

The Animal Question via Art and Law

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Abstract, Since at least the late 1960s, artistic creation has increasingly called upon its audiences to consider the acceptability of certain actions in ways that law cannot. Based on four examples carrying especial weight in international artistic circles due to their reliance on animal actors—Kim Jones’s *Rat Piece* (1976), Yukinori Yanagi’s *World Flag Ant Farm* (1993), Xu Bing’s *A Case Study of Transference* (1993-1994) and Huang Yong Ping’s *Theater of the World* (1993)—this article reflects upon the notion of sovereignty as an unstable contest between competing views of acceptability, permissibility and enforceability. Inflected by counter- or non-anthropocentric views, I consider how artworks serve as augmented para-legal cases accountable to both legal and art historical interpretation. Predicated on the belief that we consider artworks as sources of critical action rather than as products of human expression or examples of property, I explore how live animal participants initiate active reflection upon the misalignment between existing laws and proposed standards of human behavior towards animals. What common justices are imaginable for humans and animals? A corollary aim is to explore how such questions are inflected less by universal-versus-local dichotomies and more by the contingency of bodies moving across legal jurisdictions that both reinforce and undermine the structuring forces of globalization.

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In the last fifty years or so, artistic creation has increasingly called upon its audiences to consider the acceptability of certain behaviors in ways that law cannot. Situations staged in the name of contemporary art not only permits conjecture but also incentivizes it; “contemporary art” thus exceeds its presumptive function as an epochal marker to denote how artistic creation is governed less by whether something is art but by whether any object, activity, or configuration can ever be completely free from being designated as art. But while contemporary art has expanded to include virtually any material or configuration of forms, the use of live animals remains unsettling, in large part because of how law shapes human-animal relationships.¹ Legal definitions of regulation and enforcement encircle the space within which human-animal relationships operate. Such encircling

persists even as contemporary art retains a tattered, yet stubbornly resilient attachment to modernist ideals of autonomy while also being inflected by new theoretical models proposing that agency be redistributed between humans and insensate materials.²

Works involving live animals problematize what the law tries to define through categorization or fiat. This came to a head in the 1990s when the international rise of contemporary Chinese art saw numerous artists shuttling between vastly different legal jurisdictions and for whom laws, norms, and customs remained highly contested ground for parsing different values and for thinking about the viewing experience as a pretext for agreement. Not surprisingly, most discussions about live animal use in contemporary art turn on freedom of expression arguments that underscore the predominance of Euroamerican legal norms. These discussions may also be read as extensions of a key debate in the rapidly growing field of animal legal studies as to whether animal rights should precede animal welfare, a debate increasingly colored by the growing visibility of animal studies in the law which has sparked fresh interest in issues of animal sentience, capacity, and intelligence.

Both discussions share a preoccupation with power. In seeking to imagine the existence of living beings before the law defines who they are, Cary Wolfe defines “before” as that “which exists prior to the moment when the law [...] enacts its originary violence, installs its frame for who’s in and who’s out.”³ Borrowing from Stanley Hauerwas, “our question is not ‘when does life begin?’ but ‘who is its true sovereign?’”⁴ What follows is a brief reflection on how contemporary artworks depending primarily or exclusively on live animal action has us think about sovereignty as an unstable contest between competing perceptions, especially as counter- or non-anthropocentric views gain adherents in artistic, philosophical, and theoretical circles. Inherent in many such views is the belief that animal-human parity plays a significant role in conceptualizing a future where humans no longer dominate other living forms and where the specter of inescapable destruction via irreversible climate change compels us to think about life across species categories. Against this shifting intellectual landscape, legal powers of distinction between humans and animals as well as between different animal species take on a different set of inflections. For example, the question of whether there is something unique about humanity that justifies affording more rights to humans than to non-human animals begins to sound more like a question about whether we should be obligated to share our entitlements and privileges to our non-human animal counterparts, even if it means ceding or undermining our own interests. More rights are granted to animals modeling behaviors commonly regarded as human-specific and legally endorsed fictions such as the category of “companion animal” stress the connection between animal rights and human perceptions regarding how proximate certain species are to

humans.⁵ Most species, however, are separate, or even alienated from humans; this is why I focus on artworks involving rats, snakes, ants, and scorpions. In thinking about non-proximate animals, the act of species distinction becomes a call to address the dual challenge of redistributing human concern to all animals and of allocating the burden of care among humans having direct or foreseeable animal contact.

Those defending the use of live animals in art frequently uphold the claims of the non-human artwork to exist regardless of the costs incurred by its live components.⁶ Advocates claim how artworks using live animals “helps to facilitate relationships of attention, concern, and ultimately respect for the animals that they incorporate. This is plausibly an important element of their artistic value.”⁷ It reflects how the benchmark of artistic worth hinges on a given work’s social relevance, which ideally has an additional capacity to provoke discussion “necessary” to create public policy.⁸ But protests against live animals in art (whose integrity is often compromised by their excess performativity) often results in accelerated action in the form of immediate exhibition closures or artwork removals that prematurely forestall such discussion. The main determinant is power. Like those who succeeded in keeping pigs on the streets of 19th century New York despite considerable resistance, the matter of animals in contemporary art often turns on whether the human agents involved are “capable of imposing its practices, within limits, on the larger community” or “capable of resisting invasions of its relative autonomy.”⁹ For artists—an occupational class whose legal and economic status in many parts of the world including the U.S. is at best uncertain—defending the use of live animals also translates into a demand that audiences recognize the value of their labors.¹⁰ At the same time, government or institutional mandates requiring artists to follow protocols similar or identical to those required of scientists conducting animal research or animal testing might actually enhance the legal recognition of artists as a professional class. Live animals in artworks initiate active reflection upon the misalignment between existing laws and proposed standards of human behavior towards animals. The potential of such reflection to shape future laws whether as codified regulation or socially enforced custom is how we might consider artworks as sources of critical action rather than as products of human expression or examples of property.

This brings us finally to how sovereignty is expressed and enforced. With regard to artworks involving live animals, sovereignty is often a matter of regulation that is externally imposed onto the artworks via such mechanisms as legislation, court orders, or police enforcement. Yet much of what constitutes enforcement in the art world happens outside attorney’s offices, courts of law, police stations and other law-related institutions. Although not exactly law in and of itself, the force of law is often most palpable through extra-legal forms of

regulation, including critical scrutiny, social media outrage, publicly circulated petitions, and personal friendships, as well as regulation internally generated by institutions such as museums and universities that may stipulate restrictions beyond what the law in fact disallows. For these reasons I propose that artworks be read as augmented para-legal cases accountable to both legal and art historical interpretation. They function as movable boundaries that shift depending on how agreement over the scope of animal rights begins and ends. Considering artworks thus rather than as parables, spectacles, or goods for sale will help us think more carefully about what justices are not only available for humans and animals, but also what is plausible.

THE YEAR OF THE RAT

In 1976, the artist Kim Jones performed an infamous work that has become a catalytic touchstone in narratives of animal cruelty. On February 17, a complaint was lodged with the Department of Animal Regulation concerning a performance that had taken place at the art gallery of California State University, Los Angeles. In front of approximately twenty to thirty spectators, Jones poured charcoal fuel onto three rats, then set them on fire. He then poured more fuel onto the rats until they all died. Martin Harries argues Jones's performance "sought the dissolution of boundaries between performers and audiences—the intervention of an audience that saw itself in those burning rats" that "took on human qualities and became the sudden object of a usually absent human sympathy and even outrage."¹¹ Although audience members failed to stop Jones's performance, some immediately filed a complaint with the Society for Prevention of Cruelty to Animals claiming Jones had violated Section 597b of State of the California penal code.

