Katharina Braun

Law and Protest at the Periphery of Democracy

Evaluating Legal Responses to Animal Activism and Undercover Footage

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List of Abbreviations

ACLU	American Civil Liberties Union
AETA	Animal Enterprise Terrorism Act
Ag-gag	Agriculture-gag
ALDF	Animal Legal Defense Fund
ALEC	American Legislative Exchange Council
ALF	Animal Liberation Front
BGB	German Civil Code [Bürgerliches Gesetzbuch]
BGBl.	Bundesgesetzblatt
BVerwG	Federal Administrative Court [Bundesverwaltungsgericht]
CJEU	Court of Justice of the European Union
dpa	Deutsche Presse-Agentur
e.V.	Registered association [eingetragener Verein]
ECtHR	European Court of Human Rights
EU	European Union
f./ff.	Following
FAO	Food and Agriculture Organization of the United Nations
FBI	Federal Bureau of Investigations
FCC [BVerfG]	German Federal Constitutional Court [Bundesverfassungsgericht]
FCJ [BGH]	German Federal Court of Justice [Bundesgerichtshof]
GA	Goltdammer's Archiv für Strafrecht
GG	German Basic Law [Grundgesetz]
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
JA	Juristische Arbeitsblätter

JR	Juristische Rundschau
JuS	Juristische Schulung
LG	District Court [Landgericht]
MMR	Multimedia und Recht
NJW	Neue Juristische Wochenschrift
NStZ	Neue Zeitschrift für Strafrecht
NSW	New South Wales
NuR	Natur und Recht
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NZWiSt	Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht
OLG	Regional Court [Oberlandesgericht]
OVG	Regional Administrative Court [Oberverwaltungsgericht]
Para.	Paragraph
Qld	Queensland
SHAC	Stop Huntingdon Life Science Cruelty
StGB	German Criminal Code [Strafgesetzbuch]
StPO	German Criminal Procedure Code [Strafprozessordung]
TE-SAT	EU Terrorism Situation & Trend Report
UN	United Nations
TierSchG	German Animal Protection Act [Tierschutzgesetz]
TierSchNutztV	Farm Animal Welfare Regulation [Tierschutz-Nutztierhaltungsverordnung]
VGH	Regional Administrative Court [Verwaltungsgerichtshof]
ZD	Zeitschrift für Datenschutz
ZPO	German Civil Procedure Code [Zivilprozessordnung]
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft
ZUR	Zeitschrift für Umweltrecht

Part I: Groundwork

1. Introduction

In 2008, the Humane Society of the United States published undercover footage from a Hallmark/Westland meat plant. It showed cows 'too sick to stand, much less walk, being chained, dragged, fork-lifted, kicked, jabbed, and then dumped into America's food supply.'[1] The publication of this footage lead to a recall of ground beef,[2] the costs of which sent Hallmark/Westland out of business. In the wake of the video, two slaughterhouse workers plead guilty to criminal animal cruelty charges,[3] and a public debate ensued regarding food safety and animal welfare.[4] This example illustrates how the publication of undercover footage can bring about remarkable economic, legal, and political consequence.[5]

When animal activists engage in activities such as the above, they pose unique challenges to democracy and the law. They pursue radical social and legal change. Doing so is necessary, they argue, to give a voice to animals who are not represented in the political arena, although they matter moral-

1 Opening Statement of Senator Herb Kohl, Hallmark/Westland Meat Recall: hearing before a subcommittee of the committee on appropriations United States Senate 110 Congress, Senate Hearing 110–693, 28 February 2008, available at: https://www.govinfo.gov/content/pkg/CHRG-110shrg44333/html/CHRG-110shrg44333.htm (last accessed 31 March 2022).

2 Martin, Andrew, Largest Recall of Ground Beef is Ordered, The New York Times, 18 February 2008, available at: https://www.nytimes.com/2008/02/18/business/18recall.html (last accessed 30 March 2022).

3 The Food Industry Center University of Minnesota, National Center for Food Protection and Defense, Westland/Hallmark: 2008 Beef Recall. A Case Study by The Food Industry Center, January 2010, 6 f., available at: https://ageconsearch.umn.edu/record/58145/ (last accessed 30 March 2022).

4 Hallmark/Westland Meat Recall: hearing before a subcommittee of the committee on appropriations United States Senate 110 Congress, Senate Hearing 110–693, 28 February 2008.

5 According to the Humane Society, other organizations had previously brought the animal abuse at Hallmark/Westland to the United States Department of Agriculture's attention, 'yet the mistreatment persisted.' Statement of Wayne Pacelle (Humane Society of the United States), Hallmark/Westland Meat Recall: hearing before a subcommittee of the committee on appropriations United States Senate 110 Congress, Senate Hearing 110–693, 28 February 2008.

ly. To protect animals, activists demand that others radically change their behavior, for example by ceasing to produce and consume animal products, or by further restricting the use of animals in research.

To achieve this goal, animal activists sometimes resort to controversial methods at the limits of legality, such as the clandestine creation of undercover footage from animal facilities. Activists secretly, or under false pretense, enter slaughterhouses, farming facilities, and research laboratories to capture the conditions under which animals live and die. They use the footage as evidence to initiate legal proceedings against a facility operator, display it at protests, share it online, or collaborate with the media to create documentaries and broadcast them on TV. Doing so, activists may argue, brings animal suffering closer to the public's eyes and is intended to improve the enforcement of existing animal welfare law, raise consumer awareness and – on the long term – effect legal and political change towards a fuller legal recognition of animals' moral rights. Activists who rely on this strategy seem to build on the assumption that if only others could see animal suffering inside factory farms and slaughterhouses, they would abandon animal products and join the ranks of those who demand legal change. Whether this is assumption is empirically sound remains up for debate.

However, this dissertation is interested in the legal and democratic questions arising from activists' actions at the margins of the legal order: how does and how should the law respond to these actions? Is there a place for animal activists and their strategies in our democratic practices? How can their conscientious motivation be considered without passing them a carte blanche to break the law?

This dissertation analyzes, evaluates, and compares legal responses to animal activism in Germany and in the United States. Although it primarily focuses on these geographical areas, it may also inform legal discourse in other jurisdictions, as it sheds light on the understudied realm between legality and legitimacy in which animal activists operate. I chose the creation and dissemination of undercover footage as a case study, since it is a popular strategy, and, as I hope to show in the following Chapters, it promises insights regarding the tensions between the illegal and the legal as well as the democratic and the undemocratic elements of activism.

I aim to show how the law addresses the creation and dissemination of undercover footage. The law allows one to consider different criteria to decide whether footage can be disseminated, but it is not always clear

which are decisive, and why. When creating undercover footage activists risk prosecution for criminal trespass,[6] or even under so-called 'ag-gag laws,' which are specifically designed to counter animal activism by means of the creation of undercover footage.[7] This gives rise to the question whether some legal concepts would allow activists to go unpunished,[8] and also whether the strategy of increased criminalization via ag-gag laws is appropriate to the transgressions made by activists.[9] When activists disseminate undercover footage, they may also face severe limitations, especially as compared to media outlets.[10] Here, one may ask on what grounds this distinction is made. Activists and journalists may invoke freedom of expression, but they must answer to the operators of the businesses in question who may argue that their privacy and property rights are violated by the dissemination. These issues have given rise to numerous legal cases, some of which I will examine in the following Chapters.[11]

As a rule, the law provides its own normative structure and plenty of room to reach just outcomes in these difficult cases. And yet, as I show in this dissertation, the law also leaves some room for practical reasoning, especially in difficult cases which require a careful balancing between legally protected rights and values, such as property, democracy and animal protection. I show that when Courts engage in this kind of practical reasoning, they sometimes invoke concepts beyond black letter law. I specifically discuss the concepts of the 'public watchdog'[12] the 'rules of the intellectual battle of ideas'[13] as well as the assertion that activists breaking the law are a threat to democracy.[14] These concepts matter, because – as I will show – the protection afforded to animal activists hinges on them. To make sense

6 See Chapters 7 and 8.
7 On ag-gag see Chapters 10 and 11. The term ag-gag was popularized by journalist Mark Bittman. Bittman, Mark, Who Protects the Animals? The New York Times, 26 April 2011, available at: https://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/ (last accessed 3 August 2021).
8 See Chapter 9.
9 See Chapter 10.
10 See Chapter 6.
11 See Chapters 5 and 6.
12 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018; see Chapter 6.
13 ECtHR, *Tierbefreier e.V. v. Germany*, App. no. 45192/09, 16 January 2014; see Chapter 5.
14 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017; see Chapter 8.

of these non-legal concepts and evaluate judicial reasoning that employs them, we need to invoke non-legal interpretative tools. In other words, if we want to uncover the implications of Court's reasoning in these cases, we need to interpret and discuss these non-legal concepts, too. This is why I employ democratic theory (a stream of normative political philosophy) to reconstruct and evaluate legal reasoning in cases concerning animal activists.[15] I refer to this method as 'normative reconstruction.'[16]

Throughout, I work with non-legal concepts as they emerge from the judicial reasoning, rather than resorting to democratic theory as independent yardstick for evaluation. As I will show in this dissertation, Courts' engagement with the abovementioned non-legal concepts usually remains superficial or nascent. I offer a fuller interpretation and engagement with these non-legal concepts and theories supporting them.[17] Doing so can lead to a critique of existing legal reasoning, but it can also lend further support to a Court's approach. As such, my approach constitutes an internal rather than external critique of law and legal reasoning.

1.1 Placing the Dissertation in the Field of Animal Studies

The moral and political theory of animal rights is a thriving field of research, and animal issues are increasingly being considered in legal studies, too. And yet, few contributions shed light on animal activism.

For much of its academic history, the question of how to treat animals has been left to the purview of moral philosophers. It spans from the utilitarian position most famously advanced by Peter Singer in his seminal book *Animal Liberation*,[18] to the deontological approaches defended by, *inter alia*, Tom Regan and Christine Korsgaard, producing a rich body of literature.[19]

More recently, animals have also become a subject of political philosophy. The beginning of the so-called *political turn in animal ethics* was marked by the publication of *Zoopolis* by Sue Donaldson and Will Kymlic-

15 See Chapter 3.
16 See Chapter 2.
17 See Chapter 2.
18 Singer, Peter, Animal Liberation (New York: HarperCollins 2009 ed.).
19 Regan, Tom, The Case for Animal Rights (Berkley: University of California Press 2004 ed.); Korsgaard, Christine M., Fellow Creatures: Our Obligations to the Other Animals (Oxford: Oxford University Press 2018).

ka in 2011.[20] Within this political turn, philosophers and political scientists explore questions such as the representation of animals in the political system, as well as their rights as members of political communities.[21] Still, few contributions working within the political turn shed light on the role of animal activists. Of those that do, some emphasize the contribution of activists to democratic deliberation,[22] while others question whether (deliberative) democracy can accommodate animal activists.[23]

The political turn in animal ethics intersects with an increasing scholarly interest in animals, the so-called *animal turn* in the social sciences, and in law.[24] 'Global Animal Law' is a burgeoning field of research and can be defined as 'the sum of legal rules and principles (both state made and non-state made) governing the interaction between humans and other animals, on a domestic, local, regional, and international level.'[25] Legal scholars argue not only for higher animal welfare standards, but also for animal personhood and fundamental animal rights (in parallel to human rights).[26] An accompanying theme in legal literature is that concerning the reconciliation of human rights and animal welfare in cases where conflicts

20 Donaldson, Sue/ Kymlicka, Will, Zoopolis: A Political Theory of Animal Rights (New York: Oxford University Press 2011); Cochrane, Alasdair/ Garner, Robert/ O'Sullivan, Siobhan, Animal Ethics and the Political, Critical Review of International Social and Political Philosophy 21 (2018), 261–277.

21 See e.g., Cochrane/ Garner/ O'Sullivan 2018.

22 Garner, Robert, Animal Rights and the Deliberative Turn in Democratic Theory, European Journal of Political Theory 18:3 (2019), 309–329; Parry, Lucy J., Don't put all your speech-acts in one basket: situating animal activism in the deliberative system, Environmental Values 26 (2017), 437–455.

23 Hadley, John, Animal Rights Advocacy and Legitimate Public Deliberation, Political Studies 63 (2017), 696–712; Humphrey, Mathew/ Stears, Marc, Animal Rights Protest and the Challenge to Deliberative Democracy, Economy and Society 35:3 (2006), 400–422.

24 Ritvo, Harriet, on the animal turn, Daedalus 136:4 (2007), 118–122; see also Peters, Anne/ Stucki, Saskia/ Boscardin, Livia: The Animal Turn – what is it and why now?, Verfassungsblog, 14 April 2014, available at: https://verfassungsblog.de/the-animal-turn-what-is-it-and-why-now/ (last accessed 2 March 2022).

