

## Article

# Exploring the Legality of Artists' Use of Animals: Ethical Considerations and Legal Implications

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**Abstract:** A burgeoning field of literature considers animal law, the status of animals as legal objects, the protection of animals in laboratories, wild animals, etc. One aspect not often considered in the literature is the intersection between animal law and freedom of speech and, more specifically, the freedom of speech of artists. While these might seem disparate and mutually exclusive, they are not. A small but notable number of artists use, harm, or even kill animals in the creation of artwork. Elsewhere, this practice has been termed 'cruel art', defined as "the infliction of physical and/or emotional pain on non-human animals for the sole purpose of creating art that steps beyond the confines of the artist's right to freedom of speech". This article elaborates on the concept of 'cruel art' by considering animal law and the artist's freedom of expression. Interesting questions arise at this intersection: Can the law grant rights or otherwise protect the animal from being used, harmed, or killed for an artwork? Alternatively, can the law encroach on the artists' freedom of speech to protect the animals? There are good reasons to protect both parties—animals deserve protection from unnecessary suffering, and the artist should not be unduly censored from making art. This article seeks to engage with the following question: how can one consider an animal's legal standing in relation to an artist's freedom of speech? In order to answer this question, this article first briefly unpacks the concept of animal law and the need for legal reform in this arena. Secondly, this article considers freedom of speech as it relates to artists specifically. Third, it discusses the rising conflict between the legal protection of animals and the artist's freedom of expression. This article argues that certain artistic uses of animals should be legally prohibited, despite the fact that artists enjoy the right to freedom of artistic expression.

**Keywords:** animal ethics; animal law; freedom of speech; artistic freedom; animal rights



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## 1. Introduction

Legally, animals, despite their sentience, are considered property, meaning they are "relegated to the status of instrumentality" (Adams 2009, p. 29). Animals are often treated in morally abhorrent but nevertheless legally sanctioned ways. While there might be limited consideration for animal welfare in particular circumstances, overall, they enjoy no significant legal standing as legal subjects anywhere in the world. Even when provided for, "legal provisions on animal welfare are dispersed, and are often applicable to members of a particular species only" and so, as Anne Peters (2016, p. 13) advocates, we are required to "take the leap from animal welfare to animal rights" As a consequence of the growing global concern for animal welfare, a burgeoning field of literature has developed that considers these issues, namely animal law (Peters 2016).

One aspect not often considered in the literature is the intersection between animal law and freedom of speech and, more specifically, the freedom of speech of artists. While these two domains of inquiry might seem disparate and mutually exclusive, they are not. A small, but notable, number of artists use, harm, or even kill animals in the creation of artwork. Elsewhere, this practice has been termed 'cruel art' and defined as "the infliction of physical and/or emotional pain on non-human animals for the sole purpose of creating art that steps beyond the confines of the artist's right to freedom of speech" (Coetser 2020,

p. 5). While “[t]his method of using animals in art practice involves an experiential and tactile encounter that expands our understandings of what art is and the role it plays” (Coleman et al. 2021, p. 1), it nevertheless forces one to explore moral and legal questions about the limits of artistic practice when it involves potentially harming or killing animals.

Interesting questions arise at the intersection between art and animal law: can the law grant rights or otherwise protect the animal from being used, harmed, or killed for an artwork? Alternatively, can the law encroach on an artist’s freedom of speech to protect an animal from being harmed or killed for an artwork? There are good reasons to protect both parties—animals deserve protection from unnecessary suffering, and the artist should not be unduly censored from making art. However, as Stilt (2018, p. 206) argues:

“When humans are recognized as having a right to do something involving animals, the balance tips even further in the direction of human interests. For example, German animal advocates viewed the absence of a constitutional protection for animals as an obstacle to their aims because animal interests were consistently trumped by constitutional rights of humans, such as freedom of religion, freedom of artistic expression, and freedom of research”.

This article asks the following question: How can we consider an animal’s legal standing in relation to an artist’s freedom of speech? The article proceeds by first providing some examples of cruel art. Then, this article unpacks the notion of ‘animal law’ before proceeding to consider freedom of speech as it relates to artists specifically. Finally, the conflict between the legal protection of animals and the artist’s freedom of expression is discussed. The article concludes by arguing that certain artistic uses of animals should be legally prohibited, even if it entails limiting an artist’s right to freedom of artistic expression.