Rat Piece is almost a half-century old, yet it remains an enduring barometer of common attitudes and defenses regarding live animals and contemporary art. It ranks among the most visceral instances of how the purpose of contemporary art was inflected by efforts to map as dialogic the domains of impermissible and unacceptable behavior. The difference between the two is most apparent through the consequences of violation; impermissible behavior might result in a fine or a prison sentence, whereas unacceptable behavior is regulated by shaming, shunning, and other social expressions of disapprobation. Indeed, much like how some lawyers in seventies America reenvisioned legal practice involving animal "clients" by prioritizing animal interests over human ones or how Peter Singer's groundbreaking 1975 book *Animal Liberation* helped ignite the animal rights movement, *Rat Piece* marked the emergence of a new epoch for art's relationship with law through the optic of animal rights.¹² The controversy it provoked exemplifies what might retroactively be described as ethically conscious viewing. Since

the 1960s, ethics have become an increasingly significant criterion for judging art in lockstep with the rising prominence of performance art. Involving live human and, occasionally, animal participation, performance artworks were originally conceived and executed without legal apparatus in the form of liability waivers, insurance agreements, and employment contracts.¹³ In addition, contemporary art during the Vietnam War made thinking about the boundary separating proper and improper behavior, as well as criminal and non-criminal activity as necessary to artistic production as discussions of medium and reception. The line between art and the everyday often collapsed in the name of political protest, and the debate around Jones's performance centered on whether Jones was justified in killing the rats as an exercise of his First Amendment rights.¹⁴ Titled *Rat Piece*, the work responded to Jones's experience in the Vietnam War where soldiers set rats on fire to keep them out of the barracks. Jones's supporters compared his work to a "pagan ritual" involving the killing of animals and people—it gave "release" to the community or group resulting in a "general healing" for all.¹⁵

Despite historical precedents for Jones's work, including Peter Hall's play *US* where cast members allegedly set butterflies on fire, *Rat Piece* stands out for illuminating how perceptions of human responsibility, animal vulnerability and the parameters of acceptable legal and social behavior hinge on description.¹⁶ That adjudication hinges on description is nothing new; after all, many laws describe permissible and impermissible behavior. But it is magnified greatly in the context of law acting as a conduit between animal and human, for images expressed through words or another medium, especially analogies to human torture and death, are often what propels loose perception into concrete legal action.¹⁷ The prevalence of reasonableness as the threshold for action lends further urgency to description for how an animal is depicted can very well seal its fate. In the case of *Rat Piece*, one letter writer vilified the rats as "symbols of nastiness and evil being destroyed by fire which is clean" while valorizing Jones as a "nonaggressive, peaceable man" who would not "murder animals for fun."¹⁸ Conversely, the formal legal complaint claimed that Jones "did willfully and unlawfully in the city of Los Angeles, torture, torment, cruelly beat, and mutilate and cruelly kill an animal, to wit: A RAT." The significance of language was taken up by some of the many protestors of Jones's work. An unsigned article in the university paper titled "Even rats have the right to live" emphasized the verb "to live" in all-capitals: "Stress the word LIVE."¹⁹ The article stated how "even the lives of four rats" transcends the right of free artistic expression, a claim that implicitly assumed a symbolic position for the rats as a stand-in for the idea of life at large. At the same time, the article contended that it subjected human observers and the four rats to "an ordeal."

Perhaps because of how mice are often considered synecdoches for laboratory animals, the other line of defense likened *Rat Piece* to a scientific experiment.

Frank Brown, the gallery director who invited Jones to perform, characterized *Rat Piece* as “a sort of religious sacrifice, a criticism of science,” adding that “rats are killed in the psychology department every day.”²⁰ The psychology department rejected the comparison as a false equivalence, responding that “when it is necessary to sacrifice an animal (when prescribed by law)” a trained staff member does so when the rats are under anesthesia.²¹ Thus where Brown implied rat death as a routine, and even normal activity that helped make scientific research possible, the psychology department refuted the implied banality of rat death with its disclaimer, “when it is necessary.” At the same time, Brown elevates *Rat Piece* to the level of religious ritual in part by distancing the work from science. Conversely, the psychology department couched scientific experimentation as a sacrifice authorized not by a deity but by the rule of law. Legal authorization justifies the killing, while the implied lack thereof in Jones’s work rationalizes subjecting art to a stricter level of scrutiny along the lines of what lawyer Lori Andrews asked of artists using their own bodies in their work. Should artists using animals be “held to higher, the same, lesser, or different standards entirely than scientists?”²²

Jones emerged from the *Rat Piece* controversy relatively unscathed with a two-year probation and no jail time.²³ But the intensity of debate which led to the university’s dismissal of Frank Brown was symptomatic of how apportioning accountability turned on description. Several years before *Rat Piece*, the art critic Charlotte Willard described humans as parallel to beasts. “Man,” she mused, “is a reasoning animal whose capacities for learning have not yet been fully explored or developed.”²⁴ Although Willard did not develop her point further, it is worth bringing up in thinking about reciprocity. As Jacques Derrida notes in his well-known essay, there is “impudence” in the “presumption and imagination shown by man when he claims to assign them or refuse them certain faculties.”²⁵ Derrida, I think, is being unnecessarily elliptical here. For at issue is not an abstract concept of human freedom but how much we are willing to internalize the discomfort of a stand-off between animal welfare and human autonomy.

That discomfort was exacerbated by how competing descriptions of *Rat Piece* significantly departed from the certainty implied in various legal constructions of animals, most of which demonstrate how animals are legible through the uses they afford to humans. Animals are property, equipment, companions or unwanted by humans. Regarding the last classification, we think how the description of rats as “vermin” by Jones’s lawyer grafts neatly onto the exclusions carved out by the Animal Welfare Act of 1966 specifically excludes from the obligation of humane care such species as cold-blooded animals, rats and mice from its humane care requirement. Donna Haraway speaks of the “functional dog preserved only by deliberate work-related practices, including breeding and economically viable jobs.”²⁶ Her observation is borne out by how retired military

working dogs are called “excess equipment.” Companion animals lose their status when they become lost, unwanted or homeless.²⁷ In his now-classic text *Animals, Property and the Law*, Gary Francione describes how the application of property law to animals turns on their status as domestic or wild, or whether they are owned outright by “someone” or by the state who then has the power to convey the wild animal to a nongovernmental owner.²⁸ Ownership can also determine whether an animal lives or dies, as borne out by the legality of kill shelters that euthanize an animal if unclaimed after a designated period of time. At the same time, laws like California Penal Code 599(c) expressly allows “the right to destroy any animal known as dangerous to life, limb, or property,” a right that continues to exist and which Jones’s lawyer asserted when claiming that “it is well established that a rat is an animal which can be dangerous to life, limb and property.”²⁹ The arbitrariness of distinctions anchoring such categorization drew the ire of influential *Time Magazine* art critic Robert Hughes, who sarcastically remarked that university officials should make it an offense “for swatting a fly or a mosquito, or ... publish guidelines on which animals, up to, but not including *Homo sapiens*, can be burned, stomped, hanged, vivisected, inoculated, gassed, flit-gunned, garroted, or otherwise done away with.”³⁰ Despite the caustic tone of Hughes’ writing, his tacit suggestion that blanket regulation be applied to all animals “up to” humans prefigures a major turn in animal rights advocacy supporting general constitutional protection of animals without regard to their utility or to species.³¹ Linguistic precision may be a juridical ideal, but *Rat Piece* demonstrates how specificity is no guarantee of consensus as to what, or more importantly, *how* a work means.

WORKER ANTS AND THEIR FRIENDS

If Jones argued that his right to expression took precedence over rat life, the converse debate animated Yukinori Yanagi and his ant works. For the 1993 edition of the Venice Biennale, one of the world’s premier showcases for contemporary art, the Japanese artist displayed a version of his “World Flag Ant Farm.” Comprised of a grid of rectangular ant farms each colored to resemble various national flags and then connected via narrow plexiglas tubes, *World Flag Ant Farm* was activated by the movement of approximately five thousand ants carrying grains of sand from one farm to another. The intention was for the movement to erode the flag designs over time, so that the work might read as a metaphor of how transnational movement gradually undermines the stability of national identities. Almost immediately after the work was unveiled a viewer contacted a local organization for the protection of stray animals to lodge a complaint against Yanagi’s work. Together with the Italian Vegetarian Association, the animal protection group described to the Venice magistrate’s office how the ants were dying

“because their highly organized life had been turned upside down, and they were forced to follow set paths in a climate and surroundings completely different from their own.”³² Here demands for animal liberation map onto a property model of animal life whereby animals are presumed to have a property interest in living their natural lives without human interference. Venice public prosecutor Bianca Maria Cotronei ordered that the ants be freed, and opened a judicial investigation to establish whether the ants suffered during the making and display of the work.³³ Although Biennale officials responded that ants were not a protected species in Italy, the artist decided to destroy his own work (euphemistically reported by the *Chicago Tribune* as Yanagi having “dismantled his creation”) rather than pursue legal action in what amounted to an unconscious reversal of what had happened with *Rat Piece*.³⁴

That the controversy over *World Flag Ant Farm* was raised and resolved within forty-eight hours of its unveiling strongly attests to the growing recognition of animal sentience in the Western European legal imagination.³⁵ Animal welfare activists accused Yanagi of violating Article 727 of the Italian Criminal Code. Regarded as the “cornerstone” of all Italian legislation concerning human treatment of animals, one of its main provisions bars acts of cruelty that might offend “the common sentiment of pity towards animals.”³⁶ By the time *World Flag Ant Farm* made its Italian debut, however, some courts interpreted the law to recognize animals as “autonomous living beings,” thus making impermissible any behavior affecting “the sensitivity of the animal” in ways likely to cause it pain.³⁷ In contrast, despite culturalist arguments that explain why “the Japanese” view “the ideal human and animal relationship as symbiotic, rather than hierarchical,” animal rights laws in Yanagi’s home country stress punishing documented acts of human cruelty towards animals.³⁸ The Animal Protection Law introduced in 1973 also imposes a duty of care upon keepers and owners of a select list of species, namely mammals commonly raised as pets or for food.³⁹ Ants are not part of this list.