25 Peters, Anne, Introduction, in: Anne Peters (ed.), Studies in Global Animal Law (Berlin: Springer 2020), 1.

26 Sparks, Tom/ Kurki, Visa/ Stucki, Saskia, Editorial: Animal Rights: Interconnections with Human Rights and the Environment, Journal of Human Rights and the Environment 11 (2020), 149–155; Stucki, Saskia, Grundrechte für Tiere: Eine Kritik des geltenden Tierschutzrechts und rechtstheoretische Grundlegung von Tierrechten im Rahmen einer Neupositionierung des Tieres als Rechtssubjekt (Baden-Baden: Nomos 2016).

between the two arise, in particular in the areas of religious freedom and animal slaughter,[27] and freedom of research in the context of animal experiments.[28] Rarely does existing literature, even in this context, touch on animal activism as an exercise of freedom of expression.[29]

Currently lacking in the existing literature is a study of the nexus between the two concepts noted above, the *political turn in animal ethics* and the *animal turn in law*. Few contributions employ normative theory to examine animal activism in a legal and judicial context. Aside from some works that focus on animal activism and deliberative democracy,[30] research has mainly been conducted by political scientists and philosophers who have published on animal activism and civil disobedience.[31] So far, this research has rarely been connected to the legal dimension of animal activism.[32] Instead, distinctively legal publications on animal activism tend to be limited to discussions of particular cases or legislation in a given jurisdiction.[33] As such, at the time of writing, there exists no interdisciplinary contribution bringing these fields together and putting law and political theory on equal

27 Peters, Anne, Religious Slaughter and Animal Welfare Revisited: CJEU, Liga van Moskeeen en Islamitische Organisaties Provincie Antwerpen (2018), The Canadian Journal of Comparative and Contemporary Law 5:1 (2019), 269–297; Le Bot, Olivier, The Limitation of Animal Protection for Religious or Cultural Reasons, US-China Law Review 13:1 (2016), 1–12.

28 Frankenberg, Günter, Tierschutz oder Wissenschaftsfreiheit?, Kritische Justiz 27:4 (1994), 421–438; Maisack, Christoph, Zur Neuregelung des Rechts der Tierversuche, NuR 34 (2012), 745–751.

29 Sparks, Tom, Protection of Animals Through Human Rights: The Case-Law of the European Court of Human Rights, in: Anne Peters (ed.), Studies in Global Animal Law (Berlin: Springer 2020), 153–171.

30 Garner 2019; Parry 2017; Hadley 2017; Humphrey/ Stears 2006.

31 Milligan, Tony, Animal Rescue as Civil Disobedience, Res Publica 23 (2017), 281–298; McCausland, Clare/ O'Sullivan, Siobhan/ Brenton, Scott, Trespass, Animals and Democratic Engagement, Res Publica 19 (2013), 205–221.

32 For a notable and recent exception see Josse, Melvin, Repression and Animal Advocacy, PhD thesis submitted at the University of Leicester, School of History, Politics, and International Relations, 2021, available at: https://leicester.figshare.com/articles/thesis/Repression_and_Animal_Advocacy/18319376 (last accessed 6 April 2022).

33 In the German context see Scheuerl, Walter/ Glock, Stefan, Hausfriedensbruch in Ställen wird nicht durch Tierschutzziele gerechtfertigt, NStZ (2018), 448–451; Vierhaus, Hans-Peter/ Arnold, Julian, Zur Rechtfertigung des Eindringens in Massentierhaltungsanlagen, NuR 41 (2019), 73–77; in the United States see e.g., Marceau 2015; Landfried, Jessalee, Bound & Gagged: Potential First Amendment Challenges to "Ag-Gag" Laws, Duke Environmental Law & Policy Review 23 (2013), 377–403.

stance.[34] It is within this gap that this dissertation can be situated, employing normative theory to examine the distinctively legal developments of animal activism. In so doing, I provide an analysis, explanation, and evaluation of legal responses to animal activism informed by democratic theory.

1.2 Research Questions and Claims

In this dissertation, I answer three research questions reflective of the interdisciplinary approach of the project. The first is to be considered legal-doctrinal in nature, the second regards the normative dimension, and the third is comparative.

How do freedom of expression, democracy and animal law interact in cases arising from the creation and dissemination of undercover footage?

In order to address this first question, I show that a nexus exists between the right to freedom of expression and animal protection: the interpretation and the boundaries of the right to freedom of expression both reflect and influence a democracy's stand on animal ethics. Similarly, and simultaneously, a change in a democracy's take on animal ethics causes shifts in the democratic interpretation of the right to freedom of expression. In other words, the fate of freedom of expression and the progression towards the wellbeing of animals are entangled in democratic systems, a nexus which is currently under-researched and underdeveloped in the legal field. The contribution I make to the understanding of this nexus, which will be developed throughout the dissertation, is in illustrating that Courts often fail to acknowledge any link between freedom of expression and animal protection law. This results in decisions restricting animal activists' speech rights, and at the same time, hindering new developments in animal law. For example, some Courts make the legality of the dissemination of undercover footage dependent on there being depictions within that footage of violations of animal welfare law.[35] As a result, even ethically objectionable conditions remain hidden from view, and consumers are left in the belief

34 For a notable exception combining law and political theory see Gelber, Katharine/O'Sullivan Siobhan, Cat got your tongue? Free speech, democracy and Australia's 'ag-gag' laws, Australian Journal of Political Science 56:1 (2021), 19–34. This contribution primarily attends to the situation in Australia.

35 LG Hamburg [Hamburg District Court] 13 December 2013, 324 O 400/13, BeckRS 199308, 2013 (para. 51).

that if legal standards were adhered to, animals would not suffer. However, we will also see that some Courts, notably the German Federal Court of Justice, recognize this problem and allow for the dissemination of undercover footage even in absence of illegal conditions being uncovered.[36]

How does democracy relate to the Courts' reasoning in cases concerning undercover footage?

The second research question is closely linked to the methods of this dissertation,[37] building on the understanding that legal scholarship should investigate questions of democracy in every area of law.[38] I claim that different democratic cultures and practices significantly shape legal reasoning in the cases at hand. Democracy determines the boundaries and interpretation of the right to freedom of expression, while also informing the balancing of interests that is required by the legal standards most prevalent in cases on the dissemination of undercover footage.[39] Further, concerns regarding the ambivalent relationship of animal activists with democracy are invoked by those who argue that activists should be subject to punishment.[40]

At the same time, those legal arguments supporting more lenient legal responses also invoke democratic values by referring to the democratic potential of undercover footage, which can be realized only if citizens receive information that would otherwise be inaccessible to them.[41] These legal arguments resonate with the debates in political theory that occur in the context of civil disobedience. Here, the question raised is whether democracy should accommodate those activities which are undemocratic in nature, and yet promise to improve democracy on the longer term.[42]

These and other quandaries pertaining to democracy can explain some of the legal responses to animal activism and are expanded on in the following Chapters. A better understanding of these normative arguments is needed to both understand existing legal responses to undercover footage,

36 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2881).
37 See Chapter 2.
38 Lepsius, Oliver, Rechtswissenschaft in der Demokratie, Der Staat 52 (2013), 157–186.
39 See Chapters 5 and 6.
40 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 117), reasoning that if it was to allow activists to pursue political aim through illegal means, anarchy would replace democracy.
41 See e.g., in the literature criticizing ag-gag laws Gelber/ O'Sullivan Siobhan 2021.
42 For a comprehensive and compelling account on the relationship between democracy and civil disobedience see Smith, William, Civil Disobedience and Deliberative Democracy (Abingdon: Routledge 2013). See also Chapters 7 and 8.

and to further develop them. To that end, I employ the concept of deliberative democracy to explain and evaluate legal responses to undercover footage. In so doing, I reveal how democratic cultures and practices impact on the both the legal protection or the condemnation that is afforded to activists.

How can different legal responses to undercover footage in Germany and in the United States be explained?

This third and final question is comparative in nature. It arises from the observation that the case of undercover footage is treated very differently in Germany as compared to the United States. In some jurisdictions within the United States, so-called ag-gag laws hinder the creation and dissemination of undercover footage.[43] In Germany on the other hand, Courts have recently adopted progressive approaches more favorable to those animal activists engaged in the creation of undercover footage and to the journalists disseminating it.[44] To explain the striking differences between the United States approach, and the German legal approach to animal activism, socio-legal and doctrinal-legal factors will be taken into account.[45] Further, I suggest that, in the German context, it is deliberative democracy that provides resources for understanding the legal responses to undercover footage.[46] In the Unites States on the other hand, agonism[47] provides a better framework for explaining ag-gag laws. Thus, it is argued that different assumptions about the meaning of democracy, and the role of animal activists therein, can assist in explaining these different legal outcomes.[48]

1.3 Plan of the Dissertation

The dissertation comprises thirteen Chapters in total. Part I, *Groundwork*, begins with this *Introduction*, which forms Chapter 1. In Chapter 2, titled *Methods and Theoretical Underpinnings*, I define key terms such as 'analyti-

43 See Chapter 10.
44 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065); BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018.
45 See Chapter 12.
46 See Chapters 3, 5, and 6.
47 Mouffe, Chantal, By Way of a Postscript, Parallax 20:2 (2014), 149–157.
48 See Chapter 12.

cal,' 'evaluative' and 'normative reconstruction,' to which readers may want to refer back. I further explain the methodological choices made in this dissertation. Next, a detailed exploration is required of what I mean by deliberative democracy and its key role in this dissertation. This is the undertaking of Chapter 3, in which I explain what *Deliberative Democracy* is and defend its place in a legal dissertation on animal activism. Another key concept, which I introduce in Chapter 4, is *Animal Activism*.

In the next step, the dissertation will turn to the more substantive parts. In Part II, titled *The Dissemination of Undercover Footage and the Deliberative Ideal*, I examine legal responses to the dissemination of undercover footage from animal facilities in Germany through the lens of deliberative democracy. The two Chapters in this Part center the discord between traditional and more progressive approaches to deliberative democracy regarding the use of undercover footage: a traditional theory being one that provides support for restricting some animal activists' right to freedom of expression if they break with the deliberative ideal in their strategies; and the others being those theories that point to inequalities in the non-ideal deliberative process and challenge this conclusion. In the cases discussed within the Chapters constituting Part II, I will show that Courts heavily rely on the first stream of theory, without considering compelling arguments of the second.

Concretely, Chapter 5, – *Animal Activists and the Rules of Deliberative Democracy: The Tierbefreier Case* – revolves around the 2014 ECtHR case *Tierbefreier v. Germany*.[49] The domestic Courts issued an injunction against the activist group Tierbefreier, ordering them to desist from disseminating undercover footage from an animal testing laboratory.[50] As other entities were allowed to continue disseminating the same footage, the Courts in effect held that the speech of militant animal activists is less protected than that of others. I put a spotlight on the troubled relationship between animal activists and the deliberative ideal of civic virtues, and highlight its impact on legal cases. Chapter 6, titled *Animal Activists as 'Public Watchdogs?' The Organic Chicken Case,* zeroes in on the distinction between animal activists and media outlets who disseminate undercover footage. The Chapter revolves around the 2018 decision of the German

49 ECtHR, *Tierbefreier e.V. v. Germany*, App. no. 45192/09, 16 January 2014.

50 Case of Tierbefreier: OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2004; case of the journalist who created the footage: OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 77/04, ZUM-RD 579, 2004.

Federal Court of Justice, which allowed a public broadcasting company to disseminate footage from an organic egg farm.[51] I show that unlike the jurisprudence of the ECtHR, the jurisprudence of German Courts does not extend the privileges afforded to the broadcasting company in this case to animal activists. I critically challenge this approach.

In Part III, titled *The Creation of Undercover Footage as Democratic Civil Disobedience*, I turn from the dissemination to the (even more contentious) creation of undercover footage in Germany. Unlike its dissemination, the creation of undercover footage is clearly non-deliberative in nature and often involves criminal trespass. Nevertheless, there may be reasons to reconcile these acts with deliberative democracy and to let activists go unpunished.

In Chapter 7 titled *Beyond Deliberation? Trespass as Civil Disobedience* I argue that trespass to create undercover footage from animal facilities can be conceptualized as civil disobedience. In particular the deliberative approach to civil disobedience developed by William Smith, provides resources for moral and democratic justification of these acts.[52] In a next step, in Chapter 8, titled *Recent Trespass Cases: Civil Disobedience for Animals on Trial?* I analyze recent decisions of German Courts and normatively reconstruct them through the lenses of civil disobedience, and in particular a deliberative account of civil disobedience.[53] In Chapter 9, I broaden the scope and delve into other possible ways to let animal activists go unpunished. This Chapter has a doctrinal-legal focus. Titled *Civil Disobedience, Trespass and the Law*, it critically examines the view that civil disobedience can never be legally justified, and submits both possible justifications and other legal instruments which could be employed to benefit animal activists.

Part IV of the dissertation, *Deliberative Democracy vs. Agonistic Pluralism*, analyzes and compares legal responses to undercover footage in the United States, Australia and Canada with the approach taken in Germany. This Part puts a spotlight on another paradigm employed in response to undercover footage: so-called ag-gag laws specifically targeting animal activists and further criminalizing the creation of undercover footage.