## 2. Cruel Art: Animals in Art

As mentioned before, although there are not many artists who use animals in their artworks, there are enough instances that this practice warrants some scrutiny. These animal uses fall on a continuum, from mere gallery presence to deliberate interaction, imposition, harm, severe harm, and killing (Coetser 2014). Several art theorists and academics have discussed the various permeations of human-animal interaction in art. For example, Carol Freeman, Elizabeth Leane, and Yvette Watt published *Considering Animals: Contemporary Studies in Human-animal relations* (Freeman et al. 2011), in which various theorists engaged with animals and art. In this volume, Steve Baker considers those artists who use animals and animal imagery as part of their “own commitment to animal rights” such as Sue Coe, Britta Jaschinski, and Angela Singer. Artists such as these have “an understanding of the medium being used, of the history of that medium, and of the scope for working with *or against* that medium” (Baker 2011, p. 27). Therefore, while these artists use animals as mediums (and, in the case of Singer, *real* animals in the form of recycled taxidermy), they do not harm animals. Baker (2013), in his own monograph *Artist | Animal*, asks whether contemporary artists can be trusted to act ethically and responsibly with animals, living or dead, and concludes that the answer is, frequently, no. Similarly, Giovanni Aloï in *Art & Animals* (Aloï 2012) investigates the new questions raised by animal presence in contemporary art galleries. While these texts engage with the various ways in which animals are present in art, this article specifically focuses on animals that are either alive or have been killed for an artwork.

Several artworks illustrate the continuum of animal presence in the gallery. Joseph Beuys’ ‘Explaining pictures to a dead hare’ (1965), which, as the name suggests, featured a dead hare, or Jannis Kounelli’s ‘Untitled (12 Horses)’ (1969), which features twelve horses in a gallery in Rome. In artworks such as these, animals were merely present and seemed to have suffered no long-term negative consequences from their presence in the gallery.

In other artworks, such as Banksy’s ‘The Elephant in the Room’ (2006), where an elephant was placed in a room, painted to match the wallpaper for an exhibition titled ‘Barely legal’ (Oliver 2006), the animal was not merely present, but there was some deliberate interaction with him. While the elephant, Tai, was not necessarily harmed, he was

imposed upon. As Ed Boks, head of Los Angeles's Animal Services Department (ASD), admitted after meeting with animal rights activists about this exhibition, "[p]ermits will not be issued for such frivolous abuse of animals in the future" (Oliver 2006). Eduardo Kac presents another example with his 'Transgenic Art' in the form of a genetically engineered fluorescent rabbit named Alba, who went on to become a household pet for Kac (Kac 2020). According to Kac, the genetic engineering did not have the "slightest negative effect on the bunny herself" (2020, 122). Joseph Beuys, in 'I like America and America likes me' (1974), interacted with a wild coyote in an art gallery for three days. The coyote was "mostly curious, at times hostile, and often fairly calm", (Wolfe n.d.). It is not clear what happened to the coyote after the performance, but it did not seem to suffer any serious physical harm during the performance. Nevertheless, the animal was held captive and interacted with during its time with Beuys, which one could assume was a stressful experience for the animal.

There are several artworks in which animals were harmed, and even severely harmed. Huang Yong Ping's installation at the exhibition titled 'China after 1989: Theatre of the World' at the Guggenheim in 2017. The piece "consists of a tortoise-shaped wood and metal cage containing hundreds of live reptiles and insects. The animals are free to interact, often fighting or consuming each other. Over time, as the animals die, the exhibit is replenished with new animals as needed" (Cross 2018, p. 519). Another example is an installation by Guillermo Vargas' 'Exhibition No 1' in which a stray starving dog was tied to a wall in the gallery wall without access to food or water (Coetser 2020, pp. 9–10).

Then there have been several artworks in which animals have been killed and faced legal scrutiny. In the 1970s, Kim Jones (also known as Mudman) set three live rats on fire for a performance piece titled 'Rat Piece' (Harries 2007, p. 160). The gallery director of the Union State Gallery of California State University, where Jones performed 'Rat Piece' was fired and later convicted of cruelty to animals and penalized with a small fine (Harries 2007, p. 161). Interestingly, Jones placed some responsibility for the animal's suffering on the audience, stating the audience "could have stopped me" (Harries 2007, p. 162). According to Joan Kee (2021, p. 4), "Rat Piece marked the emergence of a new epoch for art's relationship with law through the optic of animal rights."

Another artwork, namely Marco Evaristti's 'Helena' (2000), featured ten working blenders containing living goldfish placed on a table. The artist never pushed a button, however, gallery visitors did, with predictable results. Peter Meyer, the director of the Trapholt museum gallery, "was sued for the work because he would not unplug the blenders after police demanded it" but he was not convicted (Bomsdorf 2013). According to the presiding judge, Preben Bagger, the fish died painlessly and instantly (BBC News 2003). Meyer used freedom of speech as a defence when he said in court, "It's a question of principle. An artist has the right to create works which defy our concept of what is right and what is wrong" (BBC News 2003).

