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The Elephant in the Art Gallery: Why Laws and Regulations for Use of Animals in Art Should Be Rewritten Through Both a Legal and Artistic Lens

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I. INTRODUCTION - THE ELEPHANT IN THE ART GALLERY

Tai was born in Asia in 1968.¹ She was taken from the wild and brought into captivity.² Painted in a pink brocade pattern to match the wallpaper in the room, she was the elephant in the room. Her presence in artist Banksy's³ artwork on poverty inspired some viewers, and angered others⁴ [See Figure I. in Appendix]. In the age of postmodern art, conceptual artists push the viewer to think about something in a new way, and in performance art that means trying "to be difficult to own or collect."⁵ Often not aesthetically pleasing, the "scandalousness and obtrusive theatricality of these images hold up a mirror to the nature of the commodified⁶ image."⁷ While art can inspire new ideas and reflection, for art exhibitions which incorporate animals⁸, some viewers are not walking away in wonderment having witnessed the artist's intention—they are demanding answers. There may be "violence associated with this art"⁹ and "exploitation."¹⁰ The public is becoming increasingly insistent that animal's rights be respected, yet there is much confusion on what that means. Some artists claim no animal was harmed in their work without really knowing; some shrug with a baffling non sentimentality while art galleries and law

¹ IMDB. *Tai*, <https://www.imdb.com/name/nm1677821/> (last visited Nov. 12, 2022).

² Teresa Gubbins, *Elephant That Was in Film Water for Elephants Dies Suddenly at Texas Facility*, CULTURE MAP DALLAS (May 17, 2021), <https://dallas.culturemap.com/news/city-life/05-17-21-have-trunk-will-travel-elephants-preserve-fredericksburg/> (last visited Nov. 11, 2022).

³ Banksy is a British graffiti artist whose identity is not public. His art is usually found on public buildings and is often political in nature. See Hans W. Holzwarth, *100 Contemporary Artists A–Z* (Taschen's 25th anniversary special ed.), Köln: Taschen, p. 40, (2009), ISBN 978-3-8365-1490-3.

⁴ Mark Oliver, *Banksy's Painted Elephant is Illegal, say Officials*, THE GUARDIAN (Sept. 18, 2006), <https://www.theguardian.com/uk/2006/sep/18/arts.artsnews> (last visited Nov. 13, 2022).

⁵ W. J. T. Mitchell, *The Violence of Public Art: "Do the Right Thing."* CRITICAL INQUIRY 16(4), 880–899. (1990), <http://www.jstor.org/stable/1343773> (last visited Nov. 13, 2022).

⁶ Commodified: to turn into a commodity; make commercial. See <https://www.dictionary.com/browse/commodified>.

⁷ Mitchell, *supra* note 5.

⁸ This paper will discuss the potential harm of using actual living or dead animals or animal parts in visual artworks, and not simply the portrayal of animals in art.

⁹ Mitchell, *supra* note 5.

¹⁰ *Id.*

enforcement engage in a tug-of-war to figure out where the boundaries are, often stepping in last-minute to shut down art exhibitions with animal abuse known months beforehand.

Meanwhile, the animal parade continues. Elephants are ambling into the art gallery, covered in paint.¹¹ Pigs are killed, sliced longitudinally, and wheeled into the gallery space in formaldehyde-filled glass tombs.¹² Kittens enter, slung demurely across the artist's shoulders as a handbag.¹³ Butterflies flutter across canvases that become the backdrop for their deaths.¹⁴ Not only must we talk about the metaphorical idiom of the elephant in the room, but we must address its presence in the art gallery. Although Tai the elephant did not die for the art exhibition she was part of,¹⁵ other animals are not so lucky. Our laws, through the right to free speech, should protect artists' freedom to create provocative art that challenges beliefs.¹⁶ Yet at the same time, artists must follow definitive guidelines and laws to ensure that an animal is not harmed in conveying that message.

If there is one thing I was taught while studying Fine Art, it was the value of questions. In the parking garage turned painting studio, tucked away under HUB Mall at the University of Alberta, Gillian Willans¹⁷ could be heard cautioning us to leave the viewer with unanswered questions. "If there aren't any, you haven't done your job!" We were to engage in an in-depth inquiry into an area of research and use imagery to convey these contemplations. Those of us

¹¹ Banksy. *Elephant in the Room*. September 16, 2006. Barely Legal Exhibition. Los Angeles. See <https://banksyexplained.com/barely-legal-los-angeles-2006/> (last visited Nov. 13, 2022).

¹² Hirst, Damien. *This Little Piggy Went to Market, This Little Piggy Stayed Home*. March 9, 2022, National History Exhibition at the Gagosian Art Gallery. London.

¹³ Tinkebell. *My Dearest Cat Pinkeltje*. Feb. 14, 2004, Looove TINKEBELL at Torch Gallery, Amsterdam.

¹⁴ Hirst, Damien. *Butterfly Paintings and Ashtrays*. June 21, 1991, In and Out of Love at Woodstock Street Gallery. London.

¹⁵ *Supra* note 11.

¹⁶ See Yan J. Art in the dichotomy of freedom of expression & obscenity: An anti-censorship perspective. *Man. L.J.* 2017;40:365.

¹⁷ Gillian Willans is the winner of the 2018 Eldon & Anne Foote Visual Arts Prize and an art instructor at the University of Alberta in Edmonton, Canada, whose paintings explore gender roles through depictions of domestic settings. See Agnieszka Matejko, *In Good Company: Gillian Willans*, EC Foundation (Nov. 9, 2021), <https://www.ecfoundation.org/blog/in-good-company-gillian-willans/> (last visited Nov. 13, 2022).

embracing a didactic art practice wished that perhaps our prodding could change the world, or at least our corner of it. Having the answers to these inquiries was not required. Following the creed of Anton Chekhov,¹⁸ we were instructed that “the role of art is not to supply answers but ask questions”¹⁹— and how these questions are formulated is the real challenge.²⁰ In delving into the art practice of influential artists from the past, the ever-present theme validated my teacher’s words. Discordant, uneasy compositions left me wondering about the choices the artist made. Some of the art from the first half of the twentieth century made me question their validity as artistic expression. This included ordinary objects, and in some instances, the utilization of animals.

One of the first examples of a commonplace article used as art occurred in 1917. Marcel Duchamp prompted a redefining of art when he plunked down a ready-made urinal in the art gallery²¹ [See Figure II. in Appendix]. Any limits previously believed to exist for art were obliterated. Artists are change-makers, and architects of innovative ideas. Composers of masterpieces, they evince the ugly parts of humanity. Artists can advance social equality through fresh conceptions which challenge inherent bias. Sculptors lay bare the provocative ideas that evoke questions from viewers. In light of this, it should not surprise anyone that artists use animals²² in their artwork. Just like Duchamp, the very idea of the artist as the curator of art simply by choosing “readymade” objects again creates debate and elicits questions.

¹⁸ Anton Chekhov is an internationally acclaimed Russian playwright. See Ronald Francis Hingley, *Anton Chekhov*, *ENCYCLOPEDIA BRITANNICA* (Aug. 31, 2022), <https://www.britannica.com/biography/Anton-Chekhov> (last visited Nov. 13, 2022).

¹⁹ Rose Whyman, *Anton Chekhov*, ROUTLEDGE (2011).

²⁰ A. Chekhov, *Anton Chekhov’s Life and Thought; Selected Letters and Commentary*, M. Heim (trans), NORTHWESTERN UNIVERSITY PRESS (1973).

²¹ Duchamp, Marcel. *Fountain*. April 1917, replica 1964, Tate Modern, London; See W.A. Camfield, *Marcel Duchamp’s fountain: Its history and aesthetics in the context of 1917, DADA/SURREALISM* (1987).

²² Throughout this paper, for succinctness, I will use the word “animal” to refer to non-human animals.

These queries pertain to our elephant in the art gallery, where British artist Banksy painted the live elephant head to toe for his show in Los Angeles in 2006.²³ It caused public outrage, questioning not just the deeper meaning of the work, but the potential detriment to the elephant.²⁴ The art exhibition was aptly entitled *Barely Legal*. Although Banksy had received permission from the Los Angeles Animal Services Department (ASD), head of ASD Ed Boks stated later that the paint used “according to government regulations was unsafe, and even illegal to use the way they had been using it.”²⁵ Confusion over what was allowed caused the mix-up. Even though meant to address the issue of poverty, the frivolity was all too obvious to Bill Dyer, from the animal rights group, In Defense of Animals. Besides the risk of the paint absorbing into Tai’s system, he said using an elephant “was unnecessary and gimmicky.”²⁶ Furthermore, animal rights groups had good reason to complain about the full-body makeup on Tai’s wrinkly skin. Elephant skin is especially apertured and “[a]n intricate network of minuscule crevices adorns the skin surface.”²⁷

Tai’s uneven exterior was eventually scoured clean by Banksy, and she showed up bare skinned for the final day of the show. The spray paint cannot have been easy to scrub off. Also, elephants may have a reputation for being thick-skinned that evidently is not deserved. Although an elephant’s skin is “one inch across the back and hindquarters,” it is “paper-thin around the mouth and eyes” and “inside the ears.”²⁸ If nobody had stepped in to address this elephant in the art gallery, this practice may have led to harm and could have caused disease. Then again,

²³ See *supra* note 11.

²⁴ Oliver, *supra* note 4.

²⁵ *Banksy's Painted Elephant Riles Animal Activists*, CIBC ARTS (Sept. 18, 2006), <https://www.cbc.ca/news/entertainment/banksy-s-painted-elephant-riles-animal-activists-1.600940> (last visited Nov. 13, 2022).

²⁶ Oliver, *supra* note 4.

²⁷ *How the African Elephant Cracked its Skin to Cool Off*, EUREKALERT (Oct. 2, 2018), <https://www.eurekalert.org/news-releases/607368> (last visited Nov. 13, 2022).

²⁸ T.J. Smith, *Bullhooks and the Law: Is Pain and Suffering the Elephant in the Room*, ANIMAL L., 19, 423 (2012).

perhaps it would merely have caused skin irritation, and while not ideal, it may have caused only minimal distress. Are artistic endeavors worth generating pain in animals? And do animals experience pain in the same way humans do? This paper will attempt to address such questions.

II. SEARCHING FOR THE PAINFUL TRUTH

Animals have been used throughout human's history for our benefit in a myriad of ways. Humans have used animals for agriculture, transportation, sustenance, research, companionship, and art. Cave paintings portrayed animals and were one of the first "concrete example[s]" of animals in art.²⁹ However, depicting an animal in drawings and using the animal itself in artworks are two very different things. Animals are being used both alive and dead in works of art. The ethical implications lead us to question what rights animals have. Of vital importance, is an inquiry into the way animals feel pain. In comparing humans to other animals, we know humans have more developed brains, with a highly advanced cerebral cortex.³⁰ The "grey matter of the cerebral cortex is a convoluted, layered sheet of tissue."³¹ Our brains employ the "principle of economic wiring" which explains why different anatomical areas of our brains perform specialized functions.³² Humans and animals have similar brains, and even though some areas of animal brains, such as the cerebral cortex, are not well-developed, the area responsible for "basic . . . impulses, emotions, and feelings are located in the diencephalon, which is well developed in many other species of animals, especially mammals and birds."³³ Experts compared human and animal brains, and concluded:

²⁹ G. Curtis, *The cave painters: Probing the mysteries of the world's first artists*. ANCHOR 132 (2007).

³⁰ "The cerebral cortex constitutes more than half the volume of the human brain and is presumed to be responsible for the neuronal computations underlying complex phenomena, such as perception, thought, language, attention, episodic memory and voluntary movement." Z. Molnár et al, *New insights into the development of the human cerebral cortex*, JOURNAL OF ANATOMY, 235(3), 432-51 (2019).

³¹ S. Shipp, *Structure and function of the cerebral cortex*, CURRENT BIOLOGY, 17(12), R443-R449 (2007).