On one level, Yanagi’s legal trials underscore how the globalization of contemporary art is perhaps most sharply defined through how different legal jurisdictions assess the permissibility of a work. Yet the story does not end with Yanagi bowing to Italian legal and organizational pressure. If the Italian legal system circa 1993 unintentionally reinforced what Carter Dillard describes as a “thick conception of legal personhood – around the notion of being more other-regarding than self-regarding” those who recognized Yanagi’s work as a distinctly legal question attempted to speak on behalf of the voiceless ants.⁴⁰ Both the fiction of the neutral viewer in contemporary art interpretation and the conceit of the reasonable observer in legal interpretation yield to the figure of the advocate, or activist viewer. The advocate is a prime manifestation of the significance of viewer participation in contemporary art and its interpretation since the 1980s.

By the early 2000s, “participatory art” and its terminological variants became an established part of the contemporary art lexicon. A key historical arc was the level and intensity of participation required from viewers to qualify as active audience members. From the early 1990s audience participation meant “using” artworks by depleting, or in some instances, ingesting its offerings as in the example of Rikrit Tiravanija which works involving the preparation and serving of Thai curry to audiences became a byword for participatory art.⁴¹ By 2000, works demanded rather more from their audiences, including the infamous *Helena* by Italian artist Marco Evaristti inviting viewers to liquidize goldfish in a blender with the touch of a button.⁴² To this we might add “ethical spectatorship” that doubles as methexis, where the audience participates, creates and improvises the action of the ritual so that the artwork reads more persuasively as a co-constituted event rather than as a fixed object or an ephemeral performance. Luc Boltanski defined ethical spectatorship as a process that recasts watching as an ethical practice whose efficacy depends on whether it translates into some kind of individual or collective action.⁴³ The reception of works involving animals has inadvertently proceeded along Boltanski’s lines where viewer advocacy in the form of protest has become the privileged form of response.⁴⁴ Advocacy is the ritual that actualizes the artwork by potentially expanding its remit to include politics. *World Flag Ant Farm* illustrates the imbrication of animal rights with artistic practices so widely known as to have the status of a norm: it is an example of how the prominence of artworks calling for greater, or more involved levels of audience participation may enable viewer-generated notions of animal personhood to override the property interests and moral rights artists accrue in creating their works.

Applied to artworks using live animals, ethical spectatorship might be translated into legal terminology as the “next friend.” Used in common law jurisdictions since the 17th century, “next friend” refers to third parties acting on behalf of another human being who cannot, or is otherwise unable to file a claim in court. Applied in many circumstances, but especially in the early 20th century when married women could not own property in their own names, the next friend doctrine has been invoked in the U.S. from the mid-1970s in suits filed on behalf of animals.⁴⁵ The “next friend” doctrine preemptively responds to the question political theorist Jane Bennett asks of policy: how “political responses to public problems change were we to take seriously the vitality of (nonhuman) bodies.”⁴⁶ In the case of *World Flag Ant Farm*, the application of the “next friend” idea distributes some of the value traditionally accorded to the human author to the ant, but also to those who speak for the ant. Potentially the “next friend” doctrine could amount to a metaphorical kind of unjust enrichment, where the human representing the animal becomes empowered to speak over—and thus silence—human authors and their animal collaborators. It provides an opportunity for

individuals or small groups to exercise considerable authority by claiming that they do so in the name of a vast constellation of creatures. Such was the concern of the Ninth Circuit in *Naruto v. Slater*, the highly publicized “monkey selfie” case of 2018 about whether a crested macaque owned the copyright of photographs he took using a camera owned by a professional wildlife photographer: animals “can actually *never credibly articulate its interests or goals*, next-friend standing for animals is left at the mercy of the institutional actor to advance its own interests, which it *imputes* to the animal or object with *no accountability*.”⁴⁷

As Julia Tanner notes, moral standing for animals “is fragile because their moral standing is dependent on others,” where “others” refer less to human parties than to non-uniform standards regarding permissible human behavior towards animals.⁴⁸ We have seen this with *Rat Piece*, where competing descriptions of the event both reflected and fueled various forms of outrage. Even those without firsthand experience of the work are provoked into action, not because they directly feel the pain of animals but because the imagined perception of animal pain is upsetting enough to spur such audiences into seeking relief. Relying mainly on secondhand descriptions rather than firsthand physical encounters with *World Flag Ant Farm*, many of the self-appointed “next friends” of Yanagi’s ants tried to lobby for an expanded model of personhood that resonates with recent proposals to expand the scope of tort law.⁴⁹

But there is another dimension of personhood to *World Flag Ant Farm*. Press reports observed how the ants were so fundamental to the work that their removal meant its de facto destruction. The ants read less as artistic material, but as figurative sub-contractors or even as presumptive co-authors, analogous to how equestrian competitions are won by horses as well as riders even though it is the former to whom medals are given and whose names are remembered. Attempts to have the law recognize animal labor have been uneven. Comparisons of orca performance to “involuntary servitude” under the Thirteenth Amendment of the U.S. Constitution were quickly dismissed, for instance, by courts declaring “servitude” as applicable only to humans, much in the same way that only humans are subject to criminal conviction.⁵⁰ Even if animal labor was acknowledged, it would automatically and perpetually be a virtual work for hire situation as *Naruto v. Slater* firmly stressed in highlighting the statutory exclusion of animals from the domain of copyright.⁵¹ The ants create property rights for Yanagi even as the trace of their activity folds back onto conventional ideas of the artist’s markmaking hand. The law’s reluctance to bestow upon animals the rights presumably supposed of a creator may be described through what Cornelia Vismann describes as a matter of guilt “passed on to the blade used to commit a crime.”⁵² Influenced by what she calls “the ecological impulse” that positions humans and non-humans on a par with one another, Vismann asks whether things might be granted rights equal in status to human rights. It is a

proposition she implicitly claims is tantamount to asking the human subject about her willingness to share her sovereignty with that formerly regarded as “servile objects or serviceable means.”⁵³

The experience *World Flag Ant Farm* generates prods us to explore the possibility of creating new categories for joint human-animal activity. Such categories would differ from legal conceptions of authorship, but thinking more actively about how animals co-construct our world as non-inert beings is what *World Flag Ant Farm* requires from its audiences. The work reads as an attempt to reframe the oft-cited debate between animal rights and animal welfare Francione and others identify as central to law’s attitude towards animals.⁵⁴ Instead of focusing primarily on human duty, in this case, Yanagi’s obligation to refrain from cruelty, *World Flag Ant Farm* gives us pause to consider whether an emphasis on labor can facilitate greater species inclusion. If animals are defined by existing legal taxonomies based on human conceptions of utility, thinking how animal action vital to legally recognized human creation (such as copyrighted artworks) should qualify as legally recognized labor may pave the way for thinking about how animals might shape existing law rather than vice versa.

Porcine Libertarianism

World Flag Ant Farm helps demonstrate how art involving live animals may be some of the best opportunities we have for thinking about the necessity and plausibility of granting legal personhood to animals, even if shifting the legal status of the animal from property to person may be politically challenging.⁵⁵ Widely applied to non-sentient organizations enabling such entities to act as if they were living humans, the concept legal personhood takes on a different gloss when read through if and when animal labor is enough to qualify the animal as a legal person. But maybe we should desist from overemphasizing personhood lest we fall into the same humanist habits of elevating only those creatures whose actions fit within our expectations of proper animal behavior. *World Flag Ant Farm* presents animal actions as being permanently suspended between their contained selves and their irrevocable belonging to a species: the animal is always one and the many. Not long after Yanagi ruffled Italian audiences who saw his ant farms as an unjustified Grand Guignol of ants, the Chinese artist Xu Bing exhibited his first work involving two copulating pigs.⁵⁶ Openly acknowledging animals as his collaborators, Xu explained that he began working with “other living beings” “in order to recognize the limit of mankind, including myself... With their assistance we can compensate for our deficiency and degeneration.”⁵⁷ Starring two pigs, a male and a female each hand-stamped with nonsense characters (one pig in English, the other in Chinese), *A Case Study of Transference* took place in January 1994 at an underground art gallery in

Beijing.⁵⁸ Placed in a pen so as to encourage mating, some concern was initially expressed as to whether the pigs would “become too nervous to perform.”⁵⁹ The opposite happened, where:

the pigs themselves were completely unfazed, and blithely ignoring their human onlookers ... it was rather the audience members who found themselves in an embarrassing and awkward position. What ultimately was exposed was not any sense of discomfort or displacement on the part of the pigs, but the limitations and the inability to adapt of the human audience.⁶⁰

In addressing how the popularization of nature programs and documentaries promote the visibility of the animal world, Pooja Rangan argues that such channels of visibility tacitly weaken the human-animal connection by presenting wildlife as completely divorced from human contact or intervention.⁶¹ One reason why *A Case Study of Transference* unsettled viewers was because of how uncomfortably close they were to animals ordinarily kept at a distance through the television or computer screen.⁶² A second reason is Xu’s decision to involve only two pigs rather than a group. The work consequently scales down the question of human and animal to a personal, and for some viewers, an unusually intimate level. Ordinary animal behavior so frequently performed as to be utterly mundane becomes abruptly shocking. *A Case Study of Transference* expands Derrida’s famous question of how an animal can “look you in the face” by asking human audiences to consider whether the image of the animal precedes the world that humans and animals cohabit.⁶³ Donna Haraway writes “that actual animals look back at actual human beings,” yet crucially does not “seriously consider an alternative form of knowing something more about cats and how to look back, perhaps even scientifically, biologically, and therefore also philosophically and intimately.”⁶⁴ Haraway speaks of a failed mirror relation, but as Derrida notes and as *A Case of Transference* attests, there is no particular “knowledge of self” possessed by animals in the manner that we presume of humans: “the animal is naked without consciousness of being naked.”⁶⁵

Art historian Stephen Eisenman proposes that animal rights be determined based on what he calls “practical autonomy,” or the capacity of animals to “desire, act intentionally and have self awareness.”⁶⁶ Autonomy is far too compromised and imprecise a term to describe what Xu’s pigs are doing, but Eisenmann suggests complicating the animal rights versus welfare debate with a consideration of animal interests which must include interests that do not serve or align with human interests, or in this case, the interests of the artist, his audience, and his promoters. This to me is the point of *A Case Study of Transference* whose central event is a porcine libertarianism where the pigs move, copulate, oink and

otherwise form their own associations with space, humans, and other pigs. Xu describes the pigs as being “very cool, [and] very focused,” a characterization of perceived mood that further reinforces a separation between the pigs and their human adjacents.⁶⁷ The pigs determined the work, conveying an indifference to the spectator that undermines the primacy of human actors and raises the subtext of how and when definitions of humanity must account for how and when animals might be independent of human needs, desires, and conceptions of action.⁶⁸ As Xu recounted, “the pigs were just the same, but not so the people.”⁶⁹ *A Case Study of Transference* redirects attention from the human sovereign towards the contingency of humans on other living beings. But the work also makes a case for human-animal co-existence that need not depend on constant reciprocal acknowledgment. In this way Xu’s work illustrates the shortcomings of law whose imagination only allows the animal to exist as property or as object.

Still we are left with Bennett’s question of whether claims for nonhuman agency are “fatally dependent on anthropomorphization.”⁷⁰ Believing that the sentience of pigs is equivalent to awareness only reinforces humanist notions of autonomy. It would, however, be premature to abort the project of description that enables contemporary art to bring both discursive and practical pressure to bear on law. The misalignment of attention hierarchies which holds that viewers will always focus differently on different aspects of a single work, is the gap that becomes the space where nonhuman agencies dwell. That Xu’s work is durational offers up the possibility of identifying ourselves with the pigs. To quote Suga Kishio, the Japanese artist whose installations of natural and industrial materials came out of a desire to relinquish the imprimatur of authorship accompanying the act of creation: “the moment a work is made, it sure is there, but as we begin to lose our conscious awareness toward the object, [things] break down and there is a shift from a state of presence toward a condition of existence.”⁷¹ Xu Bing may have had the pigs tattooed, but *A Case Study of Transference* is a performance whose parameters are controlled more by the pigs than by the human creator. The work becomes a case study for how art operates as a catalyst for a sociality where the individual artist no longer has absolute precedence.

The problem of the individual artist takes on an additional wrinkle when we consider how law’s animal problem is often one of race, as Angela Harris claims in describing the complicity of the animal rights movement with racism.⁷² Around when Xu Bing began to show video documentation of *A Case Study of Transference* in New York, London, and Dublin, animal activists loudly demanded that San Francisco’s Commission on Animal Control and Welfare ban the sale of live animals, including turtles and frogs, in Chinatown. Although the protests were not initially motivated by anti-Asian sentiment, the “optic of cruelty,” to use Claire Jean Kim’s phrase, brought to the surface accumulated anti-Asian prejudice typecasting Asians, and specifically Chinese, as inhumane,

as illegal aliens, and even as inhuman.⁷³ Response to *A Case Study of Transference* was far more muted, with critics often expressing disappointment or mild disdain such as Terry Grimley who could have “done without” the work.⁷⁴ Whether this was due to personal squeamishness at the sight of “copulating” pigs or to broader convictions regarding artistic merit is unknown; what is striking is the explanation of the work’s strangeness as a symptom of irreconcilable cultural difference. Worth noting, then, is how the cultural specificity defense so ardently deployed by and on behalf Chinatown animal vendors would fail in the eyes of the law while being the very alibi that insulated Xu from a barrage of attacks that might legally qualify as harassment or assault.⁷⁵ The handstamped characters, as well as the books scattered and then trampled by the mating pigs appeared to suspend the work in its own discursive zone, where metaphorical readings of cultural exchange preceded consideration of animal liveness.⁷⁶

Xu alleges that he returned to China to realize *A Case Study of Transference* not because he feared legal sanctions or racist attacks but because he “simply didn’t know where I could find pigs in America or how to move them.”⁷⁷ He claimed being ignorant of “animal rights” when he began thinking of how to realize his work while in New York.⁷⁸ As much is clear by how he disposed of the pigs after the work; despite naming them as collaborators, the artist returned them to the world of chattel by having them sold.⁷⁹ His muddled views of animals notwithstanding, Xu raises a question of class that further complicates the question of audience when he recalled how “the laborers who worked in the place from which I bought the pigs didn’t care, but the intellectuals were horrified by my actions.”⁸⁰ Most likely Xu was referring to educated Chinese urbanites aware of contemporary art whose economic and social backgrounds recalled those of self-identified animal rights activists in the U.S. One study published a few years earlier deduced that the “typical” such activist was a highly educated white professional woman commanding an above average income.⁸¹ While Xu would largely escape the challenges some of his contemporaries would face, the class issue he raises draws consequent attention to how racial tensions could be perpetuated in the name of animal liberation as a telling instance of all-too-human fallibility.

Theater of the World

A Case Study of Transference provoked greater controversy in Xu’s home country than in the U.S., at least in the mid-1990s. Yet a decade later it would be among the works at the epicenter of one of the fiercest recent hailstorms in the New York art world. Exhibited in U.S. and European museums and galleries with remarkable frequency since its creation in 1993, *Theater of the World* is a large multi-part installation by Xu’s friend Huang Yong Ping, another Chinese artist

that would enjoy critical international renown. The work consists of a large wooden cage whose contours echo those of a tortoise shell and which houses exclusively non-mammalian animals including various types of reptiles, amphibians, and insects. Describing the animal inhabitants as metaphors for human conflict, Huang left the animals to their own devices which resulted in predatory creatures devouring some of the other animals.⁸²

Institutional and audience engagement has been markedly varied. Some venues allowed the work to happen without modification. Others, like the Cartier Foundation in Paris, anticipated public objection with reassuring but vague language informing audiences that animals were kept according to “regulations.”⁸³ The most controversial displays occurred a decade apart: first, when it was shown at the Vancouver Art Gallery in 2007, and again in a large group show on contemporary Chinese art at the Guggenheim Museum in New York in 2017 which also included *A Case Study of Transference*. In the latter display, *Theater of the World* was the only work in the exhibition to involve the actual demise of its live animal participants, and therefore drew the lion’s share of public outrage. Huang stated that the work was his attempt to “break down” “too-perfect classifications” that divide animals too abruptly into pets and non-pets.⁸⁴ Although a veterinarian claimed that the animals in the Vancouver display were not in their natural habitat, there was no indication that the work prevented the animals from engaging in behavior typical of their respective species. Indeed, the work made such behavior its centerpiece, which could read as a forceful rejection of speciesism, or the assumption that species membership determines the amount and type of rights afforded. Deeply embedded in various legal systems around the world, speciesism accepts that the permissibility of an animal’s destruction may hinge on its properties and perceived character.