'Survival Pieces' by artists Helen and Newton Harrison is another series of artworks that places human-animal relationships in stark focus. For 'Survival Piece #3: Portable Fish Farm' (1971), the Harrisons built six tanks with fish in the Hayward Gallery in London. "A series of five feasts were planned", but the British public, along with the RSPCA, had a 'visceral reaction' thereto, and the Arts Council of Great Britain was called in. Nevertheless, the fish were eventually executed and eaten in private, thereby posing questions that "confronted the philosophical implications of what we should eat, who was allowed to prepare it for us, and of the distance we enforce between the living animal and the meat on our plate" (Ryan 2015).

Artist Hermann Nitsch also routinely uses animal carcasses, entrails, and blood in his performances. The animals Nitsch uses have already been selected for commercial slaughter, and he ensures that the animals are killed humanely, with their meat being "consumed in the feasts that accompany his performances" (Barcia 2017). He was repeatedly arrested for his work and even expelled from Italy for "disbowelling a sheep" (Ludel 2022). He was sentenced to six months in prison (SAST Report 2019). His work has been criticized from

within the art world, with artist Yvette Watt saying, “I don’t think any animal should have to die or suffer in the name of art” (Coleman et al. 2021, p. 7).

Another example is much of Damien Hirst’s work, with some estimating that nearly a million animals and insects have been used and killed for his artworks over the years (Coetser 2020, pp. 7–8).

The above presents a snapshot of some of the more notorious artworks with animals; however, there are many more. What has been demonstrated is that there are a variety of artworks and artists that have used or continue to use animals in their artworks in ways that warrant some reflection on this practice. In what follows, this practice is examined from an ethico-legal point of view.

### 3. Animal Law

The moral significance of animal interests and the need for their protection have enjoyed significant defence in philosophical literature (Bentham [1780] 2007; Singer 1975; Regan 2004; Donaldson and Kymlicka 2011; Palmer 2010; Nussbaum 2022). This article starts from the premise that harming animals unnecessarily is morally questionable and, in certain cases, morally reprehensible. However, despite this claim and its widespread support among scholars, there has been little systemic change in the treatment of animals over the past few decades. This assertion is perhaps most vividly illustrated in factory farming, where millions of animals are slaughtered daily.

One reason animal industries continue to exist is because, even though it might be morally wrong to unnecessarily harm and kill animals, many of these industries remain legally protected. For example, many legal systems allow practices such as factory farming, cosmetic and medical testing on animals (Sreedhar et al. 2020; Kabene and Baadel 2019; Maestri 2021; Jacobs 2019), hunting (Schaffner 2019), circus animals, and other uses of animals. While some of these practices might be illegal in some places (such as cosmetic testing and circus animals), there are still many legally sanctioned activities that subject animals to suffering and death in many regions worldwide.

In many legal systems, especially those influenced by Roman, Dutch, and English law, animals are seen as legal objects, or property, rather than legal subjects. While there has been some legal reform in animal law, at the time of writing (2023), no countries have extended rights to animals. Notably, Steven Wise and the Nonhuman Rights Project (NhRP) are “challenging a centuries-old status quo that unjustly sees all nonhuman animals as legal ‘things’ with no rights” (NhRP 2023), but to date, their various litigation attempts have not resulted in the extension of any rights to any animals. Where some welfare protection has been granted, it is minimal and often related to particular animals rather than entire species, for example.

In the author’s own country, South Africa, animals enjoy limited legal protection. While there are some welfare laws, there is no mention of art as it relates to animals. The closest legal consideration is the use of animals in circuses, which is still allowed in this country.

Although the aforementioned instances of animal use have been explored in the literature on animal ethics and animal law, there is one instance of animal use that has not been extensively discussed: the use of animals for art. Like many other forms of animal use, there are no legal prohibitions on using animals in or for artwork. Granted, not many animals (if one compares it to large industries such as agriculture) suffer or die for artworks; however, the consistent use of animals in artworks warrants some scrutiny.