³² *Id.*

³³ P. Singer, *Do animals feel pain?* Quoting Lord Brain, "Presidential Address," in C.A. Keele and R. Smith, eds., *The Assessment of Pain in Men and Animals* (London: Universities Federation for Animal Welfare, 1962). (1990).

Every particle of factual evidence supports the contention that the higher mammalian vertebrates experience pain sensations at least as acute as our own. To say that they feel less because they are lower animals is an absurdity.³⁴

Can insects feel pain? Entomologists who have studied these creatures with much smaller brains “typically come to the same conclusion that, for now, we do not know.”³⁵ These diminutive brains are small but mighty. Their nervous system is made up of “several distributed brains” called ganglia.³⁶ Honey bees “squeeze the ability to perform complex . . . information processing, . . . [and] circuits regulating motivated behaviors, into a brain area that contains less than a half a million neurons”³⁷ For reference, “[t]he human neocortex³⁸ contains about 20 billion neurons.”³⁹ However, possessing a relatively small brain is not dispositive in whether pain can be felt. Having a limited scope in which to fit all required elements for survival means that insects’ brain real estate is “expensive” compared to humans’ brains which generally boast a much larger capacity. However, this valuable space in insects could indeed leave room for pain and suffering.⁴⁰ Researchers have found that insects exhibited the same behavior as mammals when subjected to conditions resulting in “learned helplessness.”⁴¹ This seems to indicate insects are capable of feeling despair, or at least mimicking it. Also, looking at evolutionary reasons, “even an expensive trait will be selected for if the fitness benefits outweigh the costs.”⁴² It is

³⁴ Richard Sarjeant, *The Spectrum of Pain*, London: Hart Davis, 72 (1969).

³⁵ S. A. Adamo, *Do insects feel pain? A question at the intersection of animal behaviour, philosophy and robotics*, *ANIMAL BEHAVIOR*, 118, 75-79 (2016).

³⁶ Adamo, *supra* note 28.

³⁷ *Id.*

³⁸ The neocortex comprises the largest part of the cerebral cortex and makes up approximately half the volume of the human brain. It is thought to be responsible for the neuronal computations of attention, thought, perception and episodic memory. See Chloe Bennett, *What is the Neocortex?* NEWS MEDICAL LIFE SCIENCES, <http://bit.ly/3gm17Ly> (last visited Nov. 13, 2022).

³⁹ Adamo, *supra* note 28.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

plausible that having pain receptors could help with survival. But, recognizing limitations on an insect's freedom, and that they have "fewer behavioral choices to make" the benefit is not as great as it is in humans.⁴³ Still, insects have the capacity to learn and have areas "functionally equivalent to reward circuits in vertebrates."⁴⁴ So it is possible we have the subjective feeling of pain in common, despite the fact that we vary greatly in terms of our neurobiology.

One does not have to be a fly on the wall of artist Damien Hirst's art studio to regard this figure with dismay—he has used an estimated 913,450 animals in his works of art,⁴⁵ 912,005 of which were insects.⁴⁶ Not surprisingly, Hirst has been targeted by animal rights activists who dumped an 88-pound manure pile onto the steps of his Venice show.⁴⁷ Well-known for his art featuring large dead livestock and sharks preserved in formaldehyde in glass tanks, Hirst himself offers no grand meaning in his work. He famously stated in an interview with Will Self, "It's ridiculous what I do. I can't believe in it – but I have to."⁴⁸ Statements like these make it clear that some artists are taking it too far, and more restraint is needed.

Therefore, it is submitted that artists using animals in their art must be made to answer to a regulatory body to ensure that their process and finished artwork are in compliance with the law. As I will explain, the existing laws and regulations for using animals in art are severely lacking. These animals are on display, yet they are effectively hiding in plain sight. Tai, the elephant covered in pink paint for the art exhibition, is certainly not a small issue. Animals like Tai are on a stage of huge dimensions, and yet they are not reaping the benefits of legal

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Caroline Goldstein, *How Many Animals Have Died for Damien Hirst's Art to Live? We Counted*, ARTNET (Apr. 13, 2017), <https://news.artnet.com/art-world/damien-whats-your-beef-916097> (last visited Nov. 13, 2022).

⁴⁶ *Id.*

⁴⁷ Lorena Muñoz-Alonso, *Damien Hirst's Planned Venice Exhibition Targeted by Animal Rights Group... With Poop*, ARTWORLD (Mar. 15, 2017), <https://news.artnet.com/art-world/damien-hirst-venice-exhibition-animal-rights-group-892277> (last visited Nov. 13, 2022).

⁴⁸ W. Self, *Junk Mail: Reissued*. A & C BLACK (2012).

protection. Therefore, the laws and regulations for animals in art should be rewritten through both a legal and artistic lens.

III. THE ISSUE: ANIMALS ARE HARMED IN ART, AND NEITHER ARTISTS NOR THE FEW REGULATORY BOARDS KNOW IF THEY HAVE VIOLATED ANY LAWS, AND IF SO, WHAT THEY ARE

There is tremendous confusion surrounding the legal treatment of animals and the repercussions if they are harmed, especially in artistic endeavors. For example, animals are generally covered by the Animal Welfare Act (AWA).⁴⁹ This would presumably include all animals that are exhibited.⁵⁰ However, nothing is mentioned in the Act about artists or art exhibits.⁵¹ The fact sheet entitled *State and County Fairs* describes the types of exhibitions that are exempt from the AWA, including all state agricultural exhibits. This exemption is not in effect if a person “[p]erforms with animals such as in a circus or other type of show.”⁵² Although the U.S. Department of Agriculture’s Animal and Plant Health Inspection Service (APHIS), which operates as part of the U.S. Department of Agriculture (USDA), inspects animal exhibitors, it excludes those whose activities are considered “*de minimis*.”⁵³ This was a relatively recent amendment, brought about in 2018 for APHIS to “more effectively use its resources,” and it exempts “exhibitors with eight (8) or fewer pet animals, small exotic or wild mammals, and domesticated farm-type animals.”⁵⁴

⁴⁹ Animal Welfare Act of 1966.

⁵⁰ 7 U.S.C.A. § 2133 (West).

⁵¹ Animal and Plant Health Inspection Service - Animal Welfare Act Guidelines for County and State Fairs (2009). [fact sheet]
<https://naldc.nal.usda.gov/download/32779/PDF> (last visited Nov. 13, 2022).

⁵² *Id.*

⁵³ *De minimis* means “The law does not concern itself with trifles.” See *De minimis* definition, *Black's Law Dictionary*. (11th ed. 2019). WESTLAW.

⁵⁴ *APHIS Contacts Individuals and Businesses that may be Exempt from Licensing Requirements*, USDA Newsroom (Jul. 20, 2018),
https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa_by_date/sa-2018/sa_07/ac-exempt-license-require (last visited Nov. 13, 2022).

One of the issues with the AWA is linked to the way the USDA manages its resources. Because they carry out enforcement of the law, their action or inaction leaves animals vulnerable when the rules are disregarded, and the AWA fails to carry through with sanctions. The USDA made a decision in 2018 to start excluding inspection of some exhibitors, turning a blind eye to potential or even known abuse.⁵⁵ Of course, some inspections are taking place. But even for centers that are getting inspected, when the USDA finds abuse that warrants losing their license to exhibit animals, a “fatal gap” in the AWA means that the animals are not relocated.⁵⁶ Occasionally, the USDA has been reported to revoke the license and leave— “A policy which has earned the moniker: ‘revoke and run.’”⁵⁷ As mentioned, there are no rules listed in the AWA for animals used in art specifically, although zoos and circuses are explicitly indicated as requiring licensing.⁵⁸ Flawed as the AWA may be, amending it to include artists as exhibitors would provide more protection to animals used in art. Additionally the inclusion in the AWA would enable private organizations to point to a specific law being broken. This would prove extremely difficult, however, as it cannot merely be redrafted with a phrase including artists. It would take an Act of Congress, as will be discussed in the Recommendations section, even though it may not be an immediate solution for this predicament.

Leaving animals used in art unprotected in the AWA has one of two effects: first, it sends a message that artists are free to do whatever they want; second, the omission leaves artists completely baffled about what rules would apply to them. Artists do have one other place to turn

⁵⁵ See Secret Policy Uncovered, Animal Law and Policy Clinic, HARVARD LAW SCHOOL (May 5, 2021), <https://animal.law.harvard.edu/news-article/secret-policy-uncovered/> (last visited Nov. 13, 2022).

⁵⁶ *Lawsuit Seeks to Force USDA to Recognize its Authority to Take Possession of Animals When Agency Revokes Licenses*, ALDF (Oct. 17, 2022), <https://aldf.org/article/lawsuit-seeks-to-force-usda-to-recognize-its-authority-to-take-possession-of-animals-when-agency-revokes-licenses/> (last visited Nov. 13, 2022).

⁵⁷ *Id.*

⁵⁸ USDA Newsroom, *supra* at 47.

for ethical guidance. The College Art Association of America⁵⁹ has established professional practices for artists who use animals in their art.⁶⁰ However, the regulations are inadequate in that they hold no power. Clearly the CAA's document of ethics exists as more of an "Art Manifesto."⁶¹ Like artists who come together to put their beliefs in writing, the manuscript is more a product of art than an academic document. Reading the title of the guidelines leads one to believe the standards will be elucidated, but instead nearly all of the statements consist of "considerations" in the form of actual questions with no definitive answers. There are no repercussions for answering all of the queries in the negative. Not only that, but the CAA has sided with artists time after time, regardless of any animal abuse that may be occurring.⁶²

Overall, there is a lack of law that applies to artwork. This failure brings to mind Robert Rauschenberg's *White Paintings*,⁶³ which were simply plain canvases covered in white paint. When I encountered the paintings at SFMoma in 2020, I was struck by the simplicity of the work. Even though the panels were "considered shocking"⁶⁴ when first displayed, they became an important harbinger of conceptual art.⁶⁵ At first, the blank canvases appeared to show nothing, but upon closer inspection there were shadows cast upon the surface by the viewer. In other

⁵⁹ Hereinafter CAA.

⁶⁰ College Art Association of America, *The Use Of Animal Subjects In Art: Statement Of Principles And Suggested Considerations*, CAA (Oct. 23, 2011), <https://www.collegeart.org/standards-and-guidelines/guidelines/use-of-animals> (last visited Nov. 17, 2022).

⁶¹ An Art Manifesto is "A public declaration, often political in nature, of a group [of artists] or individual's principles, beliefs, and intended courses of action." See *Glossary of Art Terms*, Moma Learning https://www.moma.org/learn/moma_learning/glossary/#m (last visited Nov. 13, 2022).

⁶² Martha Lufkin, *Artists and Academics Fight Animal Rights Activists in US Supreme Court*, THE ART NEWSPAPER (Sept. 1, 2009), <https://www.theartnewspaper.com/2009/09/01/artists-and-academics-fight-animal-rights-activists-in-us-supreme-court> (last visited Nov. 13, 2022).

⁶³ Robert Rauschenberg, *White Painting* (1951), <https://www.rauschenbergfoundation.org/art/galleries/series/white-painting-1951> (last visited Nov. 13, 2022).

⁶⁴ *Overview: Robert Rauschenberg White Painting [three panel], 1951*, SFMOMA, <https://www.sfmoma.org/artwork/98.308.A-C/> (last visited Nov. 13, 2022).

⁶⁵ "Conceptual art is art for which the idea (or concept) behind the work is more important than the finished art object. It emerged as an art movement in 1960, and the term usually refers to art made from the mid-1960s to the mid-1970s." *Art Terms*, TATE, <https://www.tate.org.uk/art/art-terms/c/conceptual-art> (last visited Nov. 13, 2022).

words, the art on the canvas grew into fruition by the person viewing it. True, the canvas had not really changed, but the act of coming closer to understand the painting allowed the meaning to become what the viewer constructed. The canvas subtly showed the activity of the gallery-goers. In 1961, a composer named John Cage called the *White Paintings* “receptive surfaces that respond to the world around them.”⁶⁶

Just like Rauschenberg’s paintings, the lack of law leaves the standards for artwork involving animals stark and blank. Shadows of animal abuse lurk nearby casting dark shadows, the interplay of life itself interacts just like the colorless canvases of the *White Paintings*. Like the art practice of “documenting the everyday,”⁶⁷ one might say it is an artwork unto itself. It provides many questions as good artworks should. But for an area where so many animals are affected, as will be elucidated, specific laws and ethical guidelines should be required. The artists’ pursuit for that elusive inquiry for their art should not include bafflement in what law applies to the artwork. Nor should the artist be free to come up with their own answers as to where the legal limits are. There should be clear regulations for using animals in art, and specific legislation governing the regulations that is aimed at using animals in art. Artists should be held accountable, and animals should stop being harmed needlessly.

