AMERICAN LAW: LEGAL RECOGNITION OF ANIMALS’ CAPACITY TO EXPERIENCE PAIN

Taimie L. Bryant

Abstract

American law appears to validate the ideas that animals have the capacity to experience pain and that humans should not inflict suffering on animals. Nevertheless, for several reasons the American legal system is structured and operates in ways that allow for unimpeded infliction of painful experiences and death on vast numbers of animals in the United States. Advocates continue to seek improvements in the structure and operation of public laws, but increasingly they are turning to the use of private contract law to secure improvements for animals. Although Americans tend to believe that greater compliance is accomplished through voluntary contractual agreements than through regulations enacted by government bureaucrats or statutory laws enacted through the political-legislative process, the example of private contract to advance the interests of animals used in film and television is not promising. This article examines strengths and weaknesses of using private contract in this context.

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The American legal system operates at local, state, national, and international levels with legal provisions that seem to reflect concern for animals and to recognize animals’ capacity to feel pain. Nevertheless, the relationship between scientific documentation of animals’ capacity to experience pain and American law is not straightforward. One reason is that scientific information about animals is not readily incorporated into law. There was no rush to modify federal laboratory regulations concerning care of animals used in experiments when it became known that mice hear the hum of a fluorescent bulb as a “screamingly loud” 80-90 decibels, for instance. That is because mice—one of the most commonly used research animals—are not covered by laboratory animal protection regulations at all. Similarly, no state whose anticruelty statutes excluded fish took steps to amend such statutes after scientists confirmed that fish have the capacity to experience pain. There simply isn’t the public will to protect many species of animals. And, there is skepticism about scientific input. When a California state legislator brought legislation to prohibit the production and sale of foie gras in California, poultry scientists testified on both sides of the issue. This so confused a legislator that he reportedly remarked out loud that not all of them could be telling the truth.

In the United States, scientists, like lawyers, are understood to be available for hire to say whatever is helpful to the person who has hired them to offer an opinion.

A more fundamental reason that American law does not readily incorporate scientific understandings of animals’ capacity to experi-

2. The Animal Welfare Act and associated regulations apply to certain warm-blooded animals but mice and rats are explicitly excluded.
3. See, e.g., Janicke Nordgreen et al., Thermonociception in Fish: Effects of Two Different Doses of Morphine on Thermal Threshold and Post-Test Behaviour in Goldfish, 119 APPLIED ANIMAL BEHAVIOR SCI. 101 (2009) (indicating that goldfish likely experience pain and react accordingly); V.A. Brathwaite & P. Boulcott, Pain Perception, Aversion, and Fear in Fish, 75 DIS. AQUAT. ORG. 131 (2007) (noting that there has long been an awareness that fish may experience pain); Lynne. U. Sneddon, The Evidence for Pain in Fish: The Use of Morphine as an Analgesic, 83 APPLIED ANIMAL BEHAVIOUR SCI. 153 (2003) (arguing that because analgesics eliminated behaviors associated with pain, fish likely experience pain).
5. “If we listen to these conversations, somebody is not telling the truth.” Jordan Rau, Activists Win One in Battle Over Pate Foie Gras, L.A. TIMES, Apr. 27, 2004, at B1 (quoting California State Senator Edward Vincent).
ence pain is that the purpose of American laws ostensibly enacted to protect animals is not primarily to protect animals. The purpose of American animal protection laws is to protect humans' interests, especially whenever those interests are in conflict with the interests of animals. Consider state anticruelty statutes. Because animals are legally the property of humans and states have sovereignty over property within their boundaries, state anticruelty statutes play an important role in defining humans’ legal obligations to avoid infliction of suffering on animals. However, state anticruelty statutes are limited in a number of ways.