To that end, Chapter 10 titled *Ag-Gag Laws in the United States: Preempting the 'Court of Public Opinion'* examines legal responses to the creation of undercover footage in the United States. In some states so-called 'ag-gag'

51 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018.
52 Smith 2013.
53 Smith 2013.

laws, legislative instruments with the primary purpose and potential effect of preventing animal activists from creating and disseminating undercover footage, have been enacted. Instead of deliberative democracy, agonism[54] can be employed to explain and evaluate legal responses to animal activists in this context. In Chapter 11, titled *Ag-Gag in Other Jurisdictions*, I briefly turn to legislation similar to ag-gag in the United States which is currently emerging in Australia and Canada. I focus on the Australian example where several jurisdictions have recently passed legislation that critics consider similar to US ag-gag legislation.[55] Finally, Chapter 12 examines the differences between legal responses to undercover footage in the United States and in Germany, and also in Australia and Canada, through a more distinctively comparative lens. The Chapter functions to reaffirm my claim that besides socio-legal and doctrinal factors, one needs to look at democratic cultures and practices to explain different legal responses to undercover footage.

Chapter 13, *Conclusion*, will provide, in addition to an overview of the most important findings of this dissertation, an outlook regarding possible legal responses to undercover footage in the future.

2. Methods and Theoretical Underpinnings

In this Chapter, I explain and defend the theoretical underpinnings and methods of this dissertation. In so doing, I show how the methods are essential to the substance of this dissertation and to generating knowledge.

The dissertation at hand combines political philosophy and legal reasoning. Only this interdisciplinary approach can adequately capture the limbo between legality and legitimacy in which animal activism is nested. The goal of this dissertation is not only to identify, describe, and compare different legal responses to undercover footage, but also to explain and evaluate those responses through the lens of democratic theory generally, and deliberative democracy in particular.[56] On this basis, conclusions are drawn in later Chapters relating to how Courts and legislators *should* approach animal activism. Crucially, those conclusions, in providing guidance, will be made in accordance with applicable law and also justified on the basis of

54 Mouffe 2014.

55 Gelber/ O'Sullivan, 2021; Whitfort, Amanda S., Animal Welfare Law, Policy, and the Threat of "Ag-Gag:" One Step Forward, Two Steps Back, Food Ethics 3 (2019), 77–90.

56 On deliberative democracy see Chapter 3.

democratic theory. In the following, I will unpack how the methods of this dissertation can facilitate these ambitious goals.

The three theoretical and methodological pillars of the dissertation are normative jurisprudence (concerned with the relationship between law, politics and ethics),[57] discourse theory of law,[58] and comparative law. Primarily, I borrow from the themes and methods of normative jurisprudence, as this dissertation is based on the thesis that understanding law requires not only knowledge of law and legal concepts, but also of its underpinning values and political dimension.[59] I further draw on discourse theory of law which puts an emphasis on practical knowledge and democracy in law.[60] The third central pillar of this dissertation is comparative law, as I compare legal responses to undercover footage in Germany and in the United States. However, the comparison is not a stand-alone element. Rather, it ties in with normative jurisprudence and discourse analysis: contrasting the different legal responses to undercover footage contributes to their explanation.

Central to the methodological discussions is the explanation of the method of normative reconstruction, which is the methodological cornerstone of the dissertation. This method makes the dissertation interdisciplinary, as it puts law and political theory on an equal stance. It overlaps with normative jurisprudence because it allows to zero in on the relationship between law, politics and ethics. I use political philosophy, and in particular deliberative democracy, to explain and evaluate legal arguments in the context of undercover footage. In so doing, I test the soundness of propositions in legal reasoning under the extra-legal and normative framework of deliberative democracy.

2.1 Definitions

Before delving into the theoretical underpinnings and methods of this dissertation, some key terms which are relevant throughout the dissertation need to be defined. The most important method of this dissertation is the *normative reconstruction* of legal reasoning through the lens of deliberative democracy. Further, the terms *analytical* and *evaluative* are going to

57 Twining, William, General Jurisprudence: Understanding Law from a Global Perspective (Cambridge University Press 2009), 122.
58 Alexy, Robert, The Special Case Thesis, Ratio Juris 12:4 (1999), 374–384.
59 Twining 2009, 122.
60 Alexy 1999.

reoccur. The distinction between *analytical*, *reconstructive*, and *evaluative* claims is key throughout the dissertation.

When referring to *analytical* in this dissertation I imply the process of making rational sense of propositions or arguments[61] in law and legal reasoning. As such, in this process legal reasoning is considered an instance of rational discourse.[62] This is to be distinguished from 'analysis,' which refers to an exercise of testing the legality of certain propositions by interrogating how a Court is applying the law and whether it is doing so correctly. I will refer to this exercise as *legal analysis*.

The term *reconstructive* is linked to that of *analytical*. *Analytical* can refer to the examination of propositions under a non-legal framework (such as deliberative democracy) in so far as this non-legal framework is reflected in legal reasoning. I will refer to this exercise as *normative reconstruction*. I speak of an *analysis* both when testing the *legal* soundness of judicial reasoning (*legal analysis*), but also when testing the *normative* strength of a given argument in light of democratic theory (*normative reconstruction*). Below I will explain the method of normative reconstruction in greater detail.

When referring to *evaluation* I imply the drawing of implications from premises reflected in a given discourse in democratic theory, but only implications which are not drawn in the judicial decision, legislation or other instance of legal reasoning at hand. It is important to note that *evaluation* goes further than the *reconstruction*. I only make evaluative claims when arguing that deliberative democracy would warrant an approach that would be significantly different from the one prescribed by the law or a Court. Further, a *legal analysis* can imply *evaluative* claims where I argue that a legal argument is unconvincing or inconsistent with higher norms.

61 I define 'proposition' as a combination of premises and conclusions. For purposes of this dissertation, the term 'proposition' could simply be replaced by 'argument' in most cases. However, where e.g., legal doctrine is concerned, the notion of an argument might seem somewhat inadequate if it is understood to imply the absence of an analytical truth.

62 More concretely, legal reasoning is understood here in accordance with Robert Alexy as 'a special case of general practical discourse (*Sonderfallthese*).' Alexy 1999.

2.2 Normative Jurisprudence

The first of the three theoretical methods and methodological pillars of this dissertation is that of normative jurisprudence. The field of normative jurisprudence is interested in the relationship between law, politics, and ethics.[63] The dissertation is based on the thesis that an understanding of the law requires, not only knowledge of law and legal concepts, but also of its underpinning values and political dimensions. Due to this thesis, the dissertation can be characterized as belonging to the field of 'normative jurisprudence' as defined by legal theorist William Twining:

> 'Normative jurisprudence encompasses general questions about values and law. It deals with the relations between law, politics and morality, including debates between and among positivists and others about the relationship between law and morals, whether law is at its core a moral enterprise, and about political obligation and civil disobedience. It includes questions about the existence, scope, and status of natural, moral, and non-legal rights; the relationship between needs, rights, interests, and entitlements; theories of justice; constitutionalism and democracy; and standards for guiding and evaluating legal institutions, rules, practices and decisions.'[64]

This dissertation encompasses normative jurisprudence as it is concerned with questions of values and law, as well as the relationship between law, political philosophy and (to a lesser extent) ethics. Further, it focuses on some of the topics listed above; first and foremost, democracy and civil disobedience.

The understanding that legal reasoning involves questions of values is of paramount importance to normative jurisprudence.[65] It implies not necessarily judgments on moral questions, but judgements of moral relevance.[66] Applying clear legal rules to a set of facts may suffice in many, even in the majority of legal cases, but it is not sufficient in the hard cases where the applicable statues, doctrine and/or precedent allow for more than one

63 Twining 2009, 122.
64 Ibid.
65 On value-judgements see also Alexy, Robert, A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification (Oxford: Clarendon Press 1989), 6 f. with further references.
66 Alexy 1989, 9.

possible answer.[67] This is of importance as the cases discussed in this dissertation each fall squarely into this category of hard cases involving the weighing and judging of values.[68] Of course, such a finding raises the question how decisions on values or 'value-judgements'[69] can be evaluated. To that end, this dissertation employs deliberative democracy.[70]

I have consciously opted for the term 'normative jurisprudence' over those of 'legal theory' or 'philosophy of law.' Although a strict delimitation of these terms does not exist, in many minds the latter two are inevitably linked to the classical analytical legal theorists H.L.A. Hart, John Austin and Ronald Dworkin, who are united in their aim to capture nothing less than the nature of the law. In contrast, the dissertation at hand aims, rather, to justify the law and its application to specific decisions and with regard to a subject limited in scope.

It is the modesty in scope of this dissertation which distinguishes it from legal theory, philosophy of law, and even normative jurisprudence. First, the dissertation is tailored to one narrowly circumscribed issue, namely the creation and dissemination of undercover footage from animal facilities. The advocacy strategy of creating and disseminating undercover footage is distinctive and the methodology employed here is tailored to this very phenomenon (see Chapter 3.3). Nevertheless, the findings of this dissertation may inform further studies on other forms of animal activism. In fact, many of the conclusions drawn are also relevant to other 'green' social movements. And yet, claiming them to be applicable indiscriminately would not do justice to the complexity of the moral and political issues at stake. This dissertation does not claim to have uncovered the legal and normative frameworks applicable to all forms of activism, for example.

Further, the dissertation differs from the works typically associated with normative jurisprudence (and even more so from the philosophy of law and legal theory) as it does not claim to depict the very nature of law and/or legal reasoning. Accordingly, the geographical scope of the dissertation is limited. The jurisdictions featuring in this dissertation are Germany, United States, and – to a limited extent – few others. In so far as the normative claims and conclusions are concerned, they may similarly apply to other liberal democracies. The same cannot be said about the doctrinal analysis

67 Ibid., 8.
68 See especially Chapter 12.2.7.
69 Alexy 1989, 6 f.
70 See Chapter 3.

that also plays a significant role in this dissertation: here, inferences about other jurisdictions might be made via the jurisprudence of the European Court of Human Rights (ECtHR), recent high-profile cases, and similarities in legislation. For example, the jurisprudence of the ECtHR plays an important role in Chapters 5 and 6, where it delineates how state parties can limit the freedom of expression of animal activists for employing non-deliberative methods, and whether they can benefit from the privileges of a 'public watchdog.' Further, legislation in Canada and in Australia which operates to hinder the creation of undercover footage may be characterized as 'ag-gag' and be subsect to similar criticism as its counterpart in the United States, which is discussed in Chapter 10. However, even in these cases, the broader application of the conclusions to other jurisdictions should always be treated cautiously.

Unlike the doctrinal arguments, the arguments from deliberative democracy need not to be limited to specific jurisdictions. Rather, they can inform legal discourse in other liberal democracies in which a similar societal attitude towards animals exists and is manifested in the law. Yet, conclusions drawn from these arguments of right and wrong, relating to a decision or legislation, always rest on empirical questions, and thus they also cannot be answered universally.

The substantive nature of the inquiry, as well as its limitation in scope regarding both the subject matter and the jurisdictions involved, distinguishes the dissertation from scholarship typically associated with normative jurisprudence. Thus, what the dissertation borrows from normative jurisprudence is primarily methodological.

2.3 Discourse Theory and Discourse Analysis

The second pillar informing the dissertation at hand is that of discourse theory as developed by Jürgen Habermas, and further established as applicable within the legal field by Robert Alexy.[71] Discourse theory of law 'comprises a set of themes ranging from the problem of practical knowledge via the system of rights to the theory of democracy.'[72] Of particular impor-

71 Habermas, Jürgen, Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats (Frankfurt a. M.: Suhrkamp 2nd ed., 1992); Alexy 1989.