IV. HOW ANIMALS ARE BEING HARMED – ARTISTS WHO HURT OR KILL ANIMALS IN THE MAKING OF ART

Many types of harm can occur to animals during art performances. In an art performance, the art is the act. There is no canvas or motionless sculpture. The action is orchestrated by the artist and may include themselves or even animals. This art form is known to be at the center of controversy and peculiarity. Uniquely situated, one author referred to the genre as “the proudly

⁶⁶ SFMOMA, *supra* note 55.

⁶⁷ *Ed Ruscha and the Art of the Everyday*. TATE, <https://www.tate.org.uk/art/artists/edward-ruscha-1882/ed-ruscha-and-art-everyday> (last visited Nov. 7, 2022).

freaky domain of performance art.”⁶⁸ One of the first artists to incorporate performance art and include animals was Jannis Kounellis, who tethered twelve horses to the walls of the Roman Galleria L’Attico in 1969, which for him captured “the maximum of mobility” within this untitled seminal piece.⁶⁹ Kounellis’s installation “made instantly clear that art could be absolutely anything.”⁷⁰ The horses likely did not enjoy being tied to an art gallery wall for an extended period of time, although we do not have much information on their well-being.⁷¹ A restaging of the work in 2015 had tweaked the installation to include a hoof-friendly rubber covering of the cement floor, hay buckets within reach, and three groomers, who made sure gallery-goers behaved themselves, including keeping their voices hushed.⁷²

In another early example of art performance using, and likely abusing an animal, Joseph Beuys shared a gallery space in New York City with a coyote in his performance of *I like America and America Likes Me* in 1974, where spectators viewed with apprehension the treacherous situation of Beuys living with a single coyote for one week.⁷³ Just knowing that coyotes “are very social animals” and “live in family groups”⁷⁴ would allow us to conclude that the animal was likely distressed. Additionally, “misunderstanding and prejudice have dogged the

⁶⁸ Priscilla Frank, *Weird, People are Protesting an Art Performance Featuring 500 Liters of Bull Blood*, HUFFPOST (April 19, 2017), https://www.huffpost.com/entry/hermann-nitsch-bull-blood-protest_n_58f76718e4b0de5bac42841c (last visited Nov. 7, 2022).

⁶⁹ S. Bann & J. Kounellis, *Jannis Kounellis*, REAKTION BOOKS (2003).

⁷⁰ Roberta Smith, *Review: Art That Snorts, From Jannis Kounellis, at Gavin Brown’s Enterprise*, NEW YORK TIMES (Jun. 25, 2015), <https://www.nytimes.com/2015/06/26/arts/design/review-art-that-snorts-from-jannis-kounellis-at-gavin-browns-enterprise.html> (last visited Nov. 7, 2022).

⁷¹ We have only a “skeletal outline of Kounellis’s early career.” See *supra* note 69 at 29.

⁷² Allison Meier, *The Calm and Controversy of 12 Horses in an Art Gallery*, HYPERALLERGIC (Jun. 26, 2015), <https://hyperallergic.com/218248/the-calm-and-controversy-of-12-horses-in-an-art-gallery/> (last visited Nov. 7, 2022).

⁷³ J. Beuys, *Joseph Beuys: I Like America and America Likes Me : One Week’s Performance on the Occasion of the Opening of the René Block Gallery Ltd.*, United States: René Block Gallery. (1974).

⁷⁴ *The Coyote*, NATIONAL PARK SERVICE (2021), <http://bit.ly/3OoFd7i> (last visited Nov. 7, 2022).

coyote's history"⁷⁵ so this type of "bear-baiting"⁷⁶ can lead to harm on a much larger scale, encouraging fear and dislike of coyotes. Banksy's pink elephant discussed above was another art performance with animals, and even though the Californian viewers were charmed in this case, there was still potential harm. Even though Tai's handler insisted she was well taken care of, there was no reaction by the handler when legitimate concerns were raised. It is obvious these types of assertions by a conflicted party do not often amount to much.⁷⁷

Across the ocean within the artistic culture of China, artists SunYuan and Peng Yu have also created many disturbing art performances incorporating animals.⁷⁸ In one entitled "Dogs That Cannot Touch Each Other," they tied dogs to running machines where the dogs were forced into a contrived brawl. The hounds were in a perpetual feud, endlessly compelled to lash out at the other.⁷⁹ There was a gap of space between them, so even though the dogs would bark and become extremely agitated, they could not actually engage in a fight. Clearly this caused the dogs to feel quite distressed, since they would have remained in a constant state of hyperarousal. Research shows that even dogs in shelters struggle because of heightened stimuli, and that would be nowhere near the level of Yuan and Yu's pre-dog fight stance set-up.⁸⁰ Additionally, researchers have found that "[s]helter environments are stressful for dogs, as they must cope with

⁷⁵ Simon Worrall, *How the Most Hated Animal in America Outwitted Us All*, NATIONAL GEOGRAPHIC (2016), <https://www.nationalgeographic.com/animals/article/coyote-america-dan-flores-history-science> (last visited Nov. 7, 2022).

⁷⁶ Bear-baiting was a popular "sport" in Elizabethan England where "bears, dogs, bulls, chimps and other creatures routinely fought to the death in front of roaring crowds." See Evan Andrews, *The Gruesome Bloodsports of Shakespearean England*, HISTORY (Jan. 9, 2019), <https://www.history.com/news/the-gruesome-blood-sports-of-shakespearean-england> (last visited Nov. 7, 2022).

⁷⁷ Oliver, *supra* note 4.

⁷⁸ S. Yuan & P. Yu, *Collaboration as struggle and non-cooperation: a Conversation with Sun Yuan and Peng Yu*, EYELINE 74, 45-49 (2011).

⁷⁹ *Id.*

⁸⁰ V. Amaya & M.B. Paterson, *Effects of olfactory and auditory enrichment on the behavior of shelter dogs*, ANIMALS 10(4), 581 (2020).

many stimuli over which they have little control . . . [leading] to behavioral changes.”⁸¹ This, in turn “negatively affect[s] their welfare and downgrade[s] the human-animal bond, affecting rehoming success.”⁸² The research team found that this led to increased levels of arousal, and that “[r]educing arousal levels may be achieved with targeted sensory environmental enrichment.”⁸³ It is doubtful Yuan and Yu’s dogs were given any type of treatment afterwards that would alleviate their symptoms from this harrowing experience. Tragically, this leaves the dogs and the humans who care for them to deal with the adverse effects from the trauma.

This 1989 critique of the Chinese government challenged conventional morality and traditional ideas.⁸⁴ The artists’ work, as explained by Yuan and Yu, “attempts both to transgress and to question the legitimacy of established moral boundaries.”⁸⁵ Despite the artists’ attempt to clarify their reasons for this form of what many would consider to be torture, viewers of the work are left baffled. Why any art exhibitor would see a rationale for allowing such an atrocity remains devoid of reason. Similar to the gaps of space between the dogs, likewise comprehension of such an act is fractured by the lacunae.⁸⁶ Real animals being harmed in the production of an art performance meant to question moral boundaries only serves to push an unprincipled agenda. In accordance with that scheme, their installation entitled “Theater of the World” was a unit housing hundreds of reptiles and insects which would feed upon one another and as they did, the animals died.⁸⁷ Each day, the animal corpses were replaced as they were

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Yuan & Yu, *supra* note 68.

⁸⁵ *Id.*

⁸⁶ Lacunae is the plural of lacuna, which is “a gap or missing part, as in a manuscript, series, or logical argument; hiatus.” See Dictionary.com, <https://www.dictionary.com/browse/lacunae> (last visited Nov. 19, 2022).

⁸⁷ Yuan & Yu, *supra* note 68.

devoured.⁸⁸ The Guggenheim Museum pulled both *Dogs Who Cannot Touch Each Other* and *Theater of the World* after receiving threats of violence from animal rights activists.⁸⁹

In still another example of animals used in art, a Venice art show called the *Venice Biennale* in 2017 explored *Verletzlichkeit*, or vulnerability⁹⁰ and included two Dobermans. Dogs in an art gallery may not seem copacetic, but there was no public outcry. In fact, German artist Anne Imhof won the prestigious Golden Lion award at the Venice show.⁹¹ From the photos it is hard to tell how the dogs were doing, but they appeared to have fared well. The same cannot be said for artist Wim Delvoye's pigs. The Belgian artist explores biological data in his ongoing performance art of tattooing pigs.⁹² Inking up pigs has not been addressed yet by federal law in America, unless the pigs are in a farmyard. Under the farm animals provision of the AWA, there are limits on the amount of marking you can do as it must be in a "humane manner."⁹³ Marking an animal for identification on a farm is often done by a type of tattoo called a "slap marker."⁹⁴ Done for traceability, the slap marker tattoos the pigs in one swift motion, and in Canada, there is no requirement for using analgesics in this process.⁹⁵ Although Delvoye apparently sedates the pigs before tattooing them,⁹⁶ under the AWA farm animal provision, there would be a legal

⁸⁸ *Id.*

⁸⁹ Three artworks scheduled to be on display at the Guggenheim were removed, the museum citing threats as the reason for the removal. See Scarlet Cheng, *After Guggenheim Removes Animal-Related Pieces From 'Art and China,' What's Left? More Questions*, L.A. TIMES (Oct. 27, 2017), <https://www.latimes.com/entertainment/arts/la-ca-cm-guggenheim-china-art-20171029-htlstory.html> (last visited Nov. 7, 2022).

⁹⁰ J.A. WÖSSNER, *MACHT. SPIEL. RÄUME. MACHTVERHÄLTNISSE IN DER KÜNSTLERISCHEN ARBEIT FAUST VON ANNE IMHOF AUF DER VENEDIG-BIENNALE 2017*, (2021).

⁹¹ *Id.*

⁹² Gabriella Calchi-Novati, *Paradigms of Participation Wim Delvoye and Wafaa Bilal's Tattooing Performances*, *PERFORMANCE RESEARCH* 16:4, 34-45 (2011), DOI: 10.1080/13528165.2011.606048 (last visited Nov. 7, 2022).

⁹³ 7 U.S.C. 54.§2141 *Marking and Identification of Animals*. <https://uscode.house.gov/view.xhtml?path=/prelim@title7/chapter54&edition=prelim> (last visited Nov. 7, 2022).

⁹⁴ Chris Haris, *Clear Slap Marking – a Step to Accurate Traceability*, THE PIG SITE (Feb. 17, 2012), <http://bit.ly/3GADE4h> (last visited Nov. 19, 2022).

⁹⁵ *Code of Practice for the Care and Handling of Pigs*, National Farm Animal Care Council. <https://www.nfacc.ca/codes-of-practice/pig-code#section4> (last visited Nov. 19, 2022).