State laws vary as to the type of animals defined as “animals” for purposes of the statute, and few statutes come close to covering all animals. That means that it is not legally “cruel” to inflict serious suffering on an animal whose species is not defined as an “animal” for statutory purposes, even if it is known that those animals can experience pain. Second, inclusion/exclusion of species is not driven by scientific input. In general, advances in scientific information about animals, including their capacities with respect to suffering, are not readily incorporated or used by legislators to introduce new laws or to amend existing laws. As the California foie gras ban and the failure to amend anticruelty statutes to include fish mentioned earlier illustrate, scientific information is not accepted unequivocally, even if occasionally it does undergird statutory amendments, as when docking the tails of dairy cattle was limited in California
d. Third, even as to those animals covered by the statutes, exceptions and exemptions remove whole categories of animals and acts. Typical exemptions include recreational activities (such as hunting and fishing), scientific research, common husbandry practices, and pest control practices. There is no scientific basis for excluding these activities from the coverage of anticruelty statutes, since the animals harmed in these activities are already documented as capable of experiencing pain. In fact, the greatest number of animals harmed and the most consistently severe suffering inflicted on animals occurs in those types of activities. Therefore, limiting the reach of anticruelty statutes cannot help but result in few acts being covered, even if a harmed animal is defined as an “animal” for purposes of the statute. Fourth, and closely related to the statutory exemptions described above, anticruelty statutes prohibit only “unnecessary” infliction of suffering on animals, and all human uses of animals are deemed to constitute

sufficient “necessity” to inflict harm. Only completely senseless acts that cause severe suffering or death are, in actual fact, prohibited. Finally, many of those instances of gratuitous infliction of suffering and death that are covered by such statutes are not prosecuted for a variety of reasons, including the low priority many prosecutors assign to the enforcement of anticruelty statutes.

In light of all of the foregoing, it turns out that precisely because animals are the legal property of humans, humans’ interests will always prevail and anticruelty statutes will not play an important role in protecting animals from human acts that cause animals to suffer and die. There are too many disincentives to regulate the uses of animal property in a society that values tremendous latitude in how people can use their property. Indeed, a complex ideology supports protecting owners’ self-interested use of their property for their own purposes, which in turn supposedly provides the society at large with the most (and the most beneficial) ideas.

In the face of such formidable obstacles, American advocates for animals continue to seek reform and expansion of anticruelty statutes and other laws whose apparent purpose is to protect animals. However, at the same time there has been greater attention to the use of private contract to reduce human infliction of suffering on animals. For instance, once veterinary medical science provided evidence of the degree and types of harms to cats that result from declawing them, many cat adoption contracts prohibit adopters from declawing cats even though there are very few anticruelty statutes that prohibit it. Similarly, advocates for improved factory farming conditions for animals have sought to contract directly with producers and purveyors of animal flesh foods, such as the United Egg Producers and McDonalds, to change factory farming practices rather than expecting statutory or regulatory change. Increasing the size of cages used

8. Thanks to the advocacy efforts of The Paw Project (http://www.pawproject.org/), there are now some municipal laws in California that prohibit the declawing of pet cats, but it has been politically impossible to accomplish that goal at the state level. The California Veterinary Medical Association, perhaps for reasons of its impact on the income-earning potential of its members, has opposed passage of declaw bans. In this context, then, private adoption contracts that prohibit declawing of pet cats protect far more cats from declawing than the number of cats protected by the very few municipal ordinances that prohibit it. Both contracts and statutes have enforcement problems, but at least as to contract-respecting parties to adoption contracts, arguably more cats are protected by contract because adoption groups operate in many areas not covered by the statutory declaw bans.
to house egg-laying hens and prohibiting the use of crates to confine sows are two such changes advocates have sought through private agreements. This is due not only to the difficulty inherent in getting animal-protective laws and regulations passed. It is also due to differences in perceived acceptance of regulations versus requirements set out in voluntarily entered contracts. In America, compliance with voluntarily entered contracts is believed to be greater than compliance with statutes and regulations initiated by politicians and regulators. Indeed, Americans can be characterized as distrusting regulation and bridling under regulations’ requirements rather than accepting them as legitimately and appropriately enacted. And, where compliance falls short, well-drafted contracts can provide for penalties and enforcement options unavailable in criminal anticruelty statutes. Finally, there also appears to be more confidence that a decision can be reached once a commitment has been made to enter an agreement. One need not wait for consensus among legislators to enact a law, if one can bypass that process through contract negotiations with those who would have been covered by the law.

Nevertheless and despite their apparent promise, contracts turn out to be limited vehicles for effectuating change. A good example of strengths and weaknesses of such an approach is the contract between the Screen Actors Guild (“SAG”) and the Alliance of Motion Picture and Television Producers (“AMPTP”) to allow the American Humane Association (“AHA”) to review scripts, to monitor the training, housing, and use of animals on television and film sets, to stop production when risks to animals are too high, and to issue or withhold certification that no animals were harmed during production. The anchor for AHA decisions is its “Guidelines” which provide advance notice to the film and television industry as to what the AHA considers acceptable conduct toward animals used in film and television productions.