72 Alexy 1999, 374.

tance to the methods and theoretical underpinnings of this dissertation is Robert Alexy's *Sonderfallthese* (or 'special case thesis'), which views legal reasoning as 'a special case of general practical discourse'[73] encompassing moral, political and pragmatic considerations.[74] The special case thesis supposes that legal reasoning is concerned with 'practical' questions (questions about what should or should not be done) and, with regard to these practical questions, claims correctness (meaning, for example, that the Court decision in question is justified in the given legal order).[75] Yet, legal reasoning is considered to be a 'special case' because it takes place under certain constraints; such as those prescribed by procedural law, and the presumption that parties of a conflict may pursue their own interests rather than a 'correct' outcome.[76]

One need not to endorse Alexy's *Sonderfallthese* to make sense of the arguments put forward in this dissertation. Rather, what is essential is the underlying assumption that legal discourse, especially judicial reasoning, is well suited for rational arguments including (but not limited to) arguments arising in response to moral and political questions. Besides Alexy and Habermas, this more general point can also find support in the works of John Rawls and Christopher Eisgruber.[77]

As the dissertation conceives of legal reasoning as an instance of practical discourse, one might be inclined to describe the methods employed as discourse analysis. However, while this dissertation does draw on discourse theory, it is not to be qualified as 'discourse analysis.' In law, discourse analysis usually refers to either critical legal studies (which typically center an analysis and critique of power structures) or to contributions with a special focus on linguistics.[78] The dissertation at hand fits neither of these two categories. Although it does analyze legal reasoning as discourse, it

73 Ibid.
74 Ibid., 377.
75 Alexy 1989, 213 f.
76 Ibid., 212.
77 Rawls, John, Political Liberalism (New York: Columbia University Press 1999), 231; Eisgruber, Christopher, Constitutional Self-Government (Cambridge, MA: Harvard University Press), 3 f. For a critical analysis of this position see Zurn, Christopher, Deliberative Democracy and the Institutions of Judicial Review (Cambridge: Cambridge University Press 2009), 168 f.
78 Baer, Susanne, Rechtssoziologie: Eine Einführung in die interdisziplinäre Rechtsforschung (Baden-Baden: Nomos 3rd ed. 2017), 75. The first kind of discourse analysis traces back to Foucault and there are doubts whether it can even be applied to the law; see Schweitzer, Doris, Diskursanalyse, Wahrheit und Recht: Methodologis-

does so to *reconstruct*, rather than to *deconstruct* legal reasoning. Some legal scholars might use the term discourse analysis regardless, but little is to be gained from that.[79] In short, one can say that the reconstructive (as opposed to deconstructive) and normative (rather than linguistic/empirical) function of the project must caution against labeling it discourse analysis.

2.4 Critical Legal Theory

The dissertation can be associated with critical legal theory to a limited extent, although critical legal theory does not form one of the dissertations central 'pillars.' For example, I advance a form of democratic deficit and lobbyism as possible explanations for legal responses to undercover footage (see Chapter 12). Further, the dissertation leans towards critical legal theory when it engages with animal protection law, its application, and enforcement. Yet, animal protection law plays a subsidiary role in this dissertation. My engagement with the other areas of law such as constitutional law and criminal law is not driven by critical theory. As the following Chapters will show, economic inequalities and entrenched power structures play a crucial role for the speech rights of animal activists and for understanding their somewhat ambivalent relationship with democratic processes. However, this kind of proposition belongs to the conclusive parts of the dissertation, not to its methodological starting point.

Further, my focus on legal reasoning and arguments (rather than statutes or precedent) is informed by critical theory. But then again, the dissertation endorses an *internal* rather than *external* critique: its primary purpose is not to *deconstruct* and thereby critique, but to *reconstruct* and thereby uncover and better understand existing legal reasoning through the lens of democratic theory (see 'normative reconstruction' below). As such, while the thesis engages in elements of critical legal theory, it does not employ them as a methodological basis.

che Probleme einer Diskursanalyse des Rechts, Zeitschrift für Rechtssoziologie 35:2 (2015), 201–222.

79 See also Baer 2017, 76.

2.5 Comparative Law

The third theoretical and methodological pillar of this dissertation is that of comparative law. The comparative element of the dissertation consists of comparing the arguments, going beyond doctrinal analysis, in the decisions of German and US Courts on the matter of the creation and dissemination of undercover footage from animal facilities. Therefore, the comparative element is closely linked to the normative element described below. It is mobilized to better understand the results of the interplay between animal law, democracy, and freedom of expression in both legal systems, and to develop a more critical view of both. As such, the comparison advanced in this dissertation is not an end in itself. Rather, it contributes to the overall argument of the dissertation by advancing democratic theory to explain and evaluate different legal responses to undercover footage.

It should be said upfront that this dissertation does not strive for an in-depth comparison, claiming to comprehend the United States legal system as well as the German system. Such an approach would be neither feasible, nor is it desirable, given that the fast-moving nature of the field. For example, in the United States ag-gag laws may be struck down in Court, while a refined version may be passed shortly after.[80] In Australia, a crucial High Court case challenging the New South Wales ag-gag law is ongoing at the time of writing.[81] In Germany, the passing of ag-gag legislation was on the political agenda when the 2017 government coalition pledged to introducing measures countering trespass on farms.[82] Consequently, a comparison of the law itself would be but a snapshot of a legal landscape which will almost certainly look different, not only in the distant future, but perhaps tomorrow. Against this backdrop, the focus on the normative and argumentative dimension of the law ensures the continuous validity of the points made even in the face of legal change.

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80 ALDF, Ag-Gag Laws – Full Timeline, last update 22 December 2021, available at: https://aldf.org/article/ag-gag-timeline/ (last accessed 1 February 2022). The overview is updated on a rolling basis.

81 High Court of Australia, *Farm Transparency International Ltd & Anor v State of New South Wales* (ongoing) file number S83/2021, filings available at: https://www.hcourt.gov.au/cases/case_s83-2021 (last accessed 18 March 2022).

82 Coalition Treaty: Koalitionsvertrag zwischen CDU, CSU und SPD, Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt für unser Land, 19th Legislative Period, 2018, 86, available at: https://www.bundesregierung.de/resource/blob/974430/847984/5b8bc23590d4cb2892b31c987ad67%202b7/2018-03-14-koalitionsvertrag-data.pdf?download=1 (last accessed 10 February 2022).

Further, the comparison does not follow the functional method. This method is based on the idea that '*functionality*' is the 'basic methodological principle' of comparative law.[83] The underlying assumption of the functional method is that every legal system of every society faces essentially the same problems, but solves them differently.[84] Even proponents of functionalism admit that it does not suit areas of law which are highly contingent upon political and moral values.[85] The tension between freedom of expression and animal welfare on the one hand, and property and privacy rights in the agricultural industry on the other, is certainly political and morally loaded. I acknowledge and actively explore this angle. Therefore, the functionalist approach would not be fruitful for the project.

While the dissertation does not follow functionalist approach, it does borrow from it. The object of the comparison conducted in the dissertation is not only legislation, but also extends to the judicial arguments and normative references employed in determining applicability, and sometimes constitutionality, of legislation. Regarding the comparability, the dissertation borrows from functionalism to some extent: what makes the relevant arguments comparable is that they respond to the *same societal problem*, namely striking a balance between protecting the rights and interests of those working in the agriculture industry and the upholding of the legal order on the one hand, and concerns such as freedom of expression, animal welfare, and consumer protection on the other. The question of how to strike this balance is present in both Germany and in the United States.

Germany and the United States are suitable for a comparative analysis on this matter for several reasons. Overall, animals are afforded less protection in the United States, as I also note in Chapter 12.3. However, despite this difference, the United States and Germany share certain features that render them sufficiently similar for the purpose of this study. Not only do they share the societal problem arising from animal activism mentioned

83 Zweigert, Konrad/ Kötz, Hein, Introduction to Comparative Law (Oxford: Oxford University Press 3rd revised ed., 1998), 34.

84 Ibid.

85 Graziadei, Michele, The Functionalist Heritage, in: Pierre Legrand and Roderick Munday (eds.), Comparative Legal Studies: Traditions and Transitions (Cambridge: Cambridge University Press 2003), 100–128, 102; Michaels, Ralf, The Functional Method of Comparative Law, in: Mathias Reimann and Reinhard Zimmermann (eds.), The Oxford Handbook of Comparative Law (Oxford: Oxford University Press 2nd ed., 2019), 345–389, 385.

above, they also both have advanced industrialized agricultural systems and produce large amounts of animal products.

Despite this factual similarly, when it comes to the legal responses to undercover footage, the two legal systems differ significantly. It is this substantial difference in the responses to similar factual problems that provides a fruitful opportunity for comparison. Several states in the United States have so-called 'ag-gag laws' on the books, criminalizing the activities surrounding the creation and dissemination of undercover footage.[86] In Germany, specific legislation on this issue applicable only to the agriculture industry does not exist. Yet, it is possible that in the future, the responses to undercover footage in both systems may change and be informed by one another. Constitutional challenges of ag-gag laws in the United States have been in part successful.[87] At the same time, options for introducing legislation to protect the agricultural industry from animal activists have been discussed in Germany.[88] This further substantiates the need for a comparative study between the two systems. I will explore the possibility of the two systems informing each other in Chapter 12.4.

2.6 The Role of Political Philosophy: Normative Reconstruction

Having discussed the three theoretical and methodological pillars of this dissertation, the term normative reconstruction must be unpacked as the final and fundamental piece of the dissertation's methodology. The term 'normative reconstruction' is typically associated with forms of internal critique employed by scholars of the Frankfurt School Critical Theory.[89] Although this dissertation draws on the works of Jürgen Habermas (a

86 See Chapters 10 and 11.

87 See e.g., *ALDF et al. v. Gary R. Herbert in his official capacity as Governor of Utah, and Sean D. Reyes, in his official capacity as Attorney General of Utah*, 2:13-cv-00679RJS (D. Utah 2017), memorandum decision and order, 7 July 2017 ('*ALDF v. Herbert*,' in the following). The decision is also publicly available at: https://www.animallaw.info/case/animal-legal-defense-fund-v-herbert-0 (last accessed 5 August 2021). For an overview of past and ongoing litigation see Animal Legal Defense Fund (ALDF), Ag-Gag Laws – Full Timeline.

88 Coalition Treaty: Koalitionsvertrag zwischen CDU, CSU und SPD, 19th Legislative Period, 2018, 86.

89 For a short explanation (and critique) of how the term 'normative reconstruction' is used by Axel Honneth and how it relates to the Frankfurt School see Schaub, Jörg, Misdevelopments, Pathologies, and Normative Revolutions: Normative Reconstruction as Method of Critical Theory, Critical Horizons 16:2 (2015), 107–130.

prominent contemporary representative of the Frankfurt School), I do not rely on a particular version of normative reconstruction developed in this stream of theory. My usage of the term, which I already indicated above under *Definitions*, is better explained independently.

The method of normative reconstruction is the cornerstone of the dissertation. It puts law and political philosophy on equal stance and thus creates a mutually informative relationship between the two disciplines. More concretely, I use political philosophy in general, and democratic theory in particular, to explain and evaluate legal arguments in the context of undercover footage. In so doing, I test the soundness of propositions in legal reasoning under the extra-legal framework of deliberative democracy. I refer to this process as 'normative reconstruction.' Political philosophy also serves to inform future developments in legal discourse. However, for the purpose of this Section I will focus on the process of normative reconstruction, as it may require further explanation.

Typically, the normative reconstruction in the following Chapters proceeds as follows: Before the normative reconstruction can begin, a legal analysis of the relevant decisions assists in identifying decisive and salient arguments in the Court's reasoning. The legal analysis shows which arguments were decisive in the decision, and how they relate to the applicable law. As explained above, the legal analysis conceives of legal reasoning as instance of rational discourse and tests the legality of certain propositions by interrogating how a Court is applying the law and whether it is doing so correctly. This of course includes, mostly, the use of doctrinal methods. The legal analysis also assists in identifying decisive arguments that echo a stream of the dispute within democratic theory. The most relevant notions are the 'rules' of deliberative democracy (see Chapter 5), the 'public watchdog' (see Chapter 6), civil disobedience (see Chapters 7–9), and the 'court of public opinion' (see Chapter 10).

The normative reconstruction proper then delves into the political philosophy literature on the relevant aspect. This includes literature specifically on animal activism but also general literature on the issue in question independent of animal activism. Finally, I look at the Court's arguments through the lens of democratic theory. Here, the normative reconstruction may merge into a critical evaluation, but it may also support, guide, and improve legal arguments to become more stringent. For example, it can assist in identifying what constitutes responsible journalism, and justify privileging professional journalists over activists when it comes to the dissemination of undercover footage (Chapter 6). In other cases, the nor-

mative reconstruction may show that legal reasoning mentions a non-legal notion relating to democracy without considering the full implications of this concept (Chapter 5).

In Chapter 3, I provide an introduction to deliberative democracy and explain why this stream of theory has been chosen as non-legal evaluative framework for the purpose of the process of normative reconstruction just described.

3. Deliberative Democracy as Key Concept

In Chapters 1 and 2, I frequently referred to deliberative democracy. But what is deliberative democracy? How does it relate to animal studies, and animal activism specifically? And what is its role in a distinctively legal study? Before going into detail about deliberative democracy and answering these questions one by one, it needs to be clear what deliberative democracy can and cannot deliver in this dissertation.

Democracy generally has an essential function to play in law and legal research.[90] This function is of a relational rather than substantive nature: it allows for innovative methodological approaches to the law.[91] It does not imply that democracy is a value to be served over all other constitutional values,[92] but as a theory, a lens through which to appraise law and legal reasoning. It allows one to politicize a topic that is commonly moralized:[93] instead of animal ethics, democracy is the core of the project. While the former is commonly considered a matter of one's beliefs and conscience, perhaps even constitutive of identity or comparable to religion, the latter is open to compromise. As I will explain in the following, deliberative democracy (more than other streams of democratic theory) offers the explanatory and critical resources needed for examining the case of undercover footage.