⁹⁶ *Wim Delvoye is Tattooing Pigs. Is this Cruel?* PUBLIC DELIVERY <https://publicdelivery.org/wim-delvoye-tattooed-pigs/> (last visited Nov. 7, 2022).

question as to the quantity of markings, and if that action would be considered humane.⁹⁷ This seems doubtful, as he has covered several pigs' entire backsides with tattoos, and has even stuffed them after they died to preserve the artwork. This appears to be harsh treatment for the swine, since tattoos continue to hurt after the initial anesthetized inking. Furthermore, what we know suggests that the way pigs experience life is aligned with humans, and we do not have an exclusive corner on suffering. One biologist explained that pigs can suffer too.⁹⁸ The animal expert stated, "It is not obvious why . . . the key attribute that enables suffering and hence poor welfare, should be restricted to species capable of complex cognitive feats."⁹⁹ Ironically, humans, who are able to think more deeply, do not seem to perceive suffering in pigs when faced with it. When there is not a full understanding of what signs indicate suffering on the pig's part, it goes unnoticed and leads to the idea that the swine are just fine.¹⁰⁰ For example, in a study with pig farmers, the "[f]armers' perceptions [were] aligned with their understanding of animal welfare."¹⁰¹ In this case, the farmers ignored obvious "abnormal" behavior, and focused only on other biological data they understood.¹⁰² Data like this, if it is the same in an art gallery, could explain how both farmers and artists continue to use pigs without being aware of the pain they are causing them. Delvoye also suggested that since he sourced the pigs from slaughterhouses—thus saving them from certain death—his pigs are privileged to be given life, even with a back full of tattoos.¹⁰³

⁹⁷ U.S.C. *supra* note 83.

⁹⁸ M. Mendl, *Pig cognition*. CURRENT BIOLOGY (Sept. 28, 2010), 20 R796-8.

⁹⁹ *Id.*

¹⁰⁰ See P. Bateson, *Assessment of pain in animals*. ANIMAL BEHAVIOUR. 1991 Nov 1;42(5):827-39. "continuities between humans and other animals is clouded when, as is still the case, both the evolution and the function of a subjective sense of pain are obscure."

¹⁰¹ R. Albernaz-Gonçalves, *My Pigs Are Ok, Why Change?—Animal Welfare Accounts Of Pig Farmers*, ANIMAL. (Mar. 1, 2021), 15(3):100154.

¹⁰² *Id.*

¹⁰³ *Inked Oinkers: Tattooed pigs by Wim Delvoye*, IF IT'S HIP IT'S HERE, <https://www.ifitshipitshere.com/tattooed-pigs-by-wim-delvoye-updated-pics/> (last visited Nov. 7, 2022).

Another artist claiming to save animals from their predestined fate is the Dutch artist Tinkebell. Shockingly, she broke her own pet kitten's neck and made it into a handbag.¹⁰⁴ When questioned by the media, she admitted to doing this, and argued the kitten would have been euthanized anyway, and therefore her actions did not change the outcome.¹⁰⁵ She also spent a night in jail for threatening to kill a baby chick during an art performance in the Netherlands where she told observers that if they did not save a baby chick she would throw it in a wood chipper.¹⁰⁶ Her message, she claimed, was bringing awareness to factory farms who kill baby chicks every day.¹⁰⁷ When asked what people should get out of her art, she answered, "I want people to think."¹⁰⁸ But after briefly pondering her work, many people reacted by inundating her with hate mail.¹⁰⁹

Further exacerbating the issue of animals used in art and the transgressive nature some of it embraces, are artists who actually kill an animal as the key piece of the performance. Disturbingly, Chinese artist Xu Zhen "bought a cat, strangled it to death and then beat its corpse until it was a bloody pulp."¹¹⁰ Artists like Xu seem to be using art as an excuse for severe brutality. Xu said of the art performance: "In order to release my frustration without violence towards the public, the cat was a substitute."¹¹¹ In China, cats are not protected by laws against cruelty to animals. The only law China has, the Wild Animal Protection law, protects "certain precious or endangered species of wildlife such as pandas, pangolins, and snub-nosed

¹⁰⁴ Lucas Kavner, *Tinkebell, Provocative Dutch Artist, Questions How We Look At Animals*, HUFFPOST (May 3, 2012), https://www.huffpost.com/entry/tinkebell-dutch-artist-animals_n_1472411 (last visited Nov. 7, 2022). See *supra* note 13.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Peter Leghorn, *Animal Rights and Art*, TODAY'S ART WORLD (April 27, 2018), <https://todaysartworld.wordpress.com/tag/kim-jones/> (last visited Nov. 7, 2022).

¹¹¹ *Id.*

monkeys.”¹¹² Clearly, in that and other countries there is a dearth of law protecting animals used by artists. There are plenty of other examples of animals being harmed in art, and in nearly all of the cases, there is either obvious abuse, or at least a question of it.

When an animal is being bred for consumption, the rules that apply usually differ from an animal that is being housed and kept alive. Under the AWA, certain animals are excluded when they are farm animals or animals bred for food.”¹¹³ Artist Amber Hansen’s 2012 “Chicken Run” art performance included killing a chicken, preparing, cooking and serving it to the viewers. It raises some confusing questions about what rules apply when an exhibited animal (covered by the AWA) suddenly switches roles and becomes food (excluded by the AWA).

In yet another instance, animals were killed during an art performance but here they were not used for sustenance. A display of kitchen blenders full of water with goldfish swimming in them was the art installation in Denmark by artist Marco Evaristti.¹¹⁴ In a piece called *Helena*, he set up the machines and connected them to power, allowing museum goers to choose to kill the goldfish.¹¹⁵ After two goldfish were pulverized, the police issued an order to disconnect the power. However, the power remained on and five more fish were killed, causing the authorities to launch an investigation.¹¹⁶ Later, after museum director Peter Meyer refused to pay the fine for causing cruelty to animals, a Danish court ruled that the fish were not treated cruelly because their deaths were near instantaneous.¹¹⁷ After hearing from expert witnesses that testified the fish

¹¹² Leyuan Ma, *How Long Will China’s Animal Cruelty Laws Have to Wait?* PRINCETON LEGAL JOURNAL (April 29, 2022), <http://bit.ly/3gftjQt> (last visited Nov. 7, 2022).

¹¹³ The AWA states that the following animals are excluded: “farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber.” See 7 U.S.C. 2131(g)(3).

¹¹⁴ *Fish Saved From Denmark Art Exhibit*, AP NEWS (Feb. 15, 2000), <https://apnews.com/article/9b8577525a7b4041f805ad35cbc3a726> (last visited Nov. 7, 2022).

¹¹⁵ Steve Baker, *Artist Animal*, (2013).

¹¹⁶ *Id.*

¹¹⁷ *Liquidising Goldfish ‘Not a Crime,’* BBC NEWS ONLINE (2003), <http://news.bbc.co.uk/2/hi/3040891.stm> (last visited Nov. 7, 2022).

would have died within one second and it would have been painless, the Judge ruled that the fish were killed “humanely.”¹¹⁸

At the Tate Retrospective¹¹⁹ in April 2012,¹²⁰ Damien Hirst left his shark at home and went with a decidedly smaller specimen—a butterfly.¹²¹ More specifically, there were 9,000 of them. It was a serious legal issue when they all died during the exhibition called *In and Out of Love* at a rate of about 400 per week. Living a “couple of hours to several days”¹²² many butterflies were “[s]tepped on, violently swatted”¹²³ or just died with no explanation. Their life cycle is normally “several months.”¹²⁴ Unsurprisingly, “butterflies do not thrive well in windowless museum halls.”¹²⁵ The AWA apparently draws a line covering some animals and not others, which I will discuss below. Butterflies are not protected, unless they are endangered.¹²⁶

ARTISTS WHO HARM ANIMALS IN PREPARATION OF MAKING VISUAL ART

When preparing to make art featuring animals, some artists bring animals out of their natural habitat as reference material to make preliminary sketches. In the 1930’s, Walt Disney brought animals into the drawing studio for the artists to get close to, so they could learn about

¹¹⁸ *Id.*

¹¹⁹ A retrospective is: “an art exhibit showing an entire phase or representative examples of an artist's lifework.” See Dictionary.com. <https://www.dictionary.com/browse/retrospective> (last visited Nov. 7, 2022).

¹²⁰ *Butterflies die during Hirst exhibition*, CHANNEL 4 NEWS (Oct. 14, 2012), <https://www.channel4.com/news/tate-reveals-hirst-art-kills-9-000-butterflies> (last visited Nov. 7, 2022); See *supra* note 14.

¹²¹ Miller, M.H. *Damien Hirst Killed 9,000 Butterflies*, (Oct. 17, 2012), <https://observer.com/2012/10/damien-hirst-killed-9000-butterflies/> (last visited Nov. 7, 2022).

¹²² Katherine Brooks, *Damien Hirst Butterfly Fiasco: Artist Kills 9,000 In the Name Of Art*, HUFFPOST (Oct. 16, 2012), https://www.huffpost.com/entry/damien-hirst-kills-9000-b_n_1970627 (last visited Nov. 7, 2022).

¹²³ *Id.*

¹²⁴ Smithsonian National Museum of Natural History, <https://naturalhistory.si.edu/exhibits/butterfly-pavilion> (last visited Nov. 7, 2022).

¹²⁵ Brooks, *supra* note 103.

¹²⁶ “The Endangered Species Act [ESA] of 1973 provides a framework to conserve and protect endangered and threatened species and their habitats both domestically and abroad.” See Endangered Species Act, NOAA (1973), <http://bit.ly/3hYG7Li> (last visited Nov. 15, 2022).

the way the animals moved before attempting to draw them.¹²⁷ Frank Thomas and Ollie Johnston, who were animators for the Walt Disney Studio, described how the “learning that comes from feeling an animal’s bones and muscles and joints” was beneficial. They explained how they “drew everything from live rabbits and a ‘de-odorized’ skunk to full-sized horses.” Then eventually, “[o]ther animals were brought in and almost overnight, the unit had its own zoo.” This was before the Animal Welfare Act, so the practice of taking away the skunk’s main defense mechanism, although probably unethical, was not illegal. This method of study for Disney artists may still be taking place, although mostly out of public view. Their published document states, “Disney, in general, does not use exotic live animals outside of their zoo/sanctuary habitat or natural environment,” but also states that “exceptions are made.”¹²⁸ The statement applies to all uses of animals in media and “when live animals are used as models.”

ARTISTS WHO USE ANIMALS AS THE MEDIUM IN VISUAL ARTWORK

Here, animal corpses or parts of animals are used as the medium to create the art. These animals need protection because the animal is at risk, prior to captivity, to be killed for this very purpose. Ivory is an example of an animal part that, because of poaching, has been banned. Artists and those who supplied ivory to artists, were prohibited from killing elephants or to use their tusks to make art.¹²⁹ ¹³⁰ However, for ivory art already in existence, there are laws

¹²⁷ The Disney studio lot once had a collection of animals to use for drawing. *See Disney Studio’s Own Animal Kingdom*, D23, <https://d23.com/the-lots-own-animal-kingdom/> (last visited Nov. 7, 2022).

¹²⁸ *Disney’s Use Of Live Animals In Entertainment Policy*, Disney (2012), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/<https://impact.disney.com/app/uploads/2022/01/Disneys-Use-of-Live-Animals-in-Entertainment-Policy.pdf> (last visited Nov. 15, 2022).

¹²⁹ *Endangered and Threatened Wildlife and Plants; Revision of the Section 4(d) Rule for the African Elephant (Loxodonta africana)*, FEDERAL REGISTER (June 6, 2016), <http://bit.ly/3Xi1NST> (last visited Nov. 7, 2022).

¹³⁰ *Ivory Ban Question*, WILDLIFE CONSERVATION SOCIETY (last visited Nov. 7, 2022).

regulating what can be bought or sold, with an exception for antique art.¹³¹ Additionally, any endangered animal would be covered under the Endangered Species Act.¹³²

In a red carpet fashion appearance-turned art performance, Music artist Lady Gaga wore a dress made of meat to the Video Music Awards in 2010.¹³³ Gaga stated, “If we don’t stand up for what we believe in, . . . pretty soon we’re going to have as much rights as the meat on our bones.”¹³⁴ Later, she wore a meat bikini for the cover of *Vogue Japan* and said, “I am not a piece of meat.”¹³⁵ The wastefulness upset many fans, and People for the Ethical Treatment of Animals (PETA) said, “[n]o matter how beautifully it is presented, . . . [m]eat represents bloody violence and suffering, so if that’s the look they were going for — they achieved it.”¹³⁶ As for designing a dress made of meat, Canadian artist Jana Sterbak did it first.¹³⁷ Her meat dress entitled *Vanitas: Flesh Dress for an Albino Anorectic* sparked controversy in 1991.¹³⁸ Hers had to be remade for each show, and used 23 kilograms¹³⁹ of steak.¹⁴⁰ Neither of these artworks were used for sustenance, yet neither were considered illegal.