The Guidelines, and AHA involvement in the film industry more generally, are the end result of public outcry when horses were intentionally run off a cliff and killed in order to make the movie *Jesse James* in 1939. Horses, long revered in American culture as symbols of American heritage, were intentionally injured and killed in great numbers even before the heyday of the American Western. Over 100 horses were killed in the making of the silent movie version of *Ben Hur* in 1925, for example. But when, in the making of *Jesse James*, horses were intentionally run off a cliff to certain deaths, public outcry was so strong that a new animal protection provision was added to the self-regulatory requirements of Hollywood’s “Hays Code.” The AHA was called in at that time to assist in the development of animal treatment guidelines in the production of movies. From 1940 until the late 1960s, AHA also had access to film sets to ensure compliance.

Between 1968 and 1980, the Hays Code and AHA access to film sets were abandoned. However, due to the seemingly gratuitous animal carnage in the film *Heaven’s Gate*, public outcry generated sufficient pressure to bring the AHA back into the motion picture monitoring business in 1980. By 1988, the AHA had developed Guides—


11. McCarthy, ibid.


14. Ibid.

15. In 1968 the Hays Code was abandoned as anachronistic and too restrictive and not for reasons having to do with monitoring of animals on sets. (Supra, note 10) For instance, the Hays Code had prohibited the filming of such acts as swearing and “excessive kissing.” (The Motion Picture Production Code of 1930 (Hays Code), ARTS REFORMATION (Apr. 12, 2006), http://www.artsreformation.com/a001/hays-code.html.) Because the animal protection provisions were embedded in the Hays Code, when the Hays Code was abandoned, the AHA no longer had access to the sets, and movie production returned to unimpeded use (and abuse) of animals in movies and, by that point, television.

16. Allegations against the *Heaven’s Gate* production team included an authentic cockfight, tripping and blowing up horses, decapitating chickens, and bleeding cattle. The resulting outcry led the Screen Actors Guild and the Alliance of Motion
lines for production and had begun limited monitoring of the training, housing, and filming of animals used in both television and movies\textsuperscript{17}.

In comparison to state anticruelty statutes, the AHA Guidelines seem at first glance much more extensive and protective of more animals. All animals, including fish, birds, reptiles, and insects, are covered, whether they appear in the foreground, background, or off-camera (to cause an animal being filmed to do something, for instance)\textsuperscript{18}. The spider sitting in its web in the corner of the vacant house or the bird that appears briefly in the sky is protected from being harmed for purposes of producing a film or television program\textsuperscript{19}. To earn the coveted certification to the effect that “no animals were harmed in the production of this [film or television program],” producers must ensure that animals are not harmed during training\textsuperscript{20} and that they are treated well before and during their use\textsuperscript{21}.

\textsuperscript{17} McCarthy, supra, note 10.

\textsuperscript{18} The Basic Principles for the Safe Use of Animals in Filmed Media, contained within the guidelines, provides that “American Humane Association’s Guidelines apply to all animals used in the production, including animals used as background or off-camera to attract the attention of another animal being filmed.” The definitions section on the same page defines “Animal” as “any sentient creature, including birds, fish, reptiles and insects.” Whereas some states explicitly exclude these creatures from their statutory definition of “animal,” the AHA Guidelines explicitly include them. American Humane Association, Guidelines for the Safe Use of Animals in Filmed Media 6 (2011), http://www.americanhumanefilmtv.org/wp-content/uploads/2011/10/Guidelines2011WEB1.pdf.

\textsuperscript{19} Ibid.

\textsuperscript{20} In order to garner the “No Animals Were Harmed” certification, a film must be compliant in pre-production, which includes monitoring of the training of animals used in the film. The AHA “encourages productions to request USDA inspection reports from owner compounds and training facilities prior to contracting their animals for production, and to reject those suppliers who have recent and/or repeated incidents of animal abuse and/or neglect or other USDA violations related to animal care and treatment.” Additionally, the Guidelines call for the AHA to “monitor the pre-production training and conditioning of animals as a means to determine their appropriateness for use in filming.” However, the AHA itself is not particularly proactive in this regard, as “It is the responsibility of the production and the animal handler to contact American Humane Association, in pre-production, of the type and scope of any and all pre-production training and conditioning of animals.” AHA, supra, note 18.

\textsuperscript{21} The Guidelines require productions to provide adequate housing, food and water, and care during the course of the production. Supra, note 18. Of course, the Guidelines provide comprehensive rules for what is and is not permitted during filming. AHA, supra, note 18. The bulk of the Guidelines are aimed at preventing harm to animals during filming itself.
Unlike anticruelty statutes, which are notoriously difficult to change, AHA Guidelines can and have been changed as experience with different animals and activities has accumulated. For example, the AHA no longer approves the sedation of any animals for filming purposes because of risks to the animals even when a qualified veterinarian is present on the set.\(^\text{22}\) The Guidelines also contain a degree of specificity not found in anticruelty statutes, such as the requirement that candy glass be used whenever the appearance of breaking glass is part of the script.\(^\text{23}\) Importantly, AHA Guidelines present a preference for non-animal production techniques, such as computer-generated imagery, animatronics, and use of fake animals, if risks of harm to a living animal would be substantial.\(^\text{24}\) This is stated not only in the general prefatory Guidelines; it is also in the sections pertaining to particular types of animals, as when the Guidelines for fish call for simulation instead of actual hooking of fish.\(^\text{25}\)

Even so, there are numerous impediments to the AHA's ability to fulfill its mission to protect animals in film and television. They have a small budget—in 2001 it was only about $1.5 million—funded by members of the industry they are under contract to monitor.\(^\text{26}\) And that is not the only possible conflict. AHA monitors work closely enough with trainers and crew members to develop personal relationships that could negatively impact the monitors' ability to recognize harm to animals or reduce the monitors' willingness to report harm to supervisors or to authorities.\(^\text{27}\) Most significantly, the only induce-

\(^{22}\) The Guidelines used to allow the sedation of animals for filming purposes, but after a bird died after being sedated for filming in the late 1990's, the AHA changed its policy. McCarthy, supra note 10.

\(^{23}\) AHA, supra, note 18.

\(^{24}\) The Guidelines read “If, upon review of the script, American Humane Association believes there to be any dangerous animal action, American Humane Association will strongly encourage simulating the action through the use of computer-generated images (CGI), animatronics or fake animal doubles to minimize the risk of injury to animals.” AHA, supra, note 18, at 15.

\(^{25}\) AHA, supra, note 18, at 70.

\(^{26}\) The money received by the AHA for enforcement of its Guidelines comes via a “yearly grant from the Industry Advancement and Cooperative Fund.” See McCarthy, supra, note 10. The Industry Advancement and Cooperative Fund is overseen jointly by producers and the Screen Actors Guild. See Frammolino, supra, note 10. The conflict inherent in this dependent relationship, combined with the fact that the AHA wants to maintain what access it has gained to monitor the treatment of animals, present perhaps an insurmountable obstacle to enforcement of the AHA's guidelines.

\(^{27}\) In one case, an AHA representative responsible for research and investigation had inappropriate relationships with some of the animal trainers whose facilities she was supposed to be overseeing. Frammolino, supra, note 10.
ment the AHA has to promote animal safety on sets is the desirability of the "no animals were harmed" certification. If anticruelty statutory violations occur, there are no contract remedies such as damages or injunctive relief (or anything beyond what the law already provides absent the AHA Guidelines).28

Since 1997, the AHA has had the ability to make arrests for violations of the anticruelty statutes, and the AHA could file criminal anticruelty complaints.29 However, those complaints would be viable only to the extent that they are offenses prohibited by the statute and that occur to an animal covered by the statute. Take the case of harm to cockroaches, for instance. The AHA forewarned the producers of the film Problem Child 2 not to kill cockroaches, but the producers ignored the AHA's admonition.30 Because cockroaches are not covered by the state anti-cruelty statute, there was no legal recourse the AHA could pursue, its only recourse being to withhold the "No Animals Were Harmed..." certification from the film.

The AHA has been repeatedly criticized for conflicts of interest, inefficiency, and ineffectiveness in protecting animals from harm in the production of movies and television shows.31 There is no way around the fact that receiving funding from the industry they monitor generates a conflict of interest that could lead to lax attention to situations that place animals in harm's way and incentives to avoid making waves (or "biting the hand that feeds them"). Thin staffing could result in selective absences from particular sets for the purpose of avoiding seeing something that would lead monitors to stop a production.

The AHA has been criticized for failure to protect animals used in film, as when videos surfaced purporting to show Tai, the elephant used in Water for Elephants, being subjected to electric shock for purposes of forcing her to participate in behaviors necessary to the pro-

28. The AHA has no special power of enforcement over productions and producers. Rather, "should AHA representatives witness acts that violate laws regarding humane animal treatment-and the association says its guidelines exceed California's strict anti-cruelty laws-their legal recourse is the same as an ordinary citizen's." Walker, supra, note 10.
31. See, e.g., Frammolino, supra, note 10; Walker, supra, note 10; Fischer, supra, note 29.
duction of the movie. The AHA has also been criticized for failure to protect animals in television. For instance, People for the Ethical Treatment of Animals (PETA) has alleged inattention to the health and fitness of the horses used for the television show Luck. Three horses died before the producers decided to end the series, stating that they could not ensure that future deaths would not occur.

In none of those cases did the AHA bring attention to the issues of possible animal cruelty or insufficient attention to animal safety; other animal protection organizations did. The AHA has apparently not used the powers it was given in 1997 to enforce the anticruelty statutes in California, and there is no indication that it has filed any criminal complaints. By contrast, PETA filed complaints with the Los Angeles District Attorney's Office and the California Veteri-

32. In the aftermath of Animal Defenders International's posting the video of Tai's mistreatment, it reached out to AHA and asked that the group re-evaluate its procedures and its role in perpetuating the use of animals in film. See Animal Defenders International; ADI Video Exposes Movie Star Electric Shocked, ENTERTAINMENT NEWSWEEKLY, May 27, 2011, available at Factiva, Doc. No. ENTWK00020110520e75r0000g.

33. PETA alleged that that the AHA was complacent in its monitoring of the use of horses on Luck, resulting in unsafe practices used in the handling of the horses used in the production. Further, PETA alleged based on documents provided by a whistleblower, there was an awareness on the part of AHA that its guidelines were being violated during the course of filming. Dave Itzkoff, HBO Challenged Over Horse Treatment, N.Y.TIMES, May 4, 2012, http://www.nytimes.com/2012/05/05/arts/television/new-questions-about-treatment-of-horses-on-hbos-luck.html. Letters written by PETA to the AHA and later released support the allegation that AHA was allowing its guidelines to be broken by Luck producers. Kim Masters, HBO vs. PETA: Letters Reveal Long Battle over 'Luck', THE HOLLYWOOD REPORTER (Mar. 29, 2012, 9:14 AM), http://www.hollywoodreporter.com/news/hbo-luck-canceled-peta-305874.

34. Some accept that the show was cancelled after PETA requested it to be shut down following the death of the third horse. See, e.g., Lesley Goldberg, PETA Files New Complaints Alleging Further 'Luck' Mistreatment, THE HOLLYWOOD REPORTER (May 3, 2012, 12:22 PM), http://www.hollywoodreporter.com/live-feed/luck-peta-horses-complaints-319954. Others suggest that, while the series had achieved critical acclaim, viewership for Luck was declining, and ending the show was responsive to the decline in ratings rather than the problem of keeping horses safe. David Stubbs, Why Did HBO Drama Luck Fall at the First Hurdle?, THE GUARDIAN, Mar. 25, 2012, 1:01 PM, http://www.guardian.co.uk/tv-and-radio/2012/mar/25/hbo-drama-luck-fall-first.

35. According to a 2000 article, Karen Rosa, then AHA Film and TV Unit's coordinator of communications and current AHA Film and TV Unit Chairwoman, said that the AHA had yet to make use of its law enforcement powers. "We've threatened to," she said, "and that's the end of the discussion right there." Christopher Noxon, Helping Trigger: LA Group Protects Movie Animals, REUTERS (July 3, 2003), available at http://www.trashcity.org/WEIRD/ODD039.HTM. I have found no recent evidence that the AHA's Film and TV Unit has begun to use its law enforcement powers.
nary Medical Board, alleging abuse of the horses on the *Luck* set. The most severe action AHA takes is to deny certification that "no animals were harmed" during a production\(^{36}\). And, if production takes place in a foreign country or by a producer not covered by the contractual agreement\(^{37}\), there is little, if any, opportunity to review scripts and production plans or to encourage the producer to take actions that could result in certification that "no animals were harmed."