Against this backdrop, I can be clear about what deliberative democracy is not trying to deliver in this dissertation: I do not consider deliberative democracy to be an ideal theory. In other words, I do not argue, for example, that in an ideal deliberative democracy, the conflict between animal

90 Lepsius, Oliver, Rechtswissenschaft in der Demokratie 52, Der Staat (2013), 157–186.
91 Ibid., 168.
92 Ibid.
93 Lepsius suggest politicizing controversial issues as a way to address conflicts in democracy through law. Ibid., 173.

activists and actors in animal industries would be immediately resolved.[94] Neither do I argue that the rules of democracy should replace the law in the adjudication of legal cases. The law has its own normative structure, and it may well achieve fair outcomes in most cases without recourse to non-legal concepts.

Rather, deliberative democracy is an important and helpful lens through which to look at legal responses to animal activism. For animal studies scholars it is interesting as it sheds light on tools that promise to improve the lives of animals in a non-ideal world. For legal scholars it is helpful as it contributes to explaining and evaluating those limited aspects of legal reasoning that go beyond strictly legal thought. Further, deliberative democracy may contribute to the explanation of different responses to animal activism in different jurisdictions. In short, the ambition of employing deliberative democracy is two-fold. I take legal responses to undercover footage as a starting point from which to explore pertinent questions around animal activism and democracy. In addition, deliberative democracy may shed light on differences between and shortcomings of existing legal responses to undercover footage.

Certainly, democratic theory is not the sole adequate lens through which to look at the case of undercover footage. Possible other approaches include, for example, a study focusing on either the moral or the legal aspects of the issue. The former would be a question of moral philosophy, the latter would be indicative of a strictly positivist approach to law, asking what the law ultimately says. In contrast to these approaches, I will take the law as it is applied as a given, and ask whether it is normatively defensible through the lens of deliberative democracy. Another possible approach would be an empirical methodology, measuring for example the impact of undercover footage on public discourse. Empirical considerations matter greatly to deliberative democracy, and consequently to the approach taken here, but they remain variables that are contingent upon the societal, economic and cultural context and are not to be determined in a dissertation hoping to inform legal discourse beyond the borders of a given jurisdiction and point in time.

In this Chapter I begin by defining deliberative democracy in Section 1 and explaining its applicability to the subject matter of the dissertation

94 This is not only but also because deliberative democracy has a limited potential to include animals (see below).

in Sections 2 and 3. Finally, in Section 4, I defend the claim that there is a place for deliberative democracy in a legal dissertation. Based on the German philosopher Jürgen Habermas, I show that deliberative democracy is concerned with the legitimacy of laws and to some extent even legal arguments.[95] In so doing, I sketch out the role that deliberative democracy plays throughout the dissertation: namely, as a lens to explain, evaluate, and potentially further develop legal thought.

3.1 Defining Deliberative Democracy

Deliberative democracy can be defined as 'a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future.'[96] It is based on the values of 'equal status and mutual respect.'[97]

Deliberative democracy emerged as a reaction to the shortcomings of previously dominant approaches in democratic theory, which were increasingly considered lacking in their ability to address contemporary challenges. It constitutes a substantive account of democracy, setting comparatively high standards for democratic legitimacy and the democratic engagement of citizens. This distinguishes it from majoritarian accounts of democracy which are primarily driven by voting and the aggregation of preferences.[98] One of the major problems of majoritarian accounts is that they may perpetuate existing power inequalities, as they take existing preferences as the threshold against which political decisions are to be

95 Habermas, Jürgen, Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats (Frankfurt a. M.: Suhrkamp 2nd ed., 1992), 15 f., 50, 137.

96 Gutmann, Amy/ Thompson, Dennis, Why Deliberative Democracy? (Princeton: Princeton University Press 2004), 7, citing Bessette, Joseph, The Mild Voice of Reason: Deliberative Democracy and American National Government (Chicago: University of Chicago Press, 1994), 13.

97 Bächtiger, Andre/ Dryzek, John S./ Mansbridge, Jane/ Warren, Mark E., Deliberative Democracy: An Introduction, in: Andre Bächtiger, John S. Dryzek, Jane Mansbridge, Mark E. Warren (eds.), The Oxford Handbook on Deliberative Democracy (Oxford: Oxford University Press 2018), 1–32, 1 f.

98 Gutmann/ Thompson 2004, 13.

measured.[99] Crucially, aggregative forms of democracy do not account for disagreement with the method of decision making, nor do they encourage changes of mind.[100] Amy Gutmann and Dennis Thompson argued that this tends to benefit those positions that prioritize economic considerations.[101] Moreover, there is no rule according to which the preferences shared by a majority of individuals produce the best result collectively.[102] Deliberative democracy aims to remedy these shortcomings.

The consideration of deliberation as an integral part of politics goes back to Aristotle, and has been advanced by prominent philosophers since then.[103] For much of history, it had an ambivalent relationship with democracy, as its proponents usually favored deliberation within a restricted group (e.g., wealthy men, their representatives, the educated).[104] In the 19th century, John Stuart Mill, for example, advanced the idea that discussions lead to better decisions, but the inclusiveness of his theory remains up for debate.[105] While the term deliberative democracy was coined by Joseph M. Bessette,[106] the field of deliberative democracy arose from a number of different, independent approaches in different disciplines, including constitutional law, political theory, and political science.[107] John Rawls and Jürgen Habermas are credited with the 'consolidation of the philosophical foundations of deliberative democracy' which took place in the early 1990s.[108] Other prominent democratic theorists, including John Dryzek,[109] James

99 Ibid., 16.
100 Ibid.
101 Ibid., 17.
102 della Porta, Donnatella, How Social Movements Can Save Democracy: Democratic Innovations from Below (Cambridge, MA: Polity 2020), 4.
103 Gutmann/ Thompson 2004, 8; Floridia, Antonio, The Origins of the Deliberative Turn, in: Andre Bächtiger, John S. Dryzek, Jane Mansbridge, Mark E. Warren (eds.), The Oxford Handbook on Deliberative Democracy (Oxford: Oxford University Press 2018), 35–54, 36.
104 Gutmann/ Thompson 2004, 9.
105 Ibid.
106 Bessette 1994.
107 Floridia 2018, 36.
108 Floridia 2018, 36; Gutmann/ Thompson 2004, 9; referring in particular to Habermas, Jürgen Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats (Frankfurt a. M.: Suhrkamp 2nd ed., 1992).
109 Dryzek, John, Deliberative Democracy and Beyond (Oxford: Oxford University Press 2000); Dryzek, John, Discursive Democracy: Politics, Policy, and Political Science (Cambridge: Cambridge University Press 1990).

Fishkin,[110] Joshua Cohen,[111] and Any Gutmann and Dennis Thompson,[112] refined accounts of deliberative democracy leading it to become arguably the most prominent and promising model of democracy today.

Nevertheless, it comes with limits and pitfalls that have been denounced by critics from different ends of the spectrum of democratic theory. As we will see in Chapter 10, Chantal Mouffe, who is often associated with poststructuralism, advocates for 'agonistic pluralism' instead of deliberative democracy, as deliberative democracy overemphasizes rationality and universality and does not make enough room for difference in the form of a 'plurality of voices.'[113] At the other end of the spectrum of democratic theory, Jason Brennan, who is considered a defender of modern epistocracy, argues that the involvement of uneducated citizens in decision-making leads to objectively bad outcomes.[114]

In essence, deliberative democracy is both a theory of legitimacy of norms and a theory of civic virtue. Deliberative democracy requires '*reason-giving*' both amongst citizens and between citizens and their representatives.[115] The reasons given must be acceptable to 'free and equal persons seeking fair terms of cooperation.'[116] This requires that they appeal to principles that are shared and cannot reasonably be rejected by people seeking fair cooperation.[117] The moral basis for deliberative democracy, and in particular the element of '*reason-giving*,' is the principle that humans are not to be treated as objects of the law, but as agents who take part in governance.[118]

Deliberation must take place in public, rather than in an individual's own mind, so that reasons are '*accessible*' to anyone.[119] They must also be accessible in the sense that they can be understood by anyone; meaning they may, for example, rely on expert opinions but not on religious author-

110 Fishkin, James, When the People Speak: Deliberative Democracy and Public Consultation (Oxford: Oxford University Press 2009).
111 Cohen, Joshua, Democracy and Liberty, in: Jon Elster (ed.), Deliberative Democracy (Cambridge: Cambridge University Press 1998), 185–231.
112 Gutmann/ Thompson 2004, 9.
113 Mouffe, Chantal, Deliberative Democracy or Agonistic Pluralism?, Social Research 66:3 (1999), 745–758, 757.
114 Brennan, Jason, Against Democracy (Princeton: Princeton University Press 2016).
115 Gutmann/ Thompson 2004, 3.
116 Ibid.
117 Ibid.
118 Ibid., 3 f.
119 Ibid., 4.

ity.[120] The requirement of accessibility is also known from the law, which must too be public and accessible.

Further, the decisions reached through deliberation must be '*binding*' on all citizens, at least for a given time.[121] Yet, the process is '*dynamic*' in that it remains possible to continue the discussion and to challenge a given decision in the future.[122] In so doing, political opponents must adhere to what Gutmann and Thompson call 'principle of the economy of moral disagreement:'[123] opponents must continue trying to find a mutual ground, allowing them to work together. If they cannot agree an underlying issue that caused disagreement in the first place, they must nevertheless try to find a common ground allowing them to proceed.[124]

Deliberative democracy is not only about democratic legitimacy, but also about civic virtue, since it prescribes how citizens ought to behave.[125] Mutual respect between citizens is central. This has important implications for the kind of communication that qualifies as deliberation. Traditionally, it demands 'polite, emotionally detached, and persuasive dialogue oriented toward the common good.'[126] However, as Iris Marion Young has pointed out, favoring this mode of communication excludes many voices and disadvantages traditionally underrepresented and oppressed groups.[127] As such, the traditional deliberative ideal conflicts with the strategies of social movements both in history and present.[128] To make their voices heard, activists

120 Ibid., 4 f.
121 Ibid., 5 f.
122 Ibid., 6.
123 Ibid., 7.
124 Ibid.
125 Which methods or means of communication are permissible is subject to debate and depends on the theory of deliberative democracy in question. On forms of deliberative communication see Polletta, Francesca/ Gardner, Beth, The Forms of Deliberative Communication, in: Andre Bächtiger, John S. Dryzek, Jane Mansbridge, Mark E. Warren (eds.), The Oxford Handbook on Deliberative Democracy (Oxford: Oxford University Press 2018), 70–85.
126 della Porta, Donatella/ Doer, Nicole, Deliberation in Protests and Social Movements, in: Andre Bächtiger, John S. Dryzek, Jane Mansbridge, Mark E. Warren (eds.), The Oxford Handbook on Deliberative Democracy (Oxford: Oxford University Press 2018), 392–403.
127 For an overview and further references of how this position relates to other streams of democratic theories see Dryzek 2000, 57 ff.
128 Young, Iris Marion, Activist Challenges to Deliberative Democracy, Political Theory 29:5 (2001), 670–690, 672. On the works of Iris Marion Young and animals, in particular animal oppression see Gruen, Lori, The Faces of Animal Oppression,

often resort to communication and direct action outside of established channels and institutions such as, for example, leafletting, marches, blockades, sit-ins, and boycotts.[129] This issue will be central in Chapter 5 of this dissertation. Further, Young and others pointed out that the deliberative process may be distorted, or even manipulated, due to inequalities in power.[130] William Smith focuses on this aspect in his compelling democratic approach to civil disobedience that I will apply to the case of undercover footage in Chapters 7 and 8.[131]

These and other ongoing debates have resulted in the existence of more than one theory of deliberative democracy. The differences between these different theories and their practical implications are significant. In this dissertation, I do not aim to comprehensively cover all, or identify the best approach. Neither will I engage with all the questions that deliberative democracy poses.[132] Rather, I will highlight conflicts and seek answers to those and only those questions that are salient in the case of animal activists and undercover footage. Particular works, such as those of Iris Marion Young and William Smith feature prominently in the dissertation as they are well equipped to account for the challenges raised by animal law and activism.[133] Young, for example, showed how activists struggle with the prescriptive features of deliberative democracy and explains why they might favor non-deliberative methods.[134] Smith reconciled civil disobedience (which I will argue is an adequate framework under which to discuss the creation of undercover footage by means of trespass – see Chapter 7) with deliberative democracy.[135] In so doing, he emphasized the role of 'discursive blockages' and 'deliberative inertia' that prevent certain agendas

in: Ann Ferguson, Mechthild Nagel (eds.), Dancing with Iris (Oxford: Oxford University Press 2009), 161–172, 161 ff.

129 Young 2001, 672.

130 Ibid., 673.

131 Smith, William, Civil Disobedience and Deliberative Democracy (Abingdon: Routledge 2013); Smith, William, Democracy, Deliberation and Disobedience, Res Publica 10 (2004), 353–377, 365 ff.