¹³¹ See Kevin P. Ray, Collateral Damage: Ivory Ban’s Effects on Collectors, Museums, Musicians, and the Art Trade. GREENBURG TRAURIG (November 24, 2014), <https://www.gtlaw-culturalassets.com/2014/11/collateral-damage-ivory-bans-effects-on-collectors-museums-musicians-and-the-art-trade/> (last visited Nov. 20, 2022).

¹³² NOAA, *supra* note 115.

¹³³ Jillian Mapes, *Lady Gaga Explains Her Meat Dress*, BILLBOARD (Sept. 13, 2010), <https://www.billboard.com/music/music-news/lady-gaga-explains-her-meat-dress-its-no-disrespect-956399/> (last visited Nov. 7, 2022).

¹³⁴ *Id.*

¹³⁵ Monica Herrera, *Lady Gaga Wears Dead Meat, Angers PETA*, BILLBOARD (Sept. 7, 2010), <https://www.billboard.com/music/music-news/lady-gaga-wears-dead-meat-angers-peta-956472/#/news/lady-gaga-wears-dead-meat-angers-peta-1004113153.story> (last visited Nov. 7, 2022).

¹³⁶ *Id.*

¹³⁷ 1987 - *Vanitas: Flesh Dress for an Albino Anorectic*, UQUAM (2017), <https://150ans150oeuvres.uqam.ca/en/artwork/1987-vanitas-flesh-dress-for-an-albino-anorexic-by-jana-sterbak/#description> (last visited Nov. 7, 2022).

¹³⁸ *Id.*

¹³⁹ 23 kilograms is just over 50 pounds.

¹⁴⁰ UQUAM, *supra* note 127.

As discussed above, Damien Hirst has used nearly one million animal corpses in his artworks. Hirst revealed that some of his animals have been sourced from taxidermists, and some have been purchased from a fish market.¹⁴¹ However, as for whether animals have been killed for the purpose of being used by Hirst, he admitted some have. One such source is Vic Hislop, an Australian shark-hunter.¹⁴² Hirst himself has been brash about the part he plays in killing so many animals for art. He claimed in an acceptance speech for an art award, “It’s amazing what you can do with an E in A-Level art, a twisted imagination, and a chainsaw.”¹⁴³ On the other end stands ethical taxidermist and artist Beth Beverly, who has given “new life” to animals that died of natural causes or accidentally.¹⁴⁴ Even PETA has not taken issue with ethical taxidermy. PETA’s media assistant manager Katie Arth stated that “The most important thing is to look at how the animal died . . . If the animal died naturally or in an accident, then PETA doesn't have a problem with preserving their carcass.”¹⁴⁵

V. ART FOR SCIENCE

Additionally, there is a blurring of lines between art and science, which creates further confusion as to how an art exhibition should be evaluated. The Miller Standards also ask, “whether the work. . . lacks serious . . . artistic . . . or scientific value.”¹⁴⁶ It is not clear how this

¹⁴¹ Goldstein, *supra* note 38.

¹⁴² KERRIE DAVIES, *THE GREAT WHITE ART HUNTER*. THE AUSTRALIAN (2010).

¹⁴³ Bauman, Z, *Culture in a liquid modern world*, JOHN WILEY & SONS. (2013).

¹⁴⁴ Karin Marley, *Dead Animals Into Art? Meet These Women 'Rogue Taxidermists*. CBC RADIO (Oct. 25, 2017), <https://www.cbc.ca/radio/thecurrent/the-current-for-october-25-2017-1.4369486/dead-animals-into-art-meet-these-women-rogue-taxidermists-1.4369518>. (last visited Nov. 7, 2022).

¹⁴⁵ *Id.*

¹⁴⁶ The Miller Standards seem to be an attempt to “provide “concrete guidelines to isolate ‘hard core’ pornography from expressions protected by the first amendment.” See Wolfe, Stacy E. (1974) “Obscenity - New First Amendment Standards; *Miller v. California*,” Akron Law Review: Vol. 7 : Iss. 1 , Article 13.; The Miller Standards laid out by the Supreme Court of the United States are: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. (internal quotation marks and citations omitted). See *United States v. Richards*, 755 F.3d 269, 274 (5th Cir. 2014) quoting *Miller v. California*, 413 U.S. 15, 24 (1973).

value would be recognized or defined. As a rationale for their actions, some artists have claimed to be participating in a scientific endeavor. One artist used ants in an art exhibit where he fed them McDonald's food.¹⁴⁷ He then asked people to draw them, which may make this work both artistic and scientific.

Artist Eduardo Kac fused art and science when he created a living bunny sculpture. Seeking to question biotechnical advances and the ability to transform the genetic makeup of living things, he achieved this by working with scientists at Institut National de la Recherche Agronomique (INRA) in France to create a glow in the dark rabbit.¹⁴⁸ Alba the "bioart" bunny was injected with a jellyfish's phosphorescent gene.¹⁴⁹ Kac claimed to have commissioned the lab to perform his bidding, but INRA has refuted this claim.¹⁵⁰ It is not clear exactly what Kac's claim to Alba was at this point, but INRA has kept the animal in their lab. Because this has happened in France, it was not within American jurisprudence. But even if the experiment had been conducted locally, there would be confusion over what law would apply. The type of permissions scientists must obtain to conduct experiments on animals in the United States is generally overseen by the AWA, but artists do not squarely fall within this realm, as previously discussed. It is uncertain if the law would evaluate the act as scientific, artistic, or neither.

VI. DEPICTIONS- ARTISTS WHO DEPICT CRUELTY lori you are here in editing TO ANIMALS

In regard to the law concerning depictions of cruelty, so far the only law in place applies to digital depictions of cruelty to real animals. Paintings or drawings of such abuse will not likely

¹⁴⁷ Sheila Prakash, *Desert Dwellers on a Fast-Food Diet*, NEW YORK TIMES (Aug. 23, 2010), <https://www.nytimes.com/2010/08/24/science/24ants.html> (last visited Nov. 20, 2022).

¹⁴⁸ GEOFFREY THOMAS, *AMBIVALENT ANIMAL* Georgia Institute of Technology (2010) p.10

¹⁴⁹ *Id.* at 1.

¹⁵⁰ *Id.* at 11.

be criminalized. The Supreme Court recognized that there is no clear link between the idea being shown graphically and it causing violent action, stating that because studies “cannot show a direct causal link between violent video games and harm.”¹⁵¹ In other words, seeing violent images either in art or in video games is not known to cause direct violent action from that person, and it is not the first time we have heard studies trying to show a link refuted.¹⁵² Indeed, “[t]hese studies have been rejected by every court to consider them.”¹⁵³

Therefore, through precedent, it seems clear the court will steer clear of disturbing depictions that do not actually harm a live animal. The court stated that “criminalizing the commercial creation, sale, or possession of depictions of animal cruelty was substantially overbroad, and thus, the statute was facially invalid under the First Amendment protection of speech.”¹⁵⁴

Under the Constitution, it would be overbroad to say that any depiction of animal cruelty was not allowed, even if artists’ concerns over this have at times turned turbulent.¹⁵⁵ ¹⁵⁶ This leaves some things unanswered. What was the reference material for an artwork depicting gratuitous violence and abuse to an animal, and was a real animal tortured or killed in order to obtain the needed reference material? In cases where such cruelty exists, the act will be

¹⁵¹ *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 799 (2011).

¹⁵² Erik Kain, *No, For the Millionth Time, Video Games Don’t Cause Real World Violence*, (Nov. 4, 2016), <https://www.forbes.com/sites/erikkain/2016/11/04/no-for-the-millionth-time-video-games-dont-cause-real-world-violence/?sh=77125b9d5ffd> (last visited Nov. 20).

¹⁵³ *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 800 (2011); See Fn 6: See *Video Software Dealers Assn. v. Schwarzenegger*, 556 F.3d 950, 963–964 (C.A.9 2009); *Interactive Digital Software Assn. v. St. Louis County*, 329 F.3d 954 (C.A.8 2003); *American Amusement Machine Assn. v. Kendrick*, 244 F.3d 572, 578–579 (C.A.7 2001); *Entertainment Software Assn. v. Foti*, 451 F.Supp.2d 823, 832–833 (M.D.La.2006); *Entertainment Software Assn. v. Hatch*, 443 F.Supp.2d 1065, 1070 (Minn.2006), aff’d, 519 F.3d 768 (C.A.8 2008); *Entertainment Software Assn. v. Granholm*, 426 F.Supp.2d 646, 653 (E.D.Mich.2006); *Entertainment Software Assn. v. Blagojevich*, 404 F.Supp.2d 1051, 1063 (N.D.Ill.2005), aff’d, 469 F.3d 641 (C.A.7 2006).

¹⁵⁴ *United States v. Stevens*, 559 U.S. 460 (2010).

¹⁵⁵ *U.S.C.A. Const.Amend. 1*; 18 U.S.C.A. § 48; *United States v. Stevens*, *supra* note 142.

¹⁵⁶ Martha Lufkin, *Artists and Academics Fight Animal Rights Activists in US Supreme Court*, (Sept. 1, 2009), <https://www.theartnewspaper.com/2009/09/01/artists-and-academics-fight-animal-rights-activists-in-us-supreme-court>. (last visited Nov. 7, 2022).

prosecuted if there is evidence to prove it. Oftentimes, the problem is just that—the proof of such acts may only exist if someone else recorded the act on video, leading to prosecution of the distributor of the recording, even if the actor of the violence itself cannot be found. Although this can lead to identification of all actors involved as we will discuss later with Animal Crush videos.¹⁵⁷

VII. WHAT IS BEING DONE CURRENTLY? THERE ARE ETHICAL STANDARDS FOR ARTISTS TO LOOK TO, BUT THEY ARE LACKING

As discussed earlier, ethical standards for artists have been drawn up with “artistic license” by the CAA.¹⁵⁸ Many colleges and artist groups have adopted the same standards. CAA does list consequences in failing to follow the standards, but they have been known to stand by artists no matter what, fighting against animal rights activists, and for artistic freedom at all costs.¹⁵⁹ For example, the CAA filed an *Amicus Curiae*¹⁶⁰ in 2009 in support of Robert Stevens, who “was indicted . . . for selling videos depicting dogfighting.”¹⁶¹ CAA felt they had an interest in protecting a person’s right to record cruelty to animals since that could affect artists. As for the

¹⁵⁷ “Crush videos are recordings which typically depict women in stilettos or bare feet literally crushing, stomping on, or impaling small, helpless animals to satisfy the bizarre sexual fetishes of sadistic viewers.” See *Crush Videos*, Animal Welfare Institute, <https://awionline.org/content/crush-videos> (last visited Nov. 20, 2022).

¹⁵⁸ The standards, in part, by CAA: “[Artists] should consider the following issues and questions before engaging in any practice using live animals: No work of art should, in the course of its creation, cause physical or psychological pain, suffering, or distress to an animal. CAA recommends that any user of animals in art pose these three questions before beginning the work of art: Can you make the same point by replacing the animal? By reducing the number of animals? By refining the use of animals? Have you explored the institutional standards and guidelines at your home institution, if any, that apply to the use of animal subjects for research? Are you aware of the national standards and guidelines for the use of animals in research, such as those produced by the National Science Foundation or by other professional organizations to which you belong? Have you discussed any practices that may result in pain or discomfort for the animal subject? Have you considered alternatives? Have you done research on the biology of your animal subject to understand aspects of its physiognomy and experience?” College Art Association of America Authors. *Standards and Guidelines. The Use of Animal Subjects In Art: Statement Of Principles And Suggested Considerations*. (Oct 23, 2011), <https://www.collegeart.org/standards-and-guidelines/guidelines/use-of-animals>. (last visited Nov. 7, 2022).