### 4. Artistic Freedoms

Freedom of expression is a fundamental human right, enshrined in the Universal Declaration of Human Rights as follows: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers” (United Nations 1948). It is important to note that freedom of speech is not a

universal principle, and there are still several countries where freedom of speech is limited. However, this article is based on the notion that freedom of speech is an important freedom and ought to be protected as far as possible. In the author's own country, South Africa, freedom of speech was limited during Apartheid, resulting in oppression and human rights violations. However, since the dawn of democracy in 1994, it has now been a protected right as follows in the Bill of Rights:

"16. (1) Everyone has the right to freedom of expression, which includes—... (c) freedom of artistic creativity" (South African Department of Justice 1996)

Artists' freedom of speech cannot be overrated—artists fulfil a unique and important role in society. They serve as critics of society and are often those who speak out when few dare. Irene Khan, UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression aptly argues:

"If we stifle creativity, we are of course, violating the rights of artists. But we are also depriving ourselves of diversity, of new ways of looking at things, of new ways of learning. And that is why I think governments, business, social media platforms, [and] communities must encourage and sustain artistic freedom". (UNESCO 2022)

As a fervent critic of the authoritarian Chinese administration who uses art as a platform, Chinese artist Ai Weiwei is a prime example of an artist who has faced harassment and arrest from the Chinese government (Stevens 2012). However, it is also the case that some artists use countries like China to escape harsher animal protections in other parts of the world. This is the case with Belgian artist Wim Delvoye, who is well known for his tattooed pig skins. Having angered animal rights groups in Europe, he established a farm just outside of Beijing, "where animal rights laws are practically non-existent" (Kieffer 2016).

However, even in countries without authoritarian regimes, artists and art play a valuable role. Like Sherman and Morrissey (2017, p. 1) say, we "value art not just for its beauty, but also for its social and epistemic importance; that is, for its communicative nature, its capacity to increase one's self-knowledge and encourage personal growth, and its ability to challenge our schemas and preconceptions".

Given this reality, artists' freedom of speech must remain protected. Censorship in art, like censorship in the media, is treacherous territory. As Dixon observes, "[i]t's commonly assumed that artworks are special and should be almost immune to censorship; silencing artists is often considered deplorable" (2021). The effects of art censorship are wide-reaching, since unjustified restrictions "generate important cultural, social and economic losses, deprive artists of their means of expression and livelihood, create an unsafe environment for all those engaged in the arts and their audiences, sterilize debates on human, social, and political issues, hamper the functioning of democracy, and most often also impede debates on the legitimacy of censorship itself" (Shaheed 2013, p. 18). Nonetheless, artworks can also be harmful since they "speak, act, and have concrete consequence for people's lives" (Dixon 2021). There is thus an important question to ask about the boundaries of artistic freedom, especially when it involves physically injuring others, such as animals.

Rights are not absolute since there are often intersecting and conflicting rights, interests, and values that challenge any particular right. Even the right to life can be overridden in cases of self-defense or war (Gewirth 1981, p. 1). Similarly, spreading lies or defamation is not protected under the right to freedom of expression. Most rights have boundaries—the maxim so often used is 'my rights end where yours begin'. One cannot, for example, exercise one's right to freedom of movement on one's neighbour's property without her consent. One's right to freedom of movement ends where one's neighbour's right to private property begins. Similarly, the right to freedom of speech is not absolute. David van Mill says, "[t]he first thing to note in any sensible discussion of freedom of speech is that it will have to be limited" (2017). In a sense, there is no unlimited free speech, since speech



always “takes place within a context of competing values” (van Mill [2002] 2021). The issue is then “to decide how much value we place on speech in relation to other important ideals such as privacy, security, democratic equality and the prevention of harm and there is nothing inherent to speech that suggests it must always win out in competition with these values” (van Mill [2002] 2021). Rights are, then, things that conflict with other rights, interests, values, and so on. The conflict, however, is usually between a person (or at least a legal person, which oftentimes includes corporations or other entities) and another legal person. Animals are not legal persons anywhere in the world, so their interests to avoid harm and suffering remain that—interests. Writing in the Australian context, Coleman et al. (2021) acknowledge that the animal laws in this region “fails to outline the parameters of incorporating animals (live or deceased) in contemporary art or art research” and so artists are left to follow the state laws regarding animal protection.

To make the situation even more complex, artistic works often receive special protection under freedom of speech legislation. For example, in Australia, Section 18D of the Racial Discrimination Act 1975 states:

“... section 18C does not render unlawful anything said or done reasonably and in good faith: (a) in the performance, exhibition or distribution of an artistic work; or (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest;...”

The UN released a special report about the right to freedom of artistic expression and creativity, detailing the “multi-faceted ways in which the right to the freedom indispensable for artistic expression and creativity may be curtailed” (Shaheed 2013). Indeed, the UN has recommended that artists have a special status and that “[g]overnments should help to create and sustain a climate encouraging freedom of artistic expression and the material conditions facilitating the release of creative talents” (Shaheed 2013, p. 5). Artists therefore often enjoy special legal protection; however, even special legal protections must have limits, especially when suffering or death results from the practice. At the very least, such a practice demands careful moral and legal consideration, carefully balancing the interests of all involved parties.

## 5. Animals and Artists

The interests of animals and the freedom of expression of artists are not usually considered at loggerheads. It is the case that living animals are seldom used in artworks (Coetser 2020, p. 3). More often than not, animals are the subjects of paintings and sculptures. On occasion, however, the gallery becomes a site of moral exceptionalism, producing problematic social and legal behaviors (Wallis 2012, p. 315). This moral exceptionalism has, on occasion, resulted in cruel art, which sees the infliction of physical and/or emotional pain on non-human animals for the sole purpose of creating art (Coetser 2020).

It is promising to see that there have been some art organizations that have provided guidelines for the use of animals in art. For example, *Minding Animals: Curatorial Guidelines for Animals and Art Exhibitions* contains guidelines that, if followed, would entail that most of the artworks mentioned in this paper would not have been actualized. For example, these guidelines say that “There is no reason why any live animal, wild, tamed or domesticated should be included in a performance or gallery exhibition” (Minding Animals 2017). Even more clearly, it states that “Artworks must not cause animal/s to suffer any harm, either intentionally or accidentally, either in the production or presentation of the work” (Minding Animals 2017). Similarly, the *College Art Association* (2011) has provided guidelines for the use of animal subjects in art, in which they state that “No work of art should, in the course of its creation, cause physical or psychological pain, suffering, or distress to an animal”. These guidelines are, however, not legally binding and rather present institutional guidelines.

Despite some of the self-restrictions applied by organizations such as those mentioned above, nowhere is it illegal to use or even kill animals in the creation of artwork. In addition,

while some of the abovementioned artworks drew the attention of law enforcement, most legal systems allow the use of animals in artworks (or, at the very least, do not have laws against using animals for artworks). As the UN's special rapporteur says, "what may be morally objectionable (from one point of view) may not necessarily be legally inadmissible or condemnable" (Shaheed 2013, p. 8). Many artists have used live animals or killed animals for the creation of artwork. In addition, if they are within their legal rights, why is this a problem?

It is here that there is a conflict between legality and morality. Just because an action is legal does not necessarily mean it is morally defensible. Many legal (and illegal) actions are the subject of ethical discussion—abortion, euthanasia, gun ownership, and even politically sanctioned oppression, such as South Africa's Apartheid state, are or were legal, and each of these has vehement supporters and subtractors. It is the case that many actions might be legal in one region (abortion is legal and widely available in South Africa), whereas they are becoming increasingly illegal in the United States of America.

How does one then consider this conflict between the interests of animals and artists? For some, these artworks are morally defensible since they "are capable of facilitating relationships of concern and respect for those animals' interests; they do so by making use of the conventions of aesthetic engagement and appreciation in the context of the gallery" (Cross 2018, p. 527). For Anthony Cross, only those cases "where the use of animals involves a great deal of suffering, and cases where the use does not facilitate concern or respect for the animals themselves" should be ruled out (2018, 527).

The focus of this article, however, is not purely moral. The question is whether legal grounds exist to prohibit artists from using animals. The answer is yes since freedom of speech is not a limitless right. Using the United States of America as an example, given the emphasis in their First Amendment on freedom of speech, they allow limitations: "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling". For artistic expression, "the content limitations are defamation, fighting words, obscenity, child pornography and material that presents a 'clear and present danger'" (Placik 2018). It can be argued that art that harms animals fulfils the requirement of presenting a 'clear and present danger' to animals and ought therefore to be legally considered a practice to be prohibited.

## 6. Conclusions

In contrast with the artists discussed in this paper, there are cases of artists who use animals in ethical ways. Coleman et al. highlight the examples of Angela Singer and Julia deVille, who are both artists using deceased animals; however, they "purposefully employ animals in their practice as a strategy to discuss animal rights and offer visibility to the cruel and neglectful treatment of animals within society" (2021, 9–10). It is therefore possible to use animals in art in ways that are ethical, legal, and dignified.

This article considered how an animal's legal standing relates to an artist's freedom of speech. This article concluded by arguing that animal interests should be considered and that animal suffering should be since it presents a 'clear and present danger', an instance where limitations are placed on artists' freedom of expression. While there are only a few instances of animals being harmed or killed for artwork, these instances are significant enough to warrant close scrutiny of the practice, both ethically and legally.

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