132 One salient issue that I cannot attended to here is the substantive (as opposed to procedural) dimension of deliberative democracy and the question to what extent it demands liberal political values, for example. For strong arguments in favor of this position see Cohen 1998, 187 ff.

133 Young 2001; Smith 2013; Smith 2004, 353.

134 Young 2001, 673.

135 Smith 2013.

from receiving adequate consideration in the public sphere.[136] Thus, both accounts shed light on special, albeit not unique, challenges faced by animal activists in deliberative democracy.

3.2 Chances and Limits of Considering Deliberative Democracy in Animal Studies

Deliberative democracy provides promise for the academic field of animal studies as well as for those who advocate to reduce the suffering of animals in practice. However, deliberative democracy in animal studies also comes with certain limits and pitfalls, which pose challenges to the theoretical foundations of this dissertation.

First and foremost, democracy always comes with a boundary problem. I argued above that deliberative democracy is a political rather than moral idea. However, questions of animal ethics should not be ignored entirely. These issues are essential to assessing the rationality or reasonableness of the claims made and the goals pursued by animal activists. This is problematic, as these questions are not only about politics, but about *who counts* in politics. As such, they are closer to morality proper, and outside the realm of a theory of deliberative democracy. Since the dissertation is primarily interested in exploring animal activists within the status quo (as opposed to developing a utopian animal-inclusive theory of deliberative democracy) this issue is secondary here. Nevertheless, it can be said that the boundaries of deliberative democracy also impose boundaries to this dissertation. I will not challenge the assumption that it is human and only human deliberation that counts for deliberative democracy.

The above results in a second challenge, namely accepting that criticism of existing approaches to animal activism in the law are limited by democracy. In an ideal deliberative democracy, all arguments brought forward in the main body of this dissertation would be moot. In other words, if animal welfare norms, no matter how low, were enacted as a result of inclusive, undistorted deliberation, the line of argument employed here would have nothing to hold against them. This is the result of a non-ideal political theory which is, as I explained above, a distinctive advantage of this dissertation that makes it suitable for informing legal discourse.

136 Ibid.

Nevertheless, it should briefly be noted, as a matter of context, that some authors have recently questioned whether animals are really bound to remain outside the boundaries of deliberative democracy. Clemens Driessen, for example, claimed that animals 'already engage in deliberation with humans.'[137] Driessen's work focuses on the role of animals in the development of new technologies, in particular milking robots.[138] He dismisses the traditional view of the deliberative ideal as being too narrow and too demanding, and invokes Bruno Latour's 'constructivist approach to the *politics of nature*.'[139] This approach is less focused on representing nature in political decisions, but focuses rather on politics as 'creating communicative situations with an experimental character in which the interpretation of nature and its constituents is an ongoing affair.'[140] In this framework, other forms of communication and participation beyond the use of language may be accommodated.[141] However, Driessen's account is rather different from standard accounts of deliberation, as it lacks the element of mutual public reason-giving.[142]

Eva Meijer developed the perhaps most compelling account presented thus far of, what she calles, 'interspecies deliberation.'[143] Arguing that interspecies deliberation is not only possible, but already takes place, she suggests that instead of insisting on the habermasian ideal of rationality in deliberation, we should develop a view of deliberation that includes animal forms of speech.[144] To consider an interspecies account of deliberation, we need to 'take embodied and habitual aspects of political communication into account.'[145] Meijer also offers starting points that may assist in developing 'interspecies communication,' focusing on temporal, special and materi-

137 Driessen, Clemens, Animal Deliberation: Co-evolution of Technology and Ethics on the Farm, PhD thesis, Wageningen University (2014), 143, available at: https://edepot.wur.nl/318665 (last accessed 4 March 2022).
138 Ibid., 139 ff.
139 Ibid., 145.
140 Ibid.
141 Ibid.
142 On this criticism see also Ladwig, Bernd, Politische Philosophie der Tierrechte (Berlin: Suhrkamp 2020), 320; arguing that deliberation requires making use of the 'medium of public use of reason' ['Medium des öffentlichen Vernunftgebrauchs'].
143 Meijer, Eva, When Animals Speak. Toward an Interspecies Democracy (New York: New York University Press 2019), 217 ff.
144 Ibid., 224.
145 Ibid., 225.

al conditions.[146] Her work provides promise for a theory of deliberative democracy that includes animals.

Further support for a theory of deliberative democracy inclusive of animals may be found in literature on deliberative democracy and nature. Deliberative democracy is considered particularly apt to address environmental challenges.[147] John Dryzek, arguably one of the most influential theorists of deliberative democracy, defends the controversial claim that it provides space for the non-human.[148] To cope with ecological challenges, Dryzek argues, nature needs to be represented and listened to in deliberation.[149] The case of animals is distinct from ecological challenges. Most importantly, animals are sentient, and the core of the problem is their suffering rather than their impact on living humans, or future generations of humans, or on the planet as a whole. Nevertheless, the arguments about ecological challenges can be informative for animals, too.

This dissertation does not set out to solve the boundary problem by developing a theory of deliberative democracy that includes animals. The above accounts do away with the elements of reason-giving and rationality. As such, they are not suitable to inform a legal study, which precisely rests on rational discourse as common denominator of law and deliberative democracy.

However, on a more positive note, deliberative democracy – even as non-ideal theory and one that does not include animals – holds promise for improving animals' lives. Deliberative democracy is far from realized, even in liberal democratic states such as Germany and the United States. Indeed, some critics find it 'naïve;'[150] stating that it will likely always remain an ideal to aspire to.[151] This holds especially true for the more demanding approaches to deliberative democracy that emphasize the necessity of leveling the political playing field by addressing the existing power imbalances arising, for example, from economic inequality. While the demands of deliberative democracy can be quite ambitious, even a movement towards the deliberative ideal of democracy may benefit animals, as Robert Gar-

146 Ibid., 226 ff.
147 Dryzek 2000, 140 ff.
148 Ibid.
149 Ibid., 153 ff.
150 Curato, Nicole/ Hammond, Marit/ Min, John, Power in Deliberative Democracy: Norms, Forums, Systems (Cham: Palgrave Macmillan 2019), 1.
151 Gutmann/ Thompson 2004, 37.

ner has argued.[152] He aptly underscores the 'rationalistic basis' of animal rights theory.[153] Further, Lucy Parry argues that 'inclusive, authentic and consequential deliberation can facilitate animal protection goals.'[154] It is this stream of theory with which I am going to engage throughout this dissertation: I acknowledge that deliberative democracy has strong anthropocentric roots, but argue that it may nevertheless provide a resource for improving the lives of animals. While it may be able to not end animal exploitation or secure animals a comprehensive set of legal rights, it can spark the societal challenge that is necessary to further these goals from the bottom up.

3.3 Deliberative Democracy in the Context of Animal Activism and Undercover Footage

The case of undercover footage poses challenges to deliberative democracy, and *vice versa*. Undercover footage encapsulates both deliberative and non-deliberative elements, which makes it an interesting case through which to study the intersection of animal activism and deliberative democracy, as I will show in the following.

The widespread support for deliberative democracy amongst contemporary political theory scholars indicates its normative appeal; in particular, its ability to respond to contemporary challenges in liberal democratic societies. Some have employed the vocabulary of deliberative democracy in discussing climate change and other broadly environmental issues.[155] For example, Hayley Stevenson and John Dryzek indicate that deliberative democracy can render more effective, and more democratic, governance related to these issues.[156] Yet, the analytical value of deliberative democracy in the methodology of this dissertation is not exhaustively described by these considerations. As I show below, its value goes beyond that.

152 Garner, Robert, Animal Rights and the Deliberative Turn in Democratic Theory, European Journal of Political Theory 18:3 (2019), 309–329.

153 Ibid., 309.

154 Parry, Lucy J., Don't put all your speech-acts in one basket: situating animal activism in the deliberative system, Environmental Values 26 (2017), 437–455, 442.

155 Dryzek 2000, 140 ff.; Baber, Walter/ Bartlett, Robert, Consensus and Global Environmental Governance: Deliberative Democracy in Nature's Regime (Cambridge, MA: The MIT Press 2015); Stevenson, Hayley/ Dryzek, John, Democratizing Global Climate Governance (Cambridge: Cambridge University Press 2014); Niemeyer, Simon, Democracy and Climate Change: What Can Deliberative Democracy Contribute? Australian Journal of Politics and History 59:3 (2013), 429–448.

156 See e.g., Stevenson/ Dryzek 2014, 1.

It cannot be emphasized enough that deliberative democracy is first and foremost a political and not a moral theory.[157] This is not to deny its moral underpinnings: the concept of democracy is built on moral grounds, most importantly, the notion that all citizens are equal. Further, deliberative democracy, as a matter of normative democratic theory,[158] does prescribe ideals i.e., of how citizens ought to behave based on normative principles. Yet, deliberative democracy is a political and not a moral theory for it takes these underpinning moral principles as given, and it remains silent as to the right and wrong answers to moral questions, including those posed by animal ethics. Deliberative democracy accepts that disagreement on moral questions exists, and will continue to exist, in democratic societies. Moral disagreement is not a shortcoming of democratic societies, and deliberative democracy does not guide us as to how to resolve these disagreements in substance. Rather, it provides tools to enable citizens to discuss and resolve disagreements on moral issues in a manner capable of producing an outcome acceptable to all; if not in substance, then in the manner in which the outcome was reached. As Mark Warren aptly put it, deliberative democracy may be 'the only ethically compelling means of addressing moral conflicts.'[159]

This point is crucial for a study on animal activism. Deliberative democracy is not about animal ethics. It does not answer the question of how we ought to treat animals, for it is not a moral theory. Rather, it might be able to guide us (as well as legal and political decision makers) on how to argue the above question. When making this point, democratic theorists often invoke the example of religious practices, abortion, or environmental questions. I believe the moral status of animals is another suitable example. For those concerned with animal suffering, this claim might seem alienating at first. However, it may become more acceptable if one considers the broad range of reasons that lead different people to the conclusion that animal suffering matters. Academic discourse on animal ethics alone shows the plurality and the well-founded disagreement that exists between different positions within the field. Deontological and utili-

157 Warren, Mark, Deliberative Democracy, in: April Carter, Geoffrey Stokes (eds.), Democratic Theory Today: Challenges for the 21st Century (Cambridge, MA: Polity Press 2002), 173–202, 190.

158 Normative democratic theory as opposed to descriptive studies in democracy.

159 Warren 2002, 173, 187; although it of course remains 'imperfect' see Gutmann 2004, 18.

tarian positions on animal ethics might at times reach similar conclusions, but the philosophical disagreements between them are fundamental. These disagreements are reasonable. I believe that, as a rule, we should approach the disagreement between vegans and meat eaters, and between animal activists and animal facility operators, as equally reasonable. This view has recently been advanced by Federico Zuolo, who proposes a defense of animals in the tradition of political liberalism.[160] Zuolo argues that we should take disagreement about the moral status of animals, and how to treat them, seriously.[161] This resonates with my focus on deliberative democracy, for deliberative democracy accepts, addresses, and incorporates the phenomenon of disagreement. Rather than determining who is right morally, it is concerned with finding solutions acceptable to all those involved. As a result, deliberative democracy as an explicitly political rather than moral theory allows us to examine animal activism without being tied to a particular theory of animal ethics.

Theorists such as Robert Garner, Mathew Humphrey and Marc Stears have already elaborated on the intriguing relationship between animal activism and deliberative democracy as a civic virtue, or in other words, the rules of how citizens ought to behave. They ask the question: does deliberative democracy accommodate animal activists even if they employ methods that are discouraged by deliberative democracy? I will consider this question in Chapter 5. While Garner and Parry emphasize the compatibility of animal rights activism and its methods (e.g., undercover footage) with deliberative democracy,[162] Humphrey, Stears and others voice doubts in this regard.[163] That being said, the question of what qualifies as 'deliberative' is itself a subject of debate in the literature on deliberative democracy. Most authors would agree that for communication to be deliberative, it must not coercively induce a change of preferences in others.[164] For Dryzek, this excludes 'domination via the exercise of power, manipulation, indoctrination, propaganda, deception, expressions of mere self-interest, threats (of the sort

160 Zuolo, Federico, Animals, Political Liberalism, and Public Reason (Cham: Palgrave Macmillan 2020).

161 Ibid., 1 f.

162 Garner 2019; Parry 2017.

163 Hadley, John, Animal Rights Advocacy and Legitimate Public Deliberation, Political Studies 63 (2017), 696–712; Humphrey, Mathew/ Stears, Marc, Animal Rights Protest and the Challenge to Deliberative Democracy, Economy and Society 35 (2006), 400–422.