¹⁵⁹ Lufkin, *supra* note 146.

¹⁶⁰ “Literally, friend of the court. A person with strong interest in or views on the subject matter of an action, but not a party to the action, may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views.” See Legal Dictionary, <https://legal-dictionary.thefreedictionary.com/amicus+curae> (last visited Nov. 20, 2022).

¹⁶¹ *United States v. Stevens*, 559 U.S. 460, 460 (2010).

ethical standards CAA published, ironically, almost all the standards are written in question format, reflecting the true lack of answers here. One of the CAA standards is outdated, using the term “physiognomy” which has been discredited in science.¹⁶² In fact, the only academic references to physiognomy explain that it involves how a person may resemble a certain animal, such as “rat-like or owl-like.”¹⁶³ What this has to do with the ethics of featuring an animal in one’s art is beyond this writer’s comprehension. The word physiognomy should be replaced with physiology.¹⁶⁴ Additionally, artists are asked if they have done research to know the way the animal would “experience,” but the standard should state explicitly that the artist must know what signs of distress to look for. In all fairness, the question format could work if the queries were required to be answered in the affirmative. With a few revisions, the CAA standards could be a helpful guide to artists.

VIII. SOME OF THE LAWS THAT APPLY TO ANIMALS IN ART

Laws regarding animals in America have not been known to be very effective. One art publication noted that “Animal rights laws are notoriously lax and light the world over.”¹⁶⁵ One such law that potentially applies to animals used in art is the Animal Welfare Act¹⁶⁶ of 1970.¹⁶⁷ Animals are protected generally under the AWA. However, this law does not protect all

¹⁶² “Physiognomy, the study of the systematic correspondence of psychological characteristics to facial features or body structure. Because most efforts to specify such relationships have been discredited, physiognomy sometimes connotes pseudoscience or charlatanry.” BRITANNICA. <https://www.britannica.com/topic/physiognomy-divination> (last visited Nov. 20, 2022).

¹⁶³ Twine, R. (2002). Physiognomy, Phrenology and the Temporality of the Body. *Body & Society*, 8(1), 67-88.

¹⁶⁴ the branch of biology dealing with the functions and activities of living organisms and their parts, including all physical and chemical processes. See Dictionary.com, <https://www.dictionary.com/browse/physiology>

¹⁶⁵ Peter Leghorn, *Animal Rights and Art*, Today's Art World. (Apr. 27, 2018), <https://todaysartworld.wordpress.com/tag/kim-jones/> (last visited Nov. 20, 2022).

¹⁶⁶ *Hereinafter* AWA.

¹⁶⁷ Animal Welfare Act - U.S.C. Title 7 - AGRICULTURE

animals.¹⁶⁸ The AWA's definition of exhibitor does not mention artists.¹⁶⁹ Exhibitors could potentially be interpreted to include artists that are exhibiting animals since that "affects commerce."¹⁷⁰ However, the AWA has not yet included artists in licensing requirements.¹⁷¹ The U.S. Department of Agriculture (USDA) enforces the AWA, and its website boasts that it makes unannounced inspections to ensure compliance with the law. But these inspections only happen at "all facilities licensed or registered" with the AWA, which does not include art galleries.

Another federal law that could apply to artists is The Marine Mammal Protection Act (MMPA). The MMPA covers mammals such as dolphins and seals. Perhaps Damien Hirst chose a shark as he knew it would not be against this law. Additionally, The Endangered Species Act protects animals on the list of endangered species,¹⁷² limiting the types of animals artists can use.¹⁷³ Any animal on the endangered list would be off limits.

¹⁶⁸ The definition of animal in the AWA is as follows: "The term "animal" means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes (1) birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purpose." *See* Animal Welfare Act.

Some of the animals not protected include "coldblooded species (amphibians and reptiles); fish; invertebrates (crustaceans, insects, etc.); Birds (other than those bred for research) are covered under the AWA but the regulatory standards have not yet been established. *See* Animal Welfare Act.

¹⁶⁹ *Id.* at (h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, an owner of a common, domesticated household pet who derives less than a substantial portion of income from a nonprimary source (as determined by the Secretary) for exhibiting an animal that exclusively resides at the residence of the pet owner, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at §2136. Registration of research facilities, handlers, carriers and unlicensed exhibitors. Every research facility, every intermediate handler, every carrier, and every exhibitor not licensed under section 2133 of this title shall register with the Secretary in accordance with such rules and regulations as he may prescribe.

¹⁷² IUCN Red List of Threatened Species. <https://www.iucnredlist.org/>

¹⁷³ NOAA, *supra* note 116.

The constitutional right to free speech¹⁷⁴, which will be discussed later, is something artists have used to assert their right to say things that are not popular, or even deplorable to some. For example, Hirst’s artwork in an exhibit¹⁷⁵ at the Brooklyn Museum in 1999, caused both an uproar and a lawsuit. After seeing Hirst’s animals floating in formaldehyde, The Mayor of the City of New York called Hirst’s work¹⁷⁶ ““sick stuff” to be exhibited in an art museum.”¹⁷⁷ The Mayor also opined that “taxpayer-funded property should not be used to . . . ‘do things that are disgusting with regard to animals.’”¹⁷⁸ However abhorrent another person may find Hirst’s work, under the Constitution, free speech is protected except in a few narrow circumstances.¹⁷⁹

Local and state laws can have a substantial effect on protecting animals. States are entitled to “create and enforce their own humane treatment regulations,” and these laws “exceed the minimum AWA standards” much of the time.¹⁸⁰ Looking at two states close to Seton Hall Law School, we will look briefly at New York and New Jersey. In an example of how state laws are often more effective in protecting animals, one artist was charged when their art performance involved cruelty to animals. Artist Kim Jones did an art performance in New York with three live rats at his 1976 art performance called, *Rat Piece*.¹⁸¹ The work was meant to comment on the Vietnam War.¹⁸² Disturbingly, he burned the rats alive by throwing lighter fluid on them and

¹⁷⁴ U.S.C.A. Const.Amend 1.

¹⁷⁵ The exhibit was called *Sensation: Young British Artists from the Saatchi Collection*. See <https://www.brooklynmuseum.org/opencollection/exhibitions/683> (last visited Nov. 20, 2022).

¹⁷⁶ The mayor was referring to two pigs in formaldehyde, sliced longitudinally. See *supra* note 12. See M.C. Flannery, *Living with organisms*, THE AMERICAN BIOLOGY TEACHER, 63(1), 67-70 (2001).

¹⁷⁷ *Brooklyn Inst. of Arts & Scis. v. City of New York*, 64 F. Supp. 2d 184, 191 (E.D.N.Y. 1999).

¹⁷⁸ *Id.*

¹⁷⁹ There are few exceptions where freedom of speech can be constitutionally limited “including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.” See *United States v. Richards*, 755 F.3d 269, 274 (5th Cir. 2014); *United States v. Richards*, 755 F.3d 269, 274 (5th Cir. 2014).

¹⁸⁰ NALDC, *supra* note 44.

¹⁸¹ Michelle Falkenstein, *Rats on Main Street? Don’t Scream, They’re Art*, NEW YORK TIMES (2016), <https://www.nytimes.com/2016/07/10/nyregion/review-rats-on-main-street-dont-scream-theyre-art.html>

¹⁸² Isaac Kaplan, *When is it Okay to Use Animals in Art?* ARTSY (2017), <https://www.artsy.net/article/artsy-editorial-animals-art> (last visited Nov. 7, 2022).

setting them on fire. Fittingly, the gallery's director got dismissed and Jones ended up being fined for animal cruelty. There are laws in many states that could apply to animals in art, although not written specifically to do so, such as anti-cruelty statutes. ““In New York, most forms of animal cruelty constitute a misdemeanor (rather than the more punitive felony), which is punishable by up to a year in prison.”¹⁸³ Some of the criteria applies to an actor who “overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, or deprives any animal of necessary sustenance, food or drink.”¹⁸⁴

New Jersey has similar Anti-Cruelty Laws¹⁸⁵ New Jersey's anti-cruelty laws cover domesticated and wild animals and is quite comprehensive. Although art is not mentioned specifically, the statute does mention specifically a prohibition on sale of cat fur.¹⁸⁶ It states that “Any person who sells, . . . any product made in whole or in part from the fur or hair of a domestic. . . cat commits a crime of the fourth degree.” Incidentally, this law would have prohibited artist Tinkebell from selling her cat purse here in New Jersey. New York was the first to enact anti-cruelty laws, but now “all states have established their own animal welfare and anti-cruelty laws.”¹⁸⁷ Still, the familiar issue exists, where almost no state laws exist as applying to animals in art specifically.

Along with there being few laws on point, state and local bodies are the ones who enforce the federal laws, and confusion abounds. Local city governments are often not sure what is allowed, and the law lacks teeth to get changes made right away. Recall that in Banksy's *Barely*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ New Jersey State Government, 4:22-17 *Cruelty; certain acts, crime; degrees*.

https://www.state.nj.us/health/vph/documents/4_22-17%20Text%202018.pdf (last visited Nov. 19, 2022).

¹⁸⁶ *Id.* at 4:22-25.3 NJ Anti-cruelty Statute.

¹⁸⁷ National Agricultural Library, *State and Local Laws*, USDA, <https://www.nal.usda.gov/legacy/awic/state-and-local> (last visited Nov. 7, 2022); *See United States v. Stevens*, 533 F.3d 218, 224 (3d Cir. 2008) Fn. 4 for a list of the statutes.

Legal artwork, the Los Angeles Animal Service Department had officially cleared the use of body paint on Tai the elephant, then later decided they had made the wrong decision.¹⁸⁸ In actuality, the pressure from two citizens concerned with the animal's rights and a potential legal suit seems to have been the reason for the regret.¹⁸⁹ However, they did not have the enforcement power to enact a change immediately. So even though they had tried to revoke the permission, the exhibition closed before they could enforce the new change. In any event, likely due to public pressure, the artist removed the paint for the last day of the show, punctuating the important role of concerned citizens.¹⁹⁰

Interestingly, some foreign laws widen their protection to more animals than the AWA, but there is still confusion. In the summer of 2022, Damien Hirst had an artwork that was part of an exhibition at the *Kunstmuseum* in Germany entitled *Macht! Licht!*¹⁹¹ Hirst's piece was entitled, *A Hundred Years*.¹⁹² It featured flies which hatched in a glass cube, and then, if they flew over to the connected glass cube, they would be zapped and die.¹⁹³ The museum was issued a warning to shut down the exhibit from the city's veterinarian office, with People for the Ethical Treatment of Animals (PETA) joining the crusade.¹⁹⁴ Apparently, unbeknownst to the museum's director, flies are protected by German law.¹⁹⁵ The Animal Protection Act in Germany states that "no one may cause suffering or harm to an animal without a "reasonable purpose." There are many other foreign laws applying to animals, which are beyond the scope of this paper. In any

¹⁸⁸ Oliver, *supra* note 4.

¹⁸⁹ Oliver, *supra* note 4.

¹⁹⁰ *Id.*

¹⁹¹ In English: Power! Light!

¹⁹² Spiegel.de., *Wegen getöteter Fliegen – Kunstmuseum von Veterinäramt verwarnt*, SPIEGEL (Jul 7, 2022), <https://www.spiegel.de/kultur/kunstmuseum-wolfsburg-verwarnt-wegen-toter-fliegen-bei-damien-hirst-a-f899bb96-a0d3-4e84-a575-a12dcb445868> (last visited Nov. 19, 2022).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ German Animal Welfare Act <https://www.animallaw.info/statute/germany-cruelty-german-animal-welfare-act> (last visited Nov. 7, 2022).

event, this stands as yet another example of the confusion, even outside of the U.S., about what laws apply to art.