Predictable as some of the objections were, their persistence over a period that in the context of contemporary art qualifies as a *longue duree* flags a number of recurring commonalities and differences between art and law. Description plays a special role in thinking about the possible legal implications of *Theater of the World* as the legal permissibility of human behavior towards animals often hinges on whether the contested action qualifies as entertainment, recreation, or scientific research. Some viewers saw the work as a “mini-zoo,” a comparison which would legally subject the work to a higher bar given increasing pressure to ban public performances in circuses and zoos involving animals.⁸⁵ The Walker Art Center in Minneapolis inadvertently called legal scrutiny by describing the center cage as a “gladiatorial arena,” language that might induce a juridically-minded animal welfare advocate to condemn the work as a case of illegal animal fighting.⁸⁶ The artist himself described the installation as a “roomier space” than the glass terrariums in which humans sometimes keep insect, amphibian and reptile pets, yet some viewers likened the work to a “miniature jail,” thus stressing

the captive nature of the animals.⁸⁷ Huang observed how “seemingly simple spatial transposition actually changes the way people view or imagine the work,” a point writ large by another well-known contemporary artwork, *The Nightwatch*. A short 2004 film by Francis Alys, it documents through surveillance cameras the nocturnal travels of a lone fox set loose in London’s National Portrait Gallery.⁸⁸ Would audience response have changed if museums permitted Huang to set his inmates loose in the exhibition rather than keep them enclosed in a cage installed at a height just low enough for most viewers to look upon the animals from an omniscient viewpoint? The real objection to *Theater of the World* may lie in how nonchalantly it naturalizes human dominion over other sentient creatures. At the same time, it also laid bare human unease with animal behavior. Taking a page from *A Case Study of Transference*, Huang claimed his work centered on how insects create their own relationships.⁸⁹ In deciding to remove all the animals from the installation before the exhibition opened—the only institution to do so—the Guggenheim signaled an exceedingly humanist discomfort with how animal relationships often entail the destruction of one party at the hands (or claws, coils, fangs and pincers) of another.

Theater of the World emphasized the significance of the viewer in a way that coincided with legal recognition. Article III of the U.S. Constitution grants parties the right to seek relief from the government if they can prove that they have suffered a recognizable harm. In sharp contrast to the court of public opinion where an artwork’s perceived violation of an individual’s ethical or moral belief is enough to file “suit,” Article III does not recognize ideological harm by itself as grounds for legal standing.⁹⁰ However, “the desire to use or observe an animal species, even for purely esthetic purposes” has been recognized by the Supreme Court as a “cognizable interest.”⁹¹ Cass Sunstein has written at length about “aesthetic injury” through *Animal Legal Defense Fund, Inc. v. Glickman*, a case decided in 1998 involving a frequent zoo visitor who claimed he had suffered “aesthetic injury” by seeing primates in what he felt were unacceptable conditions. Although the DC circuit was divided in its opinion with some judges regarding the alleged injury little more than subjective opinion, the majority ruled that viewing animals living in a “nurturing habitat” qualified as a recognized “aesthetic interest,” a claim that could potentially have been made of seeing the animals in *Theater of the World*.⁹²

“A nuisance may be merely a right thing in the wrong place - like a pig in the parlor instead of the barnyard,” wrote Justice George Sutherland in *Euclid v. Ambler* in 1926.⁹³ Almost a century later the reception of *Theater of the World* has us ask whether a murder is “merely” a right thing in a wrong place, like a frog in a museum instead of a pond, or simply a matter of categorization, like a frog who is a pet rather than a noisy pest or an “invasive species.”⁹⁴ An implicit standard is whether a given event or condition sufficiently resembles the animal’s expected natural environment.⁹⁵ It would explain why Xu Bing’s amorous

swine in an enclosed pen excited little outrage while Huang's menagerie in a wood and mesh cage provoked tornadoes of dissent.⁹⁶ When thinking broadly of impermissible behavior via rubrics like cruelty, it seems credible and even desirable to conceptualize animals as a general, catch-all category. But metrics used in deciding the permissibility of an action like death rate or comparative lifespan are hardly consistent. Tate Modern officials defended Damien Hirst, the British artist who used live butterflies in his 2012 installation *In and Out of Love*, by stating how many of the creatures enjoyed "longer lifespans than in the wild due to the high quality of this environment."⁹⁷ Conversely, few animals died in any manifestation of *Theater of the World*, a fact whose relative obscurity reflects what critic Robin Laurence described as a general human "unwillingness to grant the possibility of suffering among what we perceive to be lower orders of animals."⁹⁸ Thus despite the unusually intense volume of protests against *Theater of the World* in Vancouver and New York, they accomplished little to challenge the presumption that killing cockroaches, scorpions, or geckos is a patently lesser crime than killing a more evolved animal.⁹⁹

As Sunstein observes, the inconsistent enforcement of animal welfare statutes due to limited government resources results in a striking gap between what the law permits and what actually takes place.¹⁰⁰ The most effective means of banning live animals from contemporary art would involve legislating a blanket ban on the import, export, and sale of any works using animals so as to both destroy the works' economic value as well as preclude them from international circulation.¹⁰¹ Absent such legislation, the next most reliable means of regulating the use of live animals in art would involve leveraging institutional anxiety fueled by abstract concerns of public safety. Fear of liability has governed museum action since at least the early 1970s, particularly as artworks have become larger, more difficult to produce, and have increasingly relied on human performers or participation.¹⁰² We remember, for instance, how California State University made Frank Brown into a veritable human sacrifice in order to appease the wrath of university community members enraged by *Rat Piece*. We might also recall a more recent instance of how the memory of past exhibitions can permanently alter future presentations: the memory of injuries caused by Robert Morris's set of interactive sculptures *Bodyspacemotionthings* in 1971 directly affected the Tate Museum's decision to recreate the works in 2009 with certain works modified beyond the scope of the artist's intention.¹⁰³ If Morris was initially reluctant to agree to these changes, it was likely fueled by an intuitive understanding of how museums now operate primarily as stewards of risk whose real master is the fear of litigation. Although the Guggenheim's decision to remove the animals compels a reckoning with how animals in fact shape, and even determine, the human, the removal can also be read as another instance of human instrumentalization of animal life to rationalize human actions. On the one hand, we could read the alleged

threats of violence lobbed at the Guggenheim as virtual proposals to exchange human life for animal life.¹⁰⁴ On the other, human arbiters of museum policy mobilize animals to perform public care. We are back to a human-centric model, one where fulfilling moral obligations also means adhering to a romanticized view of animals whose liberation can only be realized through human rescue.

Not all museums or exhibiting institutions chose to remove or alter Huang's work. Many critics deemed *Theater of the World* permissible and even desirable because it imparted educational value by making viewers aware of previously underrecognized or suppressed conditions. Yet one group's definition of acceptability can still prevail over the wishes of others. Inviting an artist to show a particular work reflects what an institution believes as permissible and acceptable. When that institution removes a work due to threats, protests, or other forms of public objection, it diminishes not only its own imprimatur to decide what is artistically permissible but potentially that of institutions perceived as having less prestige in the highly stratified art world. At the heart of defenses raised on Huang's behalf is an unwillingness to accept as enforceable the opinions of a vocal minority. More was at stake than Huang's personal rights of expression; the magnitude of the furor is likely to have a chilling effect on any future work involving live animals at other museums. Even as the use of live animals invites the exercise of institutional authority via regulation in the name of public health or staff safety, incidents like the Guggenheim New York's removal of animals illustrates how power has migrated from traditional sources of authority to special interest groups able to mobilize general public sentiment.

The removal or substitution of the animals is equally legible as a moral rights question. When the venerable Centre Pompidou in Paris replaced live animals with their photographic analogues, the unanswered question was whether that replacement constituted an actionable "mutilation" of Huang's work. Still images could hardly compensate for the absence of conflict which the artist has repeatedly claimed as the work's major theme. Moral rights doctrine holds that an artwork is an extension of the artist and therefore the artwork is entitled to certain rights. But we may speculate that the substitution of live animals with their photographs so undermined the work as to destroy or even kill it outright, a point Huang seems to have realized by his decision to "euthanize" *Theater of the World* by releasing the animals himself. Metaphorical death such as this introduces the possibility of thinking about the rights of inanimate objects or events. At the same time it spotlights ethical spectatorship as an infinite moral dilemma loop. Almost every situation is a trade-off. Proposing that Huang use photographs as an equivalent substitute for live animals assumes that the proposer knows more about the artwork than the artist and that subsequent viewers will consider juxtaposed still images equivalent to the interaction between live animals. The proposal reads as an example of surrogate authoring, which includes racist scripts

that pits the enlightened Western (Euroamerican) voice against the uncivilized Asian (Chinese) Other.¹⁰⁵ Somewhat less unacceptable from the viewpoint of Huang's defenders would be to ask Huang how he might reimagine his work so that conveys the same message. But this too is troubling for it implies that artworks are primarily defined by their capacity to bear some kind of intelligible meaning which can be readily divorced from the conditions that structure viewer experience. Should museum definition of public safety include decreasing the likelihood of animal harm, we might accordingly shift the burden of justification onto the artist seeking to use live animals. In exchange, the museum or other exhibition host should be obligated to address any structural issues arising from the work's display, modification, or omission, including the inescapable connections between live animal use and matters of race.

Of the work's Paris installation, Huang discounted any suggestion of human superiority.¹⁰⁶ But the question of who in fact is entitled to regulate human-animal relations galvanized even the most jaded contemporary art viewer into thinking about human sovereignty as a fundamentally relativized position. If Huang—who died in 2019—is right in observing humans and animals “are on the same level and open to [the] same danger,” then getting used to thinking about what kinds of habitats-in-common are possible when death is a shared future may be the humanity both art and law need most, now.¹⁰⁷

1. Notable, for instance, is how Steve Baker's *Artist Animal*—one of the most comprehensive discussions of live animals in contemporary art—opens his book with a description of Anthony Julius's disapprobation of artists whose works place the animal over the human. Steve Baker, *Artist Animal*, (Minneapolis: University of Minnesota Press, 2013), 1. Julius is a well-known British attorney known for, among things, his condemnation of anti-Semitism, including the demonization of animal slaughter done in accordance with Jewish religious law (*shechita*) and the consequent weaponization of animal welfare by pro-Nazi and neo-Nazi activists in Great Britain. Anthony Julius, *Trials of the Diaspora: A History of Anti-Semitism in England*, (Oxford: Oxford University Press, 2010), 341–4.

2. Some well-cited recent discussions of the latter turn towards human/non-human relations include calls for art history to account more proactively about materials including Michael Yonan, “Towards a Fusion of Art History and Material Culture Studies,” *West*

86th: *A Journal of Decorative Arts, Design History, and Material Culture* 18, no. 2 (Fall-Winter 2011): 232–48; the popularity of “thing” theory and network theory imported from sociology and philosophy in the name of a “material turn,” as summarized by Jennifer Roberts, “Things: Material Turn, Transnational Turn,” *American Art* 31, no. 2 (Summer 2017): 64–8; and the popularity of posthumanist thinking such as “Object Oriented Ontology” that rejects “the primacy of relations over things” but also diverges from the natural and social sciences that “attempt a literal paraphrase of what objects are by detecting and summarizing their qualities” and instead joins forces with art and its “love of objects” that “cannot be paraphrased.” Graham Harman, “Art Without Relations,” *Art Review*, 4 September 2014. <https://artreview.com/september-2014-graham-harman-relations/>, accessed 11 June 2010.

3. Cary Wolfe, *Before the Law: Humans and Other Animals in a Biopolitical Frame* (Chicago: University of Chicago Press, 2013), 8–9.

4. Stanley Hauerwas, *A Community of Character: Towards a Constructive Christian Social Ethic*, (Notre Dame: University of Notre Dame Press, 1981), 225–6.
5. The human status of pets is most likely to be recognized within the domain of family law. Pets, particularly dogs, increasingly feature as subjects of domestic violence protection orders as well as custody battles whose ferocity can rival those involving children. See Barbara J. Gislason, *Pet Law and Custody: Establishing a Worthy and Equitable Jurisprudence for the Evolving Family*, (Chicago: American Bar Association, Section of Family of Law, 2017).
6. For a discussion of these defenses as a matter of competing philosophies see Ted Nannicelli, "Animals, Ethics, and the Art World," *October* 164 (Spring 2018): 113–32.
7. Anthony Cross, "The Animal is Present: The Ethics of Animal Use in Contemporary Art," *Journal of Aesthetics and Art Criticism* 76, no. 4 (Fall 2018): 524.
8. Lori B. Andrews, "Art as a Public Policy Medium," *Signs of Life: Bio Art and Beyond*, ed. Eduardo Kac (Cambridge: MIT Press, 2007), 142.
9. Hendrik Hartog, "Pigs and Positivism," *Wisconsin Law Review* 4 (1985): 935.
10. Joan Kee, *Models of Integrity: Art and Law in Post-Sixties America*, (Berkeley: University of California Press, 2019), 46–7.
11. Martin Harries, "Regarding the Pain of Rats: Kim Jones's Rat Piece," *TDR: The Drama Review* 51, no. 2 (Spring 2007): 165.
12. For an engaging summary of key examples of animal-centric legal practice see Joyce Tischler, "The History of Animal Law, Part I (1972–1987)," *Stanford Journal of Animal Law and Policy* 1 (2008): 1–49.
13. Al Hanson, "London: Destruction in Art Symposium," *Arts Magazine* 66, no. 1 (March 1967): 52–3. A highly visible event that would become a benchmark in the history of performance, the London-based symposium "Destruction in Art" included a work involving the slaughter of chickens.
14. Through his lawyer, Jones asserted that his performance was "conduct" that "falls within the protection of the First Amendment. Demurrer to Complaint Pursuant to Penal Code 1004 (4)(5), NO. 31540476, 29 April 1976, 1. Republished in Kim Jones, *Rat Piece: February 17, 1976* (U.S.: Kim Jones, 1991).
15. J., undated letter to T., republished in *ibid.*, 48.
16. Following RSPCA complaints regarding the incineration of butterflies, the play's director, Peter Brook, concocted a strategy in which the RSPCA was told a "secret": that the butterflies used on stage were made of paper. Should the RSPCA disclose this information or make further complaints, the director would proceed to use live butterflies. According to Hall, "the blackmail worked." Peter Hall, *Making an Exhibition of Myself: The Autobiography of Peter Hall* (London: Sinclair-Stevenson, 1993), 198.
17. Since the 1980s there has been a decided uptick in descriptor substitutions; what was once known as "food" is now described as "victims," where "killing" is now "murder" and even comparisons between animal cruelty to human slavery and the Holocaust. See, for instance, Charles Patterson, *Eternal Treblinka: Our Treatment of Animals and the Holocaust* (New York: Lantern, 2002).
18. J., undated letter to T., *Rat Piece: February 17, 1976*, 49.
19. "Even rats have the right to live," *University Times*, 19 Feb 1976, republished in *Rat Piece: February 17, 1976*.
20. Brown quoted in "Nude 'artist' beings controversy to Union," *University Times* 19 Feb 1976, republished in *ibid.*
21. Martin Rickler, "Psych. Dept. Reacts to Rat Killing," *University Times* 23 Feb 1976, republished in *ibid.*
22. Andrews, 139.
23. Jones's lawyer thought the artist could have been acquitted if they had gone to trial. Carl Capozzola, letter to Kim Jones, 26 May 1976. Published in *Rat Piece: February 17, 1976*.
24. Charlotte Willard, "Violence in Art," *Art in America* 57, no. 1 (January 1969): 36–43.
25. Jacques Derrida and David Wills, "The Animal That Therefore I Am (More to Follow)," *Critical Inquiry* 28, no. 2 (Winter 2002): 375.
26. Donna Haraway, *When Species Meet*, (Minneapolis: University of Minnesota Press, 2008), 39.
27. Rebecca J. Huss, "Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals," *Marquette Law Review* 86, no.47 (2002): 68–9.

28. Gary Francione, *Animals, Property, and the Law*, (Philadelphia: Temple University Press, 1995), 26.
29. Demurrer to Complaint Pursuant to Penal Code 1004 (4)(5), NO. 31540476, 29 April 1976, 4. Republished in *Rat Piece: February 17, 1976*.
30. Robert Hughes, undated letter to David Riles, republished in *ibid*.
31. Examples include the Swiss legislation amending its constitution in 1992 to redefine animals as “beings” rather than things and the incorporation of animal protection without regard to species into the German constitution in 1994. Jessica Eisen, “Liberating Animal Law: Breaking Free from Human-Use Typologies,” *Animal Law Review* 17, no. 59 (2010): 64–6.
32. Quoted in Patricia Clough, “Dingo comes to the rescue of ants imprisoned for art,” *Independent*, 19 June 1993. <https://www.independent.co.uk/news/dingo-comes-to-the-rescue-of-ants-imprisoned-for-art-1492665.html>, accessed 7 February 2020
33. One of the most influential newspapers in Italy implied that the swiftness of legal response was not because the use of ants qualified as a animal welfare violation but because Yanagi had used “foreign” ants whose possible escape from the work might disrupt the reproduction of local ant species. Antonello Francica, “Liberate 5 Mila Formiche ‘Esposte’ alla Biennale,” *la Repubblica*, 18 June 1993
34. “Animal Rights Backer Finds Nothing Artistic about Display of 200 Ants,” *Chicago Tribune*, 20 June 1993.
35. France, for instance, recognized the sentience of animals from 1976, but only that of domestic, tamed, and captive animals. Jean-Marc Neumann has described the turn to animal sentience through a close reading of the Universal Declaration of Animal Rights of 1978 which “unambiguously classifies humans as one animal species among others.” Neumann, “The Universal Declaration of Animal Rights or the Creation of a New Equilibrium between Species,” *Animal Law Review* 19, no. 1 (2012): 98.
36. Valerio Pocar, “Animal Rights: A Socio-Legal Perspective,” *Journal of Law and Society* 19, no. 2 (Summer 1992): 225.
37. *Ibid.*, 226. The interpretation to which Pocar refers was made in 1990.
38. Mitsuhiro A. Takahashi, “Cats v. Birds in Japan: How to Reconcile Wildlife Conservation and Animal Protection,” *Georgetown International Environmental Law Review* 17, no. 135 (2004): 142.
39. See especially Article 27, Law for the Humane Treatment and Management of Animals, Law No. 105, October 1, 1973, revised May 30, 2014. https://www.env.go.jp/nature/dobutsu/aigo/1_law/files/aigo_kanri_1973_105_en.pdf, accessed 17 September 2020
40. Carter Dillard, “Empathy with Animals: A Litmus Test for Legal Personhood?,” *Animal Law Review* 19, no. 1 (2012): 13.
41. Janet Kraynak, “Rikrit Tiravanija’s Liability,” *Documents* 13 (Fall 1998): 35.
42. Accompanying the proliferation of works requiring viewers to not only invest time but also put their physical or personal well-being at possible risk (such as entering a room infused with a chemical compound that causes tearing as in the work of Tania Bruguera for Tate Modern in 2018) is the conspicuous use of liability waiver agreements.
43. Luc Boltanski, *Distant Suffering: Morality, Media and Politics*, (Cambridge: Cambridge University Press, 1999), 3–19, also 35–56.
44. This is a self-perpetuating operation. As Claire Bishop discusses, “the tendency is always to compare artists’ projects with other artists on the basis of ethical one-upmanship – the degree to which artists supply a good or bad model of collaboration – and to criticise them for any hint of potential exploitation that fails to ‘fully’ represent their subjects (as if such a thing were possible).” Claire Bishop, *Artificial Hells: Participatory Art and the Politics of Spectatorship* (New York: Verso, 2012), 19.
45. Tischler, 6. But as leading animal rights lawyer and scholar Steven Wise points out, “next friend” arguments fail because most judges are disinclined to admit the personhood of nonhuman animals. Angela Fernandez, “Legal History and Rights for Nonhuman Animals: An Interview with Steven M. Wise,” *Dalhousie Law Journal* 41 (Spring 2018): 213.
46. Jane Bennett, *Vibrant Matter: A Political Ecology of Things*, (Durham: Duke University Press, 2010), vii.
47. Italics are those of the court. *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018).

48. Julia Tanner, "Contractarianism and Secondary Direct Moral Standing for Marginal Humans and Animals," *Res Publica* 19, no. 2 (May 2013): 150.
49. David S. Favre, "Judicial Recognition of the Interests of Animals – A New Tort," *Michigan State Law Review* (Summer 2005): 333–67.
50. *Tilikum et al v. Sea World Parks & Entertainment, Inc. et al*, No. 3:2011cv02476 - Document 32 (S.D. Cal. 2012), 5.
51. *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018) (9th Cir. 2018)
52. Cornelia Vismann, "Cultural Techniques and Society," *Theory, Culture & Society* 30, no. 6 (November 2013): 86
53. *Ibid.*, 86.
54. Francione, 7.
55. Will Kymlicka proposes the idea of social membership as replacing current legal models focusing on animals as resources from which to extract human utility. He argues that classifying animals as members of a recognized social category like the family or a company (as co-workers) would help pave the way for animals to be recognized as legal persons. "Social Membership: Animal Law beyond the Property/Personhood Impasse," *Dalhousie Law Journal* 40, no. 1 (2017): 123–55.
56. Xu would also use silkworms in later works.
57. Xu Bing, quoted in Linda Weintraub, *In the Making: Creative Options for Contemporary Art* (New York: D.A.P., 2003), 270.
58. At this time, exhibitions in non-government spaces enabled experimental artists like Xu to assert their right to create non-establishment art which state institutions typically discouraged by the early termination of exhibitions including such work. Wu Hung, "A 'Domestic Turn': Chinese Experimental Art in the 1990s," *Yishu: Journal of Contemporary Chinese Art* 1, no. 3 (Fall/November 2002): 6.
59. <http://www.xubing.com/en/work/details/395?classID=11&type=class>, accessed 8 February 2020.
60. *Ibid.*
61. Pooja Rangan, *Immediations: The Humanitarian Impulse in Documentary*, (Durham: Duke University Press, 2017), 4–5.
62. Of the work's debut, Britta Erickson notes how audience members tried to distract themselves with nervous conversation and seemed "uncertain otherwise where to look." Britta Erickson, *The Art of Xu Bing: Words Without Meaning, Meaning Without Words*, (Seattle: University of Washington Press, 2001), 62.
63. Derrida, 377.
64. Haraway, 19–20.
65. Derrida, 374.
66. Stephen Eisenmann, *The Cry of Nature, Art and the Making of Animal Rights*, (London: Reaction Books, 2013), 255.
67. Ann Wilson Lloyd, "Binding Together Cultures with Cords of Wit," *New York Times*, 18 June 2000, 2.35.
68. Another version of the work staged in 2000 showcased porcine refusal as the pig protagonists "declined to co-operate, preferring to munch on the shoes of spectators." Aidan Dunne, *Irish Times*, 22 December 2000, 12.
69. Ann Wilson Lloyd, "Lost and Found," *Xu Bing: Language Lost*, (Boston: Massachusetts College of Art, 1995), 21.
70. Bennett, 96.
71. Suga Kishio, "Jotai o koete aru," *Bijutsu techo* 324 (February 1970): 24–33.
72. Angela P. Harris, "Should People of Color Support Animal Rights?," *Journal of Animal Law* 5, no. 1 (2009): 28. Also see Justin Marceau, *Beyond Cages: Animal Law and Criminal Punishment*, (Cambridge: Cambridge University Press, 2019), 151–92. A wealth of recent scholarship has addressed the contentious production of racial categories through animal metaphors, as well as the history of legal cases that directly pit animal rights devised largely within a liberal humanist framework against cultural difference as funneled through legal definitions of religious and expression freedoms. See, for instance, Otto Santa Ana, "'Like an animal I was treated': Anti-Immigrant Metaphor in US Public Discourse," *Discourse* 10, no. 2 (1999): 191–224; Glen Elder, Jennifer Wolch, and Jody Emel, "Le Pratique Sauvage: Race, Place, and the Human-Animal Divide," *Animal Geographies: Place, Politics, and Identity in the Nature-Culture Borderlands*, ed. Jennifer Wolch and Jody Emel (London: Verso, 1998), 72–90; Angela P. Harris, "Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford: Oxford University Press, 2011), 44–49. Adjacent to these histories is the dehumanization of Asians on account of how some groups have traditionally consumed animals Anglo-American law has declared are

- most proximate to humans, namely cats and dogs.
73. Claire Jean Kim, *Dangerous Crossings: Race, Species, and Nature in a Multicultural Age* (Cambridge: Cambridge University Press 2015), 72-100.
 74. Terry Grimley, "Watch Your Language in the Art Gallery: Terry Grimley at the Babel Exhibition at the Ikon Gallery," *Birmingham Post*, 30 September 1999, 13.
 75. San Francisco Chinatown vendors claimed that the sale and killing of certain animals for food was entrenched in Chinese culture and therefore should be protected as an extension of Chinese personhood, a claim that Carlos Bea, then a trial judge on the San Francisco County Superior Court, dismissed in 1998 as "not only irrelevant but bothersome" adding that "the laws that apply here are Californian, not Chinese." Kim, 92. Now on the Ninth Circuit, Bea wrote the opinion rejecting PETA's attempts to establish a judicial precedent extending copyright to animals in the notorious monkey "selfie" case. *Naruto v. Slater*, No. 16-15469 (9th Cir. 2018).
 76. Holland Cotter described the work as a "satirical, Orwellian take on the loony ways of cultural interchange, global and personal," "Calligraphy, Cavorting Pigs, and Other Body-Mind Happenings," *New York Times*, 25 January 2002, E45.
 77. Xu Bing, "Trans-boundary experiences: a conversation between Xu Bing and Nick Kaldis," *Yishu: Journal of Contemporary Chinese Art* 6, no. 2 (June 2007): 79.
 78. *Ibid.*, 79.
 79. While I am not wholesale opposed to live animals in artworks, I argue for institutions and funding bodies to hold artists contemplating such works to a stricter standard of conduct. For instance, artists seeking to exhibit their work should be made to sign contracts legally obligating them to care for the animals during the course of the work, and more importantly, *after* the work's display or after its conclusion in the case of a performance. Under no circumstances should animals be sold, released directly into the wild without appropriate supervision or abandoned at a kill shelter.
 80. Xu Bing quoted in Simon Leung and Janet Kaplan, "Pseudo-Languages: A Conversation with Wenda Gu, Xu Bing and Jonathan Hay," *Art Journal* 58, no. 3 (Fall 1999): 93. Another category of viewer worth mentioning is the Chinese state, which in the immediate years after the 1989 Tiananmen Square protests was particularly vigilant for signs of possible dissent, including experimental art. Xu experienced no government interference during his show, but observed that subsequent exhibitions at the Han Mo Art Gallery drew police attention, while he himself returned to New York the day after the show's opening. Xu Bing, "Trans-boundary experiences: a conversation between Xu Bing and Nick Kaldis," 78-9.
 81. Wesley V. Jamison and William M. Lunch, "Rights of Animals, Perceptions of Science, and Political Activism: Profile of American Animal Rights Activists," *Science, Technology & Human Values* 17, no. 4 (October 1992): 438-58. Interestingly, most of the interviewed activists demonstrated marked skepticism towards science in part because scientists were "men in white coats" not only responsible for harming animals but because they belonged to a class of patriarchal authority figures, including politicians and businessmen. *Ibid.*, 453.
 82. Wall text accompanying the display of *Theater of the World* describes thus: "the work functions as a metaphor for the conflicts among different peoples and cultures."
 83. The majority of exhibits proceeded without controversy, including at the Guggenheim Museum's SoHo branch in 1998, at the Jack Tilton Gallery in New York in 2000, at the Walker Art Center in Minneapolis and Mass MoCA in North Adams, Massachusetts in 2006.
 84. Jérôme Sans, "Huang Yong Ping: Art as a War of Imagining," *China Talks: Interviews with 32 Contemporary Artists* (Hong Kong: Timezone 8, 2009), 25.
 85. Alexa Olesen, "A Dadaist Whose Art Can Bite," *New York Times*, 8 June 2000.
 86. Doryun Chong, "A Chinese Homecoming," *Walker Reader*, 16 April 2008. <https://walkerart.org/magazine/chinese-homecoming>, accessed 4 August 2020. All U.S. states have some form of prohibition against animal fighting. In Minnesota, where the Walker Art Center is located, animal fighting statutes are limited to fighting among dogs, roosters, pets

- and other companion animals. Minn. Stat § 343.31. However, six states (Delaware, Florida, Michigan, Oregon, Utah and Virginia) have banned all forms of animal fighting.
87. Cited in Sans, 25. Quoted in Ian Mulgrew, "Art exhibit a commentary on prisoners being watched," *The Vancouver Sun*, 9 April 2007.
 88. While many audience members applauded *The Nightwatch*, others called it "irresponsible" for allowing an animal to make physical contact with some of the works on display. Lance Esplund, "Of Celestial Beings, Sly Foxes and Weehawken," *Wall Street Journal*, 4 February 2011.
 89. Quoted in Francesco Bonami, *Truce: Echoes of Art in an Age of Endless Conclusions* (Santa Fe: Site Santa Fe, 1997), 20.
 90. Perhaps the most vivid instance of this is a change.org petition circulated by a single individual which demanded that all works involving animals be removed from the Guggenheim exhibition. The petition garnered more than 820,000 signatures as well as significant media attention. <https://www.change.org/p/promote-cruelty-free-exhibits-at-the-guggenheim>, accessed 11 September 2020
 91. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
 92. Cass Sunstein, "Standing for Animals (with Notes on Animal Rights)," *UCLA Law Review* 47 (2000): 1349. As Sunstein adds in his reading of *Animal Legal Defense Fund, Inc. v. Glickman*, the court was divided as to whether the act of intentionally viewing animals in a zoo was enough for individuals to claim an interest in the prevention of what they perceived as improper treatment. Of the Guggenheim show, Huang noted that most protestors never saw the works in person, but merely succumbed to a particular media structure that "has engendered a new servility that makes people parrot each other." Scarlet Cheng, "After Guggenheim removes animal-related pieces from 'Art and China,' what's left? More questions," *Los Angeles Times*, 27 October 2017. Indeed, even those not categorically opposed to the use of live animals in artworks seem to have relied only on the most cursory descriptions of the work. See, for example, Giovanni Aioi's unsubstantiated assertion that *A Case Study of Transference* casts the viewer as a "sadistic voyeur." "Should Museums Display Artworks that Feature Live Animals?," *Apollo* (June 2018): 29.
 93. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 1926.
 94. The contempt with which humans hold the aural presence of frogs—even to the point where frogs are frequently killed or harmed for daring to croak—is perhaps most vividly described by William Hogan the anti-Catholic activist, who, when starting his legal practice described "a most hideous chorus – just as Papists have done for more than twenty years." William Hogan, *A Synopsis of Popery, as It Was and as It Is* (Hartford: S. Andrus, 1851), 227.
 95. Moving beyond the do-no-harm idea underpinning the idea of permissibility, at least one artist implies that the acceptability of live animals in art could depend on whether the work benefits the animals in some way. In 2010, Elizabeth Demaray created *Corpor Esurit, or we all deserve a break today*, which supplied ants with fast food. The ants lived at least a week more than was expected of their species, a finding repeatedly mentioned in descriptions of the work. Sheila Prakash, "Desert Dwellers on a Fast Food Diet," *New York Times*, 23 August 2010.
 96. An unnamed veterinarian alleged that the insects and reptiles used in the exhibit may be completely incompatible, and should not be confined together. Brian Hutchinson, "Reptiles safe from the angry crowd," *National Post*, 13 April 2007.
 97. Uncredited Tate Modern statement quoted in multiple news sources. "9,000 Butterflies Die for Damien Hirst's Art," *BBC*, 15 October 2012. <https://www.bbc.co.uk/newsround/19948359> accessed 2 April 2020.
 98. Four creatures died in the Vancouver iteration; when *Theater of the World* was shown in Oxford and Stuttgart, only twenty percent of the animals died and most were cockroaches supplied as food. On Huang's work, see Robin Laurence, "Huang Yong Ping," *Border Crossings* 26, no. 3 (August 2007): 132.
 99. *Ibid.*, 132.
 100. Sunstein, 1366.
 101. A case in point is *Canyon* (1959), Robert Rauschenberg's three-dimensional assembly, or in his words, a "combine" of objects which includes a bald eagle whose sale and export is

- barred in the U.S. per the 1940 Bald and Golden Eagle Protection Act and the 1918 Migratory Bird Treaty Act. Because of the criminal liability that would incur should a sale or trade be attempted, appraisers valued the work at zero. Patricia Cohen, "Art's Sale Value? Zero. The Tax Bill? \$29 Million," *New York Times*, 22 July 2012. <https://www.nytimes.com/2012/07/22/arts/design/a-catch-22-of-art-and-taxes-starring-a-stuffed-eagle.html?pagewanted=all>, accessed 18 October 2020
102. Kee, 17–20.
103. For discussions of the exhibition and its closing, see Jon Bird, "Minding the Body: Robert Morris's 1971 Tate Gallery Retrospective," in Michael Newman and Jon Bird, eds., *Rewriting Conceptual Art* (London: Reaktion Books, 1999), 88–106.
104. Guggenheim Museum, "Statement Regarding Works in 'Art and China after 1989: Theater of the World,'" <https://www.guggenheim.org/press-release/works-in-art-and-china-after-1989-theater-of-the-world>, accessed 14 July 2019.
105. A case in point is PETA representative Ingrid Newkirk who argued that withdrawing the offending works "may help [China] and its artists recognize that animals are not props and that they deserve respect." Robin Pogrebin and Sopan Deb, "Guggenheim Museum Is Criticized for Pulling Animal Artworks," *New York Times*, 17 September 26.
106. Huang Yong Ping, cited in *A Fruitful Incoherence: Dialogues with Artists on Internationalism* (London: inIVA, 1998), 112.
107. *Ibid.*, 112.

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