164 Dryzek 2000, 2.

that characterize bargaining), and attempts to impose ideological conformity.'[165] Gutmann and Thompson, for example, are ready to accommodate some non-deliberative methods such as, for example, workers' strikes if they lead to more deliberation downstream.[166]

Very few existing contributions on animal activism and democracy look specifically at the creation and dissemination of undercover footage.[167] This is unfortunate, since – as I hope to illustrate throughout this dissertation – the case of undercover footage is particularly interesting from the perspective of deliberative democracy. The many actors involved, as well as the transformative potential of undercover footage, makes the topic interesting from the perspective of deliberative democracy. Unlike models of democracy based on an aggregation of preexisting preferences, deliberative democracy emphasizes the possibility of letting oneself be convinced and changing one's views, and of changing politics, in response to the more convincing arguments. Two factors relating to the case of undercover footage bring these considerations into sharper focus:

First, the case of undercover footage transgresses the boundaries of the law, as well as of deliberative democracy. Typically, it is a process that entails deliberative and non-deliberative as well as legal and illegal activities. The creation of the footage usually entails the making of false claims when seeking employment at an animal facility, or entering it without consent. Such acts conflict with the law, and most theorists of deliberative democracy would likely agree that they constitute non-deliberative methods. After all, those engaging in these activities conceal their true aims when gaining entrance to a facility by false pretense, or breach criminal law. However, the dissemination of undercover footage can be considered a deliberative strategy, as it brings a previously concealed matter to public attention. This combination of deliberative and non-deliberative makes the case of undercover footage particularly interesting for deliberative democracy.

Second, the case of undercover footage appears to be unique both in terms of the variety of actors involved, and the transformative potential it claims. Undercover footage does not only target animal facility operators,

165 Ibid.

166 Gutmann/ Thompson 2004, 51.

167 The works of Siobhan O'Sullivan and others constitute an important exception. McCausland, Clare/ O'Sullivan, Siobhan/ Brenton, Scott, Trespass, Animals and Democratic Engagement, Res Publica 19 (2013), 205–221; Gelber, Katharine/ O'Sullivan, Siobhan, Cat got your tongue? Free speech, Democracy and Australia's 'ag-gag' laws, Australian Journal of Political Science 56 (2021), 19–34.

as the more radical or even violent methods of the movement do, nor is it aimed exclusively at raising awareness in civil society, like the deliberative and legal method of leafletting for example.[168] Rather, undercover footage engages society, law enforcement, the media, and sometimes even legislative powers. Past examples of high-impact undercover investigations illustrate this potential. Footage from a Westland/Hallmark Meat Company facility in California lead to a large beef recall, as well as criminal investigations.[169] In Australia, undercover footage featured on TV lead to public outcry and a temporary ban on live animal exports in 2011.[170] Finally, the media plays an essential role in disseminating and moderating public discourse by disseminating footage, but also by giving the facility operators and those speaking for the industry a voice and opportunity to comment.

Against this backdrop, considering the combination of non-deliberative and deliberative means as well as the transformative potential and multitude of actors involved, a study on undercover footage and deliberative democracy is lacking in existing literature.

3.4 Deliberative Democracy and the Law

In addition to lacking an explicit exploration of the case of undercover footage, existing literature on animal activism and deliberative democracy also does not pay due regard to the law. This constitutes a shortcoming, for legal reasoning often resonates with democratic principles. At the same time, the law's engagement with democratic principles usually remains superficial. Democratic principles are present in the form of nascent ideas; legal actors hint at them without considering their full implications. Against this backdrop, democratic theory can be employed as a lens to explain, evaluate, and potentially to further develop legal thought. Doing so is important, as it is the law and its application, rather than the philosophical idea, that determines the lived reality of activists. Further, law is crucial

168 For a comprehensive overview of common strategies of animal activists and which actors they involve see Munro, Lyle, Strategies, Action Repertoires and DIY Activism in the Animal Rights Movement, Social Movement Studies 4:1 (2005), 75–94.

169 Martin, Andrew, Largest Recall of Ground Beef is Ordered, The New York Times, 18 February 2008, available at: https://www.nytimes.com/2008/02/18/business/18recall.html (last accessed 1 February 2022).

170 Munro, Lyle, The Live Animal Export Controversy in Australia: A Moral Crusade Made for the Mass Media, Social Movement Studies 14:2 (2015), 214–229.

to pacifying the underlaying social conflicts about the ethical treatment of animals, and to creating certainty for the actors involved in these conflicts.

To return to Habermas' discourse theory, law is indispensable to social integration in modern societies, which are characterized by: 'cultural rationalization' – meaning increasing plurality of values and a decline of traditional, for example religious, authority; and by 'functional differentiation' – the detachment of certain administrative and economic aspects from the *Lebenswelt*.[171] Facing these developments, modern societies need law to achieve social integration and to allow individuals to live in a stable social environment where the consequences of their actions are foreseeable and where coordination with others is possible, despite the lack of a common value systems.[172] It seems reasonable to assume that cultural rationalization and the decline of unifying traditions, in particular, are driving disagreement about the ethical treatment of animals. While unable to resolve the underlaying moral conflicts, law is required to pacify them through the provision of rules the adherence to which all can expect and can plan for accordingly. Against this backdrop, the absence of consideration of the law in existing literature on animal activism and democracy is striking. Little guidance exists as to which tools the law and legal actors should employ to address animal activism.

As I will illustrate in this dissertation, arguments about democracy are already present in cases arising from the creation and dissemination of undercover footage to some extent. In the jurisdictions discussed, it is understood that law is the outcome of a democratic process. This is evidenced by Courts employing references to democracy, notably, more than they do to animal ethics. Most drastically, the Heilbronn District Court found that trespass to create undercover footage was paving the path for anarchy to prevail over democracy.[173] In public discourse on undercover footage as an advocacy tool, the focus is more on animal ethics, but the democratic dimension is evidenced by the broad coalition of actors opposing ag-gag legislation in the United States including the American Civil Liberties

171 Habermas 1992, 15 ff. On these aspects of Habermas' discourse theory see Zurn, Christopher, Discourse Theory of Law, in: Barbara Fultner (ed.), Jürgen Habermas: Key Concepts (Abingdon: Routledge 2014), 156–172, 158.

172 Habermas 1992, 15 ff; Zurn 2011, 158 f.

173 LG Heilbronn [Heilbronn District Court] May 23, 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 117).

Union (ACLU)[174] and a number of media organizations who represent journalists.[175] Although deliberative democracy is an ideal that is far from realized in practice, it is a prominent stream in democratic theory and thus particularly relevant when scrutinizing references to democracy.

Deliberative democracy is not only relevant to the issue of undercover footage, it is also relevant to the law and the legal discipline more broadly. As indicated above, Jürgen Habermas, arguably a founding father of deliberative democracy, placed great emphasis on the law.[176] Habermas' influential *Diskurstheorie* is also a theory of law. Like Immanuel Kant, Habermas considers the legitimacy of a legal norm to be derived from the democratic process.[177] However, unlike Kant, Habermas presents positive law on equal stance with morality, rather than subordinated to it.[178] The relationship between law and morality is complementary.[179] This complementary relationship is achieved by the *Diskursprinzip*, which holds that norms hold if, and only if, all those affected by them can agree to them in a rational discourse;[180] which is the source of legitimacy in deliberative democracy.

Theorists of deliberative democracy agree that the primary purpose of deliberation is for citizens, as well as their representatives, to justify the laws they impose on one another.[181] In their view, deliberation creates democratic legitimacy and that – few would dispute – is a necessary condition for 'good' legal norms. Therefore, deliberative democracy is about nothing less than the legitimacy of legal norms.[182]

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174 Ninth Circuit Court of Appeals, *ALDF et al. v. Wasden et al.*, Case No. 15–35960, 4 January 2018; see also ACLU, Public Interest Coalition Challenges Constitutionality of Iowa's "Ag-Gag" Law, 10 October 2017, available at: https://www.aclu.org/press-releases/public-interest-coalition-challenges-constitutionality-iowas-ag-gag-law (last accessed 5 April 2021).

175 US District Court, D. Iowa, *ALDF et al. v. Reynolds et al.*, Case No. 4:17-cv-00362-JEG-HCA, Brief for Amici Curiae 23 Media Organizations and Associations Representing Journalists, Writers and Researchers in Support of Plaintiffs-Appellees, available at: https://www.rcfp.org/wp-content/uploads/2019/07/20190627-Media-Amici-Brief-ALDF-v-Reynolds.pdf (last accessed 5 April 2021).

176 Habermas 1992, 15 ff; see also Zurn 2011, 157 f.

177 Habermas 1992, 50.

178 Ibid., 137.

179 Ibid.

180 Ibid., 138.

181 Gutmann/ Thompson 2004, 27.

182 I refer to legal norms rather than laws here since the following Chapters feature not only codified law but also (legal) arguments in the form of interpretation and

Legal scholars may have reservations about employing deliberative democracy to explain and evaluate legal reasoning. Especially positivist lawyers from civil law systems may reject this endeavor as what legal scholar Conrado Hübner Mendes described as a 'politicization of law.'[183] Understanding this problem requires a brief foray into legal theory proper. Hübner Mendes outlines and convincingly rejects the 'politicization' argument in his work on constitutional Courts and deliberative democracy.[184] The crudest form of a lawyer's rejection of combining law and deliberative democracy would invoke a dichotomy, an 'unbridgeable gap between lawmaking and application.'[185] Once law is enacted, there is no room for disagreement and debate.[186] However, this idea of law is empirically questionable; it cannot account for the disagreements that exists between lawyers about the correct understanding of innumerable laws and legal standards.[187] There are more sophisticated arguments presented within this camp. Hübner Mendes invokes Raz as a representative of those: according to Raz, once law is enacted, it 'pre-empts' other substantive reasons that arose in the political debate and justified enacting the law in question.[188] Considering these reasons derived from the realm of politics again in the process of application of the law would be 'double counting' and therefore impermissible.[189]

The theories of Ronald Dworkin or Robert Alexy can be employed to object to this criticism.[190] As we have seen in Chapter 2 on methods and theoretical underpinnings, a close relative of deliberative democracy is

application of the law by judges and sometimes legal scholars. This focus is inspired by critical legal theory: putting the spotlight on arguments rather than law itself provides the most relevant insights. While this might not apply in every area of law to an equal measure, it is certainly promising in animal law which is driven by both economic, cultural, and moral considerations.

183 Hübner Mendes, Conrado, Constitutional Courts and Deliberative Democracy (Oxford: Oxford University Press 2013), 54–61.

184 Ibid.

185 Ibid., 54.

186 Ibid.

187 Hübner Mendes even denounces this argument as a 'collective self-deception […] a resilient immaturity symptom of a democratic public culture.' Ibid., 55.

188 Raz, Joseph, The Morality of Freedom (Oxford: Clarendon Press 1986), 57 f.

189 Ibid., 58.

190 Hübner Mendes 2013, 56; Alexy, Robert, A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification (Oxford: Clarendon Press 1989); Dworkin, Ronald, Law's Empire (Cambridge, MA: Harvard University Press 1986).

present in legal theory, most famously in the writings of Jürgen Habermas and Robert Alexy as representatives of 'discourse theory of law.'[191] However, one need not subscribe to the discourse theory of law to make the room for the consideration of law through the lens of deliberative democracy in the cases at stake here. The cases at hand are what one can call 'hard cases' where a simple application of the law in an atomized fashion is impossible.[192] While positivists would defer those cases to the discretion of judges, the less positivist theorists would take recourse to the 'underpinning principles of law.'[193] According to both views, a solution must be found through rational argumentation, which is also a form of deliberation.[194] At least where hard cases are concerned, deliberative democracy should be afforded some role in explaining and evaluating legal reasoning.

In addition, deliberative democracy is experiencing increasing popularity in the legal fields of environmental law and constitutional law.[195] Notwithstanding the relevance of both fields to the dissertation at hand, the approach taken here differs from most legal engagement with deliberative democracy. As such, it does not fit into the categories delineated by Ron Levy and Hoi Kong and as 'deliberation-to-law' (deliberation generating 'legitimate constitutional law') and 'law-to-deliberation' (constitutional legal discourse enhancing deliberation amongst citizens, branches of government etc.).[196] Authors writing on deliberative democracy and constitutional law seem mostly interested in formal connections between deliberative democracy and constitutional law in the sense of the above categories.[197] Similarly, works on environmental law and deliberative democracy explore how the making and enforcement of the law are connected with, and can benefit, from deliberation.[198]

Unlike the above contributions, this dissertation is interested in the *substantive* features of deliberative democracy as invoked in judicial reasoning.

191 Habermas 1992; Alexy 1989.
192 Hübner Mendes 2013, 58.
193 Ibid.
194 Ibid., 59.
195 Levy, Ron/ Kong, Hoi, Introduction: Fusion and Creation, in: Ron Levy, Hoi Kong, Orr Graeme, Jeff King (eds.), The Cambridge Handbook of Deliberative Constitutionalism (Cambridge: Cambridge University Press 2018), 1–14.
196 Ibid., 3 f.
197 Ibid.
198 Baber/ Bartlett 2015; Rotolo, Giuseppe, Deliberative Democracy and Environmental Law Enforcement, in: Toine Spapens, Rob White, Wim Huisman (eds.), Environmental Crime in Transitional Context (London: Routledge 2016), 157–192.