IX. RECOMMENDATIONS – PUBLIC PRESSURE, AND OTHER IDEAS

The first recommendation for protecting animals in art is through public pressure. Many of the artists mentioned in this paper were influenced to either change their artwork so it would no longer harm animals or shut down the show through mounting pressure from concerned citizens. This tactic often goes unrecognized as to the power it holds. This held true in the past, and it is true now over a century later. Researchers have found “evidence that public pressure was an important and frequently overlooked factor” in reforming civil service laws.¹⁹⁶ Also during that time, it was found that “laws and institutions have been altered or revolutionized in deference to opinion”¹⁹⁷ Even now, public pressure can be used to affect change in the way animals are treated in art, as evidenced by the many public protests outlined in this paper.

Tying directly into the public sphere is an additional idea worth exploring. Development of a certification program such as *No Animal Harmed*.¹⁹⁸ would oversee the making of art and would give clarity where there is now confusion. The artist program could be modeled after the *NAH* program for film and include having specialized animal handlers for different types of animals. Through the program, artists would need to show proof that the animals were not harmed. One aspect of this could be having the artist’s initial proposal signed by a licensed veterinarian. Artists would be held to a clear standard and would have to treat animals ethically

¹⁹⁶ Theriault SM. Patronage, the Pendleton Act, and the Power of the People. THE JOURNAL OF POLITICS (2003) Feb;65(1):50-68.

¹⁹⁷ Dicey, A.V., & Cosgrove, R.A. (1981). *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (1st ed.). ROUTLEDGE. <https://doi.org/10.4324/9780203787403>

¹⁹⁸ Hereinafter *NAH*; See *No Animal Harmed*. <https://humanehollywood.org/> (last visited Nov. 19, 2022).

in their work. Public pressure would be key to establishing this standard, as it would be voluntary for artists to have their artworks certified.

Amending the AWA is another way to lower the amount of animals being treated unethically in art. The amendment I propose would explicitly state that art exhibitions that include animals fall under the same standards as other shows with animals, such as circuses. However, this could be a significant undertaking since “[t]he amendment process is very difficult and time consuming: A proposed amendment must be passed by two-thirds of both houses of Congress, then ratified by the legislatures of three-fourths of the states.”¹⁹⁹ The process is so onerous that this remedy must needfully be a secondary, “back-burner” approach. In the past, Congress has been able to amend acts where the cruelty to animals was abhorrent and the approach was narrowly tailored to a compelling government interest.²⁰⁰ In fact, after escaping prosecution in a 2010 ruling that the act was overbroad, an Animal Crush video producer and actor were able to be prosecuted due to an amendment of the act in record time.²⁰¹ In response to the undesirable ruling by the court, “Congress swiftly and nearly unanimously passed an amended version of the Act in 2010.”²⁰² This is an example of how amendments can happen timely, albeit a rare one.

Alternatively, the AWA could simply be interpreted to already include animals in art in its scope. Using public pressure, the federal statute could be regulated more stringently. As mentioned previously, the AWA created federal regulations which are promulgated by the

¹⁹⁹ *The Amendment Process*, Harry S. Truman Museum, <https://www.trumanlibrary.gov/education/three-branches/amendment-process> (last visited Nov. 20, 2022).

²⁰⁰ *Fifth Circuit Rules that Animal Crush Video Law Prohibits Obscenity and Congress Has Significant Interest in Preventing Animal Cruelty*, ALDF (June 14, 2014), <https://aldf.org/article/fifth-circuit-rules-that-animal-crush-video-law-prohibits-obscenity-and-congress-has-significant-interest-in-preventing-animal-cruelty/> (last visited Nov. 20, 2022).

²⁰¹ *Id.*

²⁰² *Id.*

USDA. By compelling the agency through public pressure such as a petition or a protest, art using animals could begin to be included in the regulations. The definition of exhibitor in the AWA is “any person. . . exhibiting any animals, which were purchased in commerce . . . or will affect commerce, to the public for compensation.”²⁰³ Commerce is defined as “trade, traffic, transportation, or other commerce.”²⁰⁴ The supreme court has held that the plain language of laws is often all that is needed, and that in many cases “legislative history does not demonstrate that the plain language was not intended.”²⁰⁵ Because of this, a strong case could be made for the USDA to begin regulating art exhibitions. Commerce is surely affected by art exhibitions. Although the artist is not usually paid directly for the art for the exhibition, they often get travel costs.²⁰⁶ One museum revealed that “the average direct cost was around \$20 a square foot” to install art exhibitions.²⁰⁷ This cost would be recouped by the museum as public came to view the exhibition, and the artist indirectly profits immensely from such shows. The “prestige of museum shows raises the value of an artist’s work” and of course the show itself aids in “boosting gallery profits.”²⁰⁸

Once the law is either amended or the scope has been broadened, artists who are not currently taking care to ensure the safety of animals would be less likely to harm animals when creating art. This was the result, albeit short-lived, when the statute against animal crush videos was first passed, nearly eliminating the videos overnight. In fact, “the market for crush videos

²⁰³ Animal Welfare Act *supra*, note 158.

²⁰⁴ *Id.*

²⁰⁵ *Maine v. Thiboutot*, 448 U.S. 1, 8 (1980).

²⁰⁶ *The Costs and Funding of Exhibitions*, SMITHSONIAN INSTITUTION (2002), <https://www.si.edu/content/opanda/docs/rpts2002/02.08.costsfundingexhibitions.final.pdf> (last visited Nov. 20, 2022).

²⁰⁷ *Id.*

²⁰⁸ Robin Pogrebin, *Art Galleries Face Pressure to Fund Museum Shows*, NEW YORK TIMES (Mar. 7, 2016), <https://www.nytimes.com/2016/03/07/arts/design/art-galleries-face-pressure-to-fund-museum-shows.html> (last visited Nov. 20, 2022).

rapidly dissipated, and the films . . . were expelled from existence.”²⁰⁹ If such support were shown in the art performance space, animals used in art could be enjoying much more protection from the law.

Additionally, there is always the concern that free speech is being restricted simply because the government disagrees with the message. Artists have the right to express themselves freely, and this right to free speech is guaranteed by the Constitution.²¹⁰ The courts have made it clear that freedom of speech will be protected generally. In *Stevens*, the court stated that, “as a general matter, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”²¹¹ What this means is that the freedom to express ideas can only be restricted in a few limited circumstances and not simply because the government finds the expression unhelpful or even wrong.²¹² In fact, the Court has held that it will not restrict free speech under Constitutional Law even if the Government disagrees with the message it contains.²¹³

As a form of expression, art certainly relies on freedom of speech, and as discussed earlier, an illusion of harm will not be against the law. Therefore, another recommendation avoiding the mistreatment of animals is to use artificial animals rather than real ones. Perhaps this is quixotic, but even if some artists take on this challenge, it would be a move in the right

²⁰⁹ See Meredith L. Shafer, *Perplexing Precedent: United States v. Stevens Confounds a Century of Supreme Court Conventionalism and Redefines the Limits of "Entertainment"* 19 VILL. SPORTS & ENT. L.J. 281 (2012), <https://www.animallaw.info/article/perplexing-precedent-united-states-v-stevens-confounds-century-supreme-court-conventionalism>; See also Joseph J. Anclien, *Crush Videos and the Case for Criminalizing Criminal Depictions*, 40 U. MEM. L. REV. 1, 5 (2009), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/umem40&div=4&id=&page=> ; Elton W. Gallegly, *Beyond Cruelty*, U.S. Fed. News (Dec. 16, 2007), https://www.scotusblog.com/wp-content/uploads/2009/04/08-769_cert_amicus_humane.pdf (last visited Nov. 20, 2022).

²¹⁰ U.S.C.A. Const.Amend 1.

²¹¹ See *Stevens*, 559 U.S. at 468, Quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002).

²¹² 559 U.S. at 468 (citations omitted); *Richards*, *supra* note 168.

²¹³ U.S.C.A. Const.Amend. 1; *United States v. Richards*, 755 F.3d 269 (5th Cir. 2014).

direction. There are already artists who sculpt animal likenesses that have movement and realism.²¹⁴ For example, artist Beth Cavener creates sculptures of wolves. On display at the Metropolitan Museum of Art, her work has been called “off-kilter” and “primal.”²¹⁵ Another artist, Angela Singer uses “vintage discarded taxidermy” and recycles it into something new.²¹⁶ Being an animal rights activist, she claims she has not harmed an animal or had one killed for her art, instead using donations of unwanted taxidermy.²¹⁷

It is important to note, that if artists use animal sculptures or ethical taxidermy instead of real animals, the artist’s intended message could still be there. It is precisely what is allowed to continue—free speech, minus the harm to live animals. This could be even more powerful, and as long as it was not against the standards established in Miller,²¹⁸ it would be permitted within the law. On the other hand, an artwork that fell within the transgressive standards could be illegal. This is an area not specifically addressed by the courts as of yet, and it could prove difficult to determine the Miller standard of “serious . . . artistic . . . value.”²¹⁹ There may be a “gray area” where an artwork could be “obscene and also has serious artistic merit.”²²⁰ Interestingly, “photorealistic paintings [of obscene acts] might only transgress our moral or cultural conventions, whereas . . . photos of actual [cruelty to] animals also transgress the law.”²²¹

WHAT CAN WE REALISTICALLY EXPECT?

²¹⁴ Ellis Lotozo, *Fine Arts Major Beth Cavener '95 Has Made a Career Out of Her Passion*, (2018), <https://www.haverford.edu/college-communications-fine-arts/news/fine-arts-major-beth-cavener-%E2%80%9995-has-made-career-out-her> (last visited Nov. 19, 2022).

²¹⁵ *Id.*

²¹⁶ Angela Singer, PHOTOPHORE <http://www.thephotophore.com/angela-singer/> (last visited Nov. 20, 2022).

²¹⁷ Mythily Meher, *An Interview With Angela Singer*, THE ART PAPER (Dec. 14, 2021), <https://www.the-art-paper.com/journal/angela-singer-mythily-meher> (last visited Nov. 20, 2022).

²¹⁸ *United States v. Richards*, 755 F.3d 269, 273 (5th Cir. 2014).

²¹⁹ *Id.*

²²⁰ Laura Macguire, *Art and Obscenity*, PHILOSOPHY TALK (Mar. 11, 2017), <https://www.philosophytalk.org/blog/art-and-obscenity> (last visited Nov. 20, 2022).

²²¹ *Id.*

Although there has been “dramatic growth of the animal rights movement,” there are some aspects that will not likely change.²²² Some animals may not be protected because of their size or relative lack of importance to society.²²³ This would include insects, leaving artworks that kill insects without protection in most cases. Also, the killing of animals for consumption is likely to continue to be allowed. Unless everyone is willing to become vegan, it is simply not realistic. Depictions of non-real animals being violently tortured will continue to be protected under free speech. As discussed, the Supreme Court made it clear that it will not limit this type of free speech that includes non-real animals.²²⁴ Disturbingly, these depictions will only grow in the degree to which they are nearly indistinguishable from reality.

It is hard to predict if the law will be successful in restricting the “free rein” of artists. Historically, artists have had sweeping freedom in expressing their ideas. Part of what makes art compelling is the fact that there is that freedom. At the same time, being restrained in the name of protecting animals is needed. It will not necessarily take away from the messages artists want to convey, and in fact may help because the focus will be on the intention of the art and not the animal’s welfare.

As posited, public pressure may be the key to bringing about change in how artists treat animals. Public pressure has been extremely successful in many of the artworks that were exceedingly harmful to animals, with animal rights groups leading the charge. Some examples include the shutdown of *The Theater of the World*: “The works swiftly met with opposition from animal rights groups, with a . . . petition to remove the pieces—which it alleged represented “unmistakable cruelty against animals in the name of art”—gaining half a million signatures over

²²² C.R. Kruse, *Gender, views of nature, and support for animal rights*. SOCIETY & ANIMALS. (1999);7(3):179-98.

²²³ See Bart WM. *A hierarchy among attitudes toward animals*. THE JOURNAL OF ENVIRONMENTAL EDUCATION. (1972) 3(4):4-6.