Under these circumstances, the AHA can accomplish only so much, despite a detailed set of Guidelines and an expansively worded agreement. As extensive as the film and television industry is, including its use of animals, it probably is true that the AHA does not have the resources to be in all the places it would need to be to protect animals, although defenders of the AHA would most likely describe diligence that belies the limited budget with which the AHA operates. For instance, an AHA defender wrote after *Luck* was canceled that the AHA had required daily veterinary inspections of the horses, use of each horse was limited to twice a day with horses running no longer than 3/8 mile of track at a time in racing scenes, 2 racetrack-experienced veterinarians were involved, and there were prohibitions on the use of drugs on any of the horses enforced through random drug testing\(^{38}\). The conclusion of such a defender must be that it is simply

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\(^{37}\) Because the AHA Guidelines cover only productions under the auspices of SAG and the AMPTP, independent films produced without SAG actors would have no obligation to call in the AHA for supervision. The Guidelines themselves direct producers of non-SAG and out-of-country productions to contact the AHA for monitoring, illustrating the non-compulsory nature of oversight of these productions. Additionally, the AHA provides domestic monitoring free of charge, but presumably charges for out-of-country and non-SAG productions. See AHA, *supra*, note 18 at 4. The international filming of some productions has decreased the AHA's authority over the use of animals in film. Frammolino, *supra*, note 10.

inescapable that there are some inherent, insurmountable risks in using animals for film and television production, but that the AHA reduces those risks to a tolerable level.

Since the use of animals in film and television surely does involve managing, not eliminating, risk, one who supports the use of live animals in those contexts would have to be willing to tolerate some animal injuries and deaths for the purpose of entertaining humans. Indeed, if one is concerned about eliminating all possible harms to animals that arise from their use in film and television, it is difficult to imagine a satisfactory mechanism, whether derived through private agreement or through traditional legislative processes. In an eloquent appeal to boycott the new television show *Animal Practice* in which a capuchin monkey is used, Gavin Polone enumerates many of the harms animal advocates have long known arise from the use of animals in film and television, especially wild animals\(^39\). Polone quotes capuchin expert Dr. Ottoni from the University of Sao Paolo, “For wild animals, captivity will always be a cruel practice. In the case of monkeys like Crystal [the capuchin monkey used in *Animal Practice*], who lead complex social lives in nature, raising them in captivity condemns them to a life of utter loneliness”\(^40\). And as for Crystal’s frequent grin-like expression, Dr. Ottoni points out that the potential to misread a fear, avoidance, or submission response as a “grin” is high\(^41\). Polone quotes primate veterinarian, Dr. Richardson, who expresses the opinion that, in order to dependably get that “grin” from Crystal, at some point in her training she would have to have learned to provide a fear, avoidance, or submission display on demand, and the way to do that is through inducing fear or anxiety\(^42\). The AHA does not have standing through the agreement to supervise training methods that occur before a production has been slated, but many animals and especially wild animals would have to be subjected to


\(^{40}\) Ibid.

\(^{41}\) Ibid.

\(^{42}\) Commentator “Shoogar” (following the post) claims that he or she “knows” that the trainer didn’t use intimidation. Shoogar, Comment to *Why Animal Practice is Cruel*, VULTURE (Sept. 19, 2012, 12:30 p.m.), http://www.vulture.com/2012/09/polone-why-animal-practice-is-animal-cruelty.html. However, “Shoogar’s” discussion of the trainer’s treatment of Crystal (that he treated her like a nice human father would) only echoes the point of Polone’s article: that people make faulty judgments on animals’ happiness and health by anthropomorphizing them.
potentially harmful and/or cruel training methods from a very early age in order to be suitable for use in television and film.

Polone further notes the phenomenon of impulse purchase of animals (and their behaviors) misrepresented in shows like *Animal Practice*. One need only recall the tremendous uptick in Dalmatian ownership while the film *101 Dalmatians* was popular. Dalmatians are high energy dogs that need lots of exercise and are not particularly good with children. When people learned the true nature of Dalmatians through personal experience, an untold number of owners abandoned their Dalmatians or left them at animal shelters to be killed at public expense. Unwanted pets are also regularly killed by veterinarians at the request of owners.