Guided by these substantive encounters of deliberative democracy and legal reasoning, it aims to understand the place of animal activists in deliberative democracy and, on this basis, to turn back and reflect upon the legal reasoning and norms at stake, thereby informing future legal discourse.

Again, it is the quality of democratic theory as political rather than moral theory that allows to proceed this way. Democracy is essential in the jurisdictions that feature in this dissertation. In Germany, it is enshrined in Article 20 (1) and (2) of the Basic Law. In the United States Constitution, it is present in the principles of representation, the separation of powers and checks and balances, as well as individual rights. But more importantly, democracy features prominently in the Court decisions examined in this dissertation. In other words, democracy is integral to the legal orders and Court decisions at issue.

In the case of Germany, one could argue that the wellbeing of animals is also inherent in the legal orders and Court decisions discussed, since animal protection is enshrined in Article 20a of the Basic Law. The dissertation at hand takes this commitment to animal protection into account and, as I will show in Chapter 12, finds that it shapes the legal responses to undercover footage. However, employing animal protection as central framework of reference would prevent meaningful comparison and transferability to other legal systems, since besides Germany, only Switzerland and Austria have included comparable provisions on the wellbeing of animals in their constitutions.[199] It would also prevent transferability to subjects other than animal activism, such as climate protest and the rights of future generations. A closer analysis of the parallels between the wellbeing of animals and these causes shows that the parallels are, first and foremost, political rather than moral. Further, employing the wellbeing of animals as central evaluative framework would increase the risk of the dissertation collapsing into an independent, external critique of the existing law, potentially less prepared to inform future legal discourse and practice. Democratic theory, as political rather than moral theory, is better suited to remaining an internal critique and informing, rather than deconstructing, the law and ongoing legal discourse.

Nevertheless, I will not overstretch the space that can be occupied by (deliberative) democracy in law and in a legal dissertation. Whereas con-

199 See Global Animal Law Database, Animal Legislations in the World at National Level, available at: https://www.globalanimallaw.org/database/national/index.html (last accessed 1 February 2022).

stitutional law, in particular the interpretation of the right to freedom of expression, is relatively open to considerations of democracy, this does not hold for criminal law to the same extend. As I will show in Chapter 9, its potential role in criminal cases is limited, although it may assist in drawing conclusions, for example, as to the culpability of an offender. Further, as I will show in Chapter 10, deliberative democracy is less equipped to explain legal responses to undercover footage in the United States. Against this backdrop, the level of interaction between the law and democratic theory throughout the dissertation varies depending on the applicable law and the jurisdiction in question.

4. Animal Activism as a Key Concept

In this dissertation, I examine legal responses to undercover footage from animal facilities. But who is behind these acts? Who enters animal facilities secretly, or under false pretense, to create and disseminate footage? In this dissertation, I will refer to them primarily as 'animal activists.' Animal activists deploy a wide range of different strategies, of which the creation and dissemination of undercover footage is one. To compare it to, and distinguish it from, other strategies deployed by the movement, and to delineate the scope of the arguments made in this dissertation, it is important to shed some light on animal activism more broadly.

If animal activists were asked to define themselves, their response might be something along the following lines:

> 'Animal rights activists are people living all over the world who spend some or most of their time protesting or otherwise working against factory farming, animal testing and other abuses of the animal kingdom. An animal activist believes that animals deserve to live happy, cruelty-free lives, and in addition they do something to help create a world where that is possible.'[200]

This definition glosses over controversial and at times illegal tactics employed by animal activists. It additionally stands squarely in contrast with how those affected by the activities of animal activists would describe them.

200 Lingel, Grant, Animal Rights Activists: Who They Are & What They Do, Sentient Media 22 October 2018, available at: https://sentientmedia.org/animal-rights-activists/ (last accessed 23 February 2022).

For example, the activities of some animal activists have been considered a terrorism threat, especially in the United States but also in Europe.[201]

This contrast warrants a closer look at animal activism as a concept. In this short Chapter, I will briefly touch on what animal activists consider 'happy, cruelty-free lives' and then examine what to 'do something' to make this a reality for animals can entail. In other words, I will critically examine the 'Why?' and 'How?' of animal activism. To do so, I first delineate animal activists' moral convictions and point out the distinction between animal welfare, rights, and liberation. In a second step, I critically examine the strategies of animal activists, as well as their points of friction with law, democracy, and the rights of others. I outline different attempts at classifying the strategies of animal activists in existing social science literature. My goal in this Chapter is to give the reader a better idea of the different strategies employed by activists. Further, I explain the popular activist strategy of creating and disseminating undercover footage from animal facilities, which this dissertation is primarily concerned with. I show that it provides an interesting case study to explore the relationship between, not only law and democracy as already explored, but also between those concepts and that of animal activism.

4.1 Why? The Theories Behind Animal Activism

In this dissertation, I am more interested in what activists do, than in their moral convictions. Still, a brief foray into the motivation behind animal activism is necessary to gain an understanding of this phenomenon. I employ the term 'animal activist' to cover a broad range of activists who are concerned with the wellbeing of animals. This includes, but is not

201 In 2004, the FBI named 'animal rights extremists and ecoterrorism matters' as the 'highest domestic terrorism investigative priority' of the FBI. Statement of John E. Lewis (Deputy Assistant Director), Couterterrorism Division, FBI, in a hearing before the committee on the judiciary United States Senate May 2004, Serial No. J-108–76, available at: https://www.govinfo.gov/content/pkg/CHRG-108shrg98179/html/CHRG-108shrg98179.htm (last accessed 13 September 2021). Europol too considers some activities of animal activist groups as 'single-issue terrorism.' See e.g., Europol, European Union Terrorism Situation and Trend Report, Publications Office of the European Union, Luxembourg, 2008, 8, available at: https://www.europol.europa.eu/activities-services/main-reports/te-sat-2008-eu-terrorism-situation-trend-report (last accessed 13 September 2021). See in more detail Chapter 12.

necessarily limited to, animal welfare, animal rights, and animal liberation activists.[202]

Typically, animal welfare activists campaign for improved living conditions for animals, and for reforms of animal welfare laws.[203] The change for which they advocate may be more or less profound, but as a rule, they do not challenge humans keeping animals for food production, as long as animal welfare standards are upheld. Thus, the reduction of animal suffering is key.[204] Animal rights activists typically go further and maintain that animals have rights, including a right to life and freedom from suffering, with which most use of animals for human ends is incompatible.[205] Consequently, they demand an end of all forms of animal use.[206] Finally, animal liberation shares some aims of the animal rights movement, but is more critical of the notion of rights and thus centers a critique on oppression.[207]

The ideals of the distinct types of animal activists described above are associated with different streams of animal ethics. As such, animal activism finds support in moral philosophy. For decades, there has been a sustained academic debate about animal ethics. Prominent thinkers from various intellectual traditions support the claim that the current treatment of animals, especially in industrialized agriculture, is morally wrong. Authors such as Peter Singer, Tom Regan, and Christine Korsgaard have been very influential in this debate.[208] Furthermore, animal activists may invoke anthropocentric arguments for a paradigm shift in our relationship with animals, considering the detrimental impact that large-scale animal agriculture has

202 These are the categories most commonly employed. See also Schmitz, Friederike, Zivilgesellschaftliches Engagement für Tiere, in: Elke Diehl, Jens Tuider (eds.), Haben Tiere Rechte? Aspekte und Dimensionen der Mensch-Tier Beziehung (Bonn: Bundeszentrale für politische Bildung 2019), 93–105.

203 Ibid., 95 ff.

204 Ibid., 95.

205 Ibid., 97 ff.

206 Ibid., 98.

207 Ibid., 99 ff.

208 Singer, Peter, Animal Liberation (New York: HarperCollins 2009 ed., first published in 1975); Regan, Tom, The Case for Animal Rights (Berkeley: University of California Press 2004 ed.); Korsgaard, Christine, Fellow Creatures: Our Obligations to the Other Animals (Oxford: Oxford University Press 2018).

on the planet and human life.[209] These anthropocentric considerations are currently more evident than ever in light of the COVID-19 pandemic.[210]

Against this backdrop, it is important to note that animal ethics, that is the philosophical ideas underpinning animal activism, are not against the rights and wellbeing of humans. As Tom Regan aptly put it: 'to be "for" animals is not to be "against" humans.'[211] Yet, as I will show below, the reality of animal activism sometimes tells a different story. The nuanced academic and political arguments for the protection of animals and potential for furthering human interests at the same time, are often sidelined in animal activism. Therefore, the question of 'How?' – concerning the actual conduct of animal activists – is more important for the legal and political decisions at stake. The strategies, more than the underlying philosophical arguments, pose serious challenges to the law, the rights of others, and democracy.

4.2 How? The Strategies of Animal Activists

Animal activists shock, offend, and sometimes interfere with the law in conducting their campaigns. In Europe, some of these campaigns have given rise to high-profile Court cases. One concerns the controversies surrounding PETA's 'Holocaust on your plate' campaign,[212] or the campaign by Animal Defenders International, 'My mate's a primate,' both of which, *inter alia*, resulted in ECtHR decisions unfavorable to the NGO applicants.[213] While animal protection might be in the public interests, that is not necessarily sufficient to condone the strategies mobilized by animal activists.

The different streams within the movement for better animal protection may be associated with distinctive activism strategies. Sociologist Lyle

209 For an overview see e.g., FAO, Livestock's Long Shadow: Environmental Issues and Options, Rome 2006, available at: http://www.fao.org/3/a0701e/a0701e00.htm (last accessed 23 February 2022).

210 UN Environment Programme, Preventing the Next Pandemic – Zoonotic Diseases and How to Break the Chain of Transmission, New York, 6 July 2020, available at: https://www.unep.org/resources/report/preventing-future-zoonotic-disease-outbreaks-protecting-environment-animals-and (last accessed 23 February 2022).

211 Regan 2004, 156, in the context of critiquing so-called 'indirect duty' views on animal ethics.

212 ECtHR, *PETA Deutschland v. Germany*, App. no. 43481/09, 8 November 2012.

213 ECtHR, *Animal Defenders International v. the United Kingdom*, App. no. 48876/08, 22 April 2013.

Munro associates the 'moderate' animal welfare movement with conventional, legal tactics within the political process; the animal rights movement with more disruptive, militant, albeit non-violent tactics, mobilized within civil society; and radical animal liberation with coerced changes sought through violent and illegal action, even amounting to terrorism.[214] Similarly, Friederike Schmitz ascribes the use of information campaigns, calling for boycotts, petitions, interventions through the judicial system, and similar legal forms of protest to animal welfare activism.[215] Schmitz also points out that animal welfare activists sometimes work with the agriculture industry and, for example, give out animal welfare labels.[216] This is rarely the case for animal rights activists. They too engage in a range of legal forms of protests, but they also are associated with the creation of undercover footage from animal facilities and civil disobedience.[217] Finally, animal liberation activists employ similar methods, but often single out, and put pressure on, a specific economic actor that they consider responsible for animal exploitation.[218]

These categories should be treated with caution. In practice, they are often indistinguishable. It is not always clear to which stream of the movement activists subscribe and whether their action(s) match the ideal of that type. Further, the meaning of animal welfare, rights, and liberation, as well as the strategies associated with them, are contingent upon the cultural and societal context. The authors referred to above, Munro and Schmitz, come to similar observations for the Anglo-American and the German context, respectively. This indicates that animal activism in Germany and in the United States is comparable in so far as is required for the purpose of this dissertation. However, while comparing legal responses to animal activism, one must not lose sight of significant differences between movements depending on the country in which they operate. In Germany, for example, some animal protection movements have failed to distance themselves from far-right extremists. A leading member of the German party for animal protection, *Tierschutzpartei*, who gained a seat in the European Parliament was

214 Munro, Lyle, The Animal Rights Movement in Theory and Practice: A Review of the Sociological Literature, Sociology Compass 6:2 (2019), 166–181, 169 ff. Schmitz 2019, 200 ff. makes similar observations in the German context.
215 Schmitz 2019, 208.
216 Ibid.
217 Ibid., 214.
218 Ibid., 217.

formerly a member of the most far-right nationalist party.[219] In the United States, militant animal activist groups such as the Earth Liberation Front have committed arson attacks resulting in significant economic damage, shaping the public and legal discourse around animal activism. Comparable acts may not have taken place in Australia, for example, where the perception of animal activism might therefore be more positive.[220] These are merely examples intended to illustrate the tendencies within movements which can be specific to a jurisdiction, and can shape the form of animal activism as well as public and legal responses to it.

Further, animal activism is dynamic; strategies can develop based on considerations of effectiveness[221] in a given social context. Therefore, the above classification should be looked at as an approximation.[222] As this dissertation seeks to inform legal discourse across jurisdictions, it cannot excessively rely on the sociological account. The methods and strategies should not be considered evidence of a stream within the movement, and *vice versa*.

Animal activists deploy a broad range of strategies to further their respective goals. These strategