian without either the need to prove willfulness or the stigma attached to abuse prosecutions. The inclusion of American zoos in a program of historical preservation could be a major step towards increasing the nation's environmental health by recognizing a modern need to administer not just inanimate objects of value, but the full dynamic range of nationally valuable properties.

IV. CONCLUSION

Recently there has been much discussion about American zoos making animal conservation their primary goal (or at least a priority over and above education and entertainment).[68] This goal can only be achieved with the eventual involvement of the nation's legislatures and enforcement by the nation's courts. If zoo animals continue to be treated as personal property will attempts to conserve them be thwarted? In arguing for the need for animal conservation by zoos, it is curious that American ecologists are fond of pointing, with much dismay, to the fact that many other countries sell off their native wildlife to foreign zoos as a prime source of income.[69] Is the United States much different, however, sheltered as it is by a common law and decisional jurisprudence that declares that captured (or accumulated) wildlife legally become the transferable, private financial assets of their captors?

It may be that under the laws of property, wildlife conservation is furthered and zoo animals are better served ecologically. It may be that an aging and decrepit New England church deserves more to be cloaked in the protective mantle of federal regulation than does an aging and decrepit Asiatic lion. Further, it may be that the legal transformation of an animal from a standard trade good into a historical article is merely a shadow play, achieving nothing more than enticing people to imagine that the objects presented for their amusement are not inanimate, but are truly alive in a sense beyond what has been defined for them by social consensus. How ever these questions will be answered by our courts, it is apparent that there remains a novel role for animals to play in the law which may at least affect, if not remedy, the dishonor of their real world circumstances.

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[67] There is some, albeit slight, precedent for using a police regulation protecting the public good to penalize harms to animals. In State v. American Agricultural Chemical Co., 110 S.E. 800 (S.C. 1922), a South Carolina court allowed the prosecution of a public welfare offense against a corporation which itself had allowed a substance poisonous to fish to flow from a fertilizer plant.

[68] *See, e.g.*, TUDGE, *supra* note 42.

[69] *See, e.g.*, Charles W. Fawcett, Comment, *Vanishing Wildlife and Federal Protective Efforts* 1 ECOLOGY L.Q. 520 (1971).