What Polone does not mention in his post is the cruelty of the process by which captive animals are bred and separated from their infants when those infants are routed into entertainment and the pet trade. And what happens to such animals when people and movie/television producers learn that wild animals’ true nature is not hospitable to life in human homes (or on the sets of films)? Sanctuaries, as Polone suggests? We don’t really know what happens to all such animals. And what of Crystal? Dr. Richardson gets the last ominous word: “To me the biggest harm is [Crystal] has had her life taken away from her, and she is going to bite someone in the end and then they won’t be using her anymore and she’ll be in a cage somewhere until she dies.”

Is there any way that the AHA can adequately address all the harms that befall specific animals or animals of the same type who have been misleadingly characterized by the film and television industry? Not realistically. We would have to suppose that everything in the following lengthy list could occur routinely as to foreign and domes-

45. Ibid.
46. Ibid.
47. According to primate behavioral expert Julia Gallucci of PETA, chimpanzees destined for entertainment are bred in a single U.S. facility and separated from their parents at an age far too young for fulfillment of their developmental needs. Telephone Interview with Julia Gallucci, Primatologist, PETA, in Los Angeles, Cal. (Oct. 3, 2012).
tically produced films and television shows: adequate enforcement mechanisms included in such agreements, budgets large enough for access to all venues animals occupy from birth/capture/acquisition until death, reliable verification that non-violent methods of animal breeding/capture/acquisition were used, and credible means of assuring that animals will be cared for their entire lives without caging or painful methods of training and with adequate access to species- and individual-appropriate food, water, habitat, and opportunities to build meaningful relationships with others of his/her species (if the species is non-solitary). For those who believe that humans owe no less to animals whose lives they have forever altered for human entertainment purposes, the improbability of meeting all those requirements means that the use of animals in film cannot be ethical. Any mechanism that inspires complacency in the viewing public is misguided because it is an illusory promise and prolongs a practice that cannot be justified on ethical grounds.

For some others who care about animals, the appropriate question to ask would be framed differently. To them, as long as it is lawful to use animals in film and television, private standards agreed upon through private contract seem to offer relatively more protection, limited as it is, than anticruelty statutes. From this “humane utilization” perspective, such contracts and the message at the end of each production that “no animals were harmed” instill and reinforce kindness to animals as a societal value.

Finally, there are those who believe that messages are indeed very important—so important, in fact, that animals should not be represented in films and television in ways that degrade them or depict human-inflicted injury or harm (broadly defined). Regardless of whether animals are actually harmed in the production of a film or TV show, the message that the audience receives regarding human entitlement to use animals for various purposes is damaging. The fact that computer-generated imagery technologies are developing rapidly and may ultimately completely replace the use of living animals in all productions provides little comfort to adherents of this view. Even if

49. Movie critic Roger Ebert stated in a recent article that “The day has come” where “advanced CGI [will] allow convincing animals to be created out of thin air and shown doing essentially anything.” Roger Ebert, No Animals Were Uncanny Valleyed in the Making of this Movie, CHICAGO SUN TIMES Aug. 31, 2011, 8:52 PM, http://blogs.suntimes.com/ebert/2011/08/no_animals_were_uncanny_valley.html. With this new technology, perhaps humans will favor CGI which is easy to
computer-generated imagery could eliminate the use of all animals in all film and television productions wherever produced and whoever produces them, animals will be at risk as long as computer-generated imagery and depictions reinforce existing human-animal relationships based on human exercise of complete control over animals to suit human desires. Viewed from this perspective, even an apparent "abolitionist" approach of completely replacing the use of animals in film and television with computer-generated imagery does not go far enough in achieving important goals for animals.

In conclusion, the example of contractual agreement in the case of animals used in film and television does not lead to the conclusion that contract is a better vehicle for helping animals than regulations and law. Other areas of private contractual agreement, such as factory farming and pet adoption, may provide a more complete picture of advantages and disadvantages, but enforcement difficulties—perhaps for different reasons—seem as likely in those contexts as in this one. The most important key to improving the condition of animals may well not lie in public law or private contract law directly pertaining to animals. Rather it may lie in factual and moral education about animals as well as the development of products and services (such as computer-generated images in the film and television context) that make it easier to stop using animals for human purposes.