²²⁴ *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 799 (2011).

four days.”²²⁵ Another example of public pressure that succeeded occurred in 2017 when Animal Liberation Tasmania was able to gather 9,000 signatures in petition of an artwork by Austrian Hermann Nitsch,²²⁶ where he used 500 liters of bull blood.²²⁷

Moreover, Animal Rights activists entered the space where the 2015 restaging of Jannis Kounellis’s *Untitled (12 Horses)* installation was happening, with signs that stated, ‘It’s not art, it’s animal abuse’ and ‘Modern Slavery.’²²⁸ The exhibition had improved some of the previous problems, but not enough for animal lovers. Some of the conditions were tweaked at the last minute, which suggests public pressure played a role.

Motion picture producers have lit the way for artists adopting a program to certify animals’ safety, and the public played a role here too. The motion picture industry was once plagued with blatant abuse of animals in productions. In 1903, Thomas Edison released the short film *Electrocuting an Elephant*.²²⁹ Horrifyingly, he killed Topsy the elephant with “alternating current to show how dangerous it was”²³⁰ The movie *Ben Hur*²³¹ released in 1959, saw as many as one hundred horses die during production.²³² Over time, as the public became aware of the

²²⁵ A. Goldstein, *The Guggenheim’s Alexandra Munroe on Why ‘The Theater of the World’ Was Intended to Be Brutal*. ARTNET NEWS (Sept. 26, 2017), <https://news.artnet.com/art-world/alexandra-munroe-theater-of-the-world-interview-pt-1-1095470> (last visited Nov. 11, 2022).

²²⁶ Priscilla Frank, *Weird, People are Protesting an Art Performance Featuring 500 Liters of Bull Blood*. HUFFPOST (Apr. 19, 2017), https://www.huffpost.com/entry/hermann-nitsch-bull-blood-protest_n_58f76718e4b0de5bac42841c. (last visited Nov. 11, 2022).

²²⁷ 500 liters is approximately 132 gallons.

²²⁸ *Rights Protestors Demonstrate Against Gavin Brown’s Restaging Of Jannis Kounellis’s Untitled (12 Horses)*, ARTREVIEW (June 30, 2015), <https://artreview.com/news-30-june-2015-animal-rights-protestors-demonstrate-against-kounellis-12-horses/> (last visited Nov. 11, 2022).

²²⁹ Thomas A. Edison (uploaded by Sean Elliot), *Electrocuting an Elephant*, YOUTUBE (1903), <https://www.youtube.com/watch?v=RkBU3aYsf0Q>. (last visited Nov. 11, 2022).

²³⁰ Susan McCarthy, *Hollywood’s Long History of Animal Cruelty*, SALON (Apr. 2, 2012), https://www.salon.com/2012/04/02/hollywoods_long_history_of_animal_cruelty/ (last visited Nov. 11, 2022).

²³¹ “Ben-Hur”. *The American Film Institute Catalog of Motion Pictures*. AMERICAN FILM INSTITUTE. Production Company: Metro-Goldwyn-Mayer Corp. (Loew’s Inc.); Distribution Company: Loew’s Inc. (1959), <https://catalog.afi.com/Film/52827-BEN-HUR> (last visited Nov. 19, 2022).

²³² McCarthy, *supra* note 195.

gratuitous animal cruelty taking place for the sake of entertainment, they staged protests and boycotts, leading to vital changes.²³³ When the group American Humane²³⁴ wrote its guidelines for animals used in productions in 1988, “the incidence of accidents, illnesses and deaths of animals on sets . . . sharply declined.”²³⁵ The *No Animal Harmed (NAH)* insignia became the standard, and film producers began to adhere to the standards. Producers knew that to garner public support, they had to adhere to the ethical treatment of animals and show that by the recognizable *NAH* logo that would scroll past after the credits. Perhaps the art world will adopt a similar set of universal standards that can create trust with viewers of art. As for the types of media *NAH* oversees, the group only certifies motion pictures, television productions and computer images. The AH organization boasts that they monitor “70 percent of known animal action in film and television productions.”²³⁶ It is not clear how many animals have been helped as a result of their monitoring, but the care the animals receive has improved drastically since they began. Both “Admirers and foes say the association has achieved tremendous power and credibility in the film community.”²³⁷ Unfortunately, AH does not handle any art outside of the scope mentioned, which is why artists would need their own regulating body.

Far from perfect, the AH has gotten flack over incidents that have happened while overseeing productions with the *NAH* crew. But the certification does not actually mean that no animals were harmed. As incongruous as that sounds, accidents can happen that are out of anyone’s control.²³⁸ Also, the *NAH* has learned that some animals are treated badly before

²³³ Animal Welfare Act - U.S.C. Title 7 - AGRICULTURE

²³⁴ Hereinafter AH.

²³⁵ AWA, *supra* note 224.

²³⁶ American Humane. <https://www.americanhumane.org/initiative/no-animals-were-harmed/> (last visited Nov. 19, 2022).

²³⁷ Patricia Klein, *Protecting Animals in Films : Humane Group Credited With Drastically Decreasing Cruelty*, (Jan. 11, 1987), <https://www.latimes.com/archives/la-xpm-1987-01-11-me-4007-story.html> (last visited Nov. 20, 2022).

²³⁸ *Why the ‘No Animals Were Harmed’ movie disclaimer doesn’t mean much*, CBS NEWS HOUR (2013),

arriving on set. *NAH* is aware that “[h]aving its representatives present on set has been shown to be no guarantee that animals will be safe, and it also doesn't oversee the off-site training of animals — where most . . . abuse occurs.”²³⁹ Still, “the association has served as the quasi-official watchdog of animal actors” and “is widely credited with drastically decreasing the incidence of animal cruelty in films” since their inception in 1925.²⁴⁰ The *NAH* representatives “keep careful watch on sets worldwide” and “monitor[] the protection of nearly 100,000 animal actors each year.”²⁴¹ The group works with movie producers “to help them get the shots they want while keeping the animals safe.”²⁴² Therefore, while not able to stop all abuse, *NAH* is a beneficial program that has made a positive difference for some animals.

X. CONCLUSION

Through public pressure, the Animal Welfare Act needs to be reformed to include art exhibitions. Artists should be explicitly labeled as art exhibitors and be understood as within the scope of the law regarding the use of animals in art. Secondly, we need to encourage the use of an Artist certification program such as *No Animal Harmed*. This will ensure that there are standards that are being overseen by those who have the proper knowledge and qualifications. Then animals will not be harmed as often. It will not prevent every accident, but it will be an improvement.

<https://www.pbs.org/newshour/nation/why-the-no-animals-were-harmed-movie-disclaimer-doesnt-mean-much> (last visited Nov. 19, 2022).

²³⁹ Ingrid Newkirk, ‘A Dog’s Purpose’ Is Just The Latest Proof That Animals Are Harmed In Making Films, Despite The Disclaimers, NEW YORK DAILY NEWS (Jan 21, 2017), <https://www.nydailynews.com/opinion/dog-purpose-latest-instance-animal-abuse-film-article-1.2952314> (last visited Nov. 20, 2022).

²⁴⁰ Klein, *supra* note 223; Jennifer Chen, *Thomas Edling Helps Keep Hollywood’s Animals Safe*, JOHNS HOPKINS MAGAZINE (winter 2021), <https://hub.jhu.edu/magazine/2021/winter/no-animals-harmed-edling/> (last visited Nov. 20, 2022).

²⁴¹ *Id.*

²⁴² *Id.*

Besides being Banksy's "elephant in the room" for his art exhibition, Tai the elephant had a long career in show business including *Dumbo* and *Water for Elephants*.²⁴³ She earned the nickname the "premiere pachyderm in Tinseltown."²⁴⁴ Her handlers, called Have Trunk Will Travel (HTWT), recently relocated to Texas after state laws in California banned the use of bullhooks.²⁴⁵ In May 2021, HTWT simply removed Tai from their webpage,²⁴⁶ and the 9,200 pound beast²⁴⁷ just disappeared. She had died of kidney failure.²⁴⁸ Her early death may have been due to being held in captivity, as we know that "[l]arge-brained animals with complex cognitive capacities such as elephants . . . seem particularly prone to poor welfare in captive environments."²⁴⁹ Additionally, "Neuroscientific research indicates that living in an impoverished, stressful captive environment physically damages the brain."²⁵⁰ Even though HTWT claims that their elephants are happy (Rosie "loves to paint and hula-hoop"²⁵¹) we know that elephants do not like being around humans,²⁵² and that if you see elephants "forced to do any kind of routine (as the *Have Trunk Will Travel* elephants are), it's safe to assume that cruelty was used to persuade them to do so."²⁵³ Artists like Banksy should not only refrain from pulling elephants into the art gallery, they should think ethically about how these types of animals are

²⁴³ IMDB. Actress profile Tai. <https://www.imdb.com/name/nm1677821/>

²⁴⁴ *Five Film Facts: Water For Elephants*. YAHOO. <https://www.yahoo.com/entertainment/five-film-facts-water-for-elephants-slideshow-3377.html>

²⁴⁵ Bull hooks are hooked rods that are outlawed in many states for the pain they cause in training elephants; Gubbins, *supra* note 2.

²⁴⁶ Archived webpage with Tai:

<https://web.archive.org/web/20210225190630/https://www.visitthepreserve.com/elephant-ambassadors/>; Current webpage without Tai: <https://www.visitthepreserve.com/elephant-ambassadors/>

²⁴⁷ YAHOO, *supra* note 232.

²⁴⁸ Gubbins, *supra* note 2.

²⁴⁹ Bob Jacobs. *Putative neural consequences of captivity for elephants and cetaceans* (Sept 16, 2021), <https://www.degruyter.com/document/doi/10.1515/revneuro-2021-0100/html> (last visited Nov. 7, 2022).

²⁵⁰ Bob Jacobs, *The neural cruelty of captivity: Keeping large mammals in zoos and aquariums damages their brains*, AP NEWS (Sept. 24, 2020), <https://apnews.com/article/from-our-partner-the-conversation-environment-lifestyle-stress-environment-and-nature-a71d4d06cfd306d7568e0dc4c15fd8d7> (last visited Nov. 7, 2022).

²⁵¹ *See Elephant Ambassadors*. <https://www.visitthepreserve.com/elephant-ambassadors/> (last visited Nov. 7, 2022).

²⁵² Gubbins, *supra* note 2.

²⁵³ *Id.*

being trained in advance of being part of their artistic spectacle. We know that Tai was treated cruelly in her life as a trained elephant for hire. In fact, “[t]his poor elephant was trained to do the very tricks you see . . . by being given electric shocks.”²⁵⁴

And those questions artists endeavor to produce—the search for a way to call into question a deeply-rooted aspect of our world? It must necessarily start with the artist themselves. Artists need to first do an inquiry into the ethics of their own practice in order to ensure compliance with proper regulations and laws before turning to the world beyond the canvas. Before they can be a conduit for change, they must turn inward and analyze whether the animal they seek to use in their art is being harmed, and whether an animal should be used at all. Only then can an artwork focus its energy on the desired issue, and not become mired in an investigation into an animal’s wellbeing, or become a sad display not of empathy, but cruelty to animals. Ultimately, this behavior would bring about the shared goal of questioning everything. Even so, some questions need to have answers, if not in the esoteric meaning, at least in the applicable law.

²⁵⁴ *Water for Elephants’ Elephant Was Abused in 2005, Says Animal Rights Group*. THE HOLLYWOOD REPORTER (May 9, 2011), <https://www.hollywoodreporter.com/movies/movie-news/water-elephants-elephant-was-abused-186634/> (last visited Nov. 7, 2022).

XI. APPENDIX

ILLUSTRATIONS



FIGURE I: *Barely Legal* Exhibition, 2006 by Banksy featuring Tai the Elephant.
Taken from: <https://artrepublic.com/blogs/news/435-banksy-and-the-elephant-outside-the-room-html>



FIGURE II: *Fountain*, 1917 by Marcel Duchamp
Taken From: <https://www.tate.org.uk/art/artworks/Duchamp-fountain-t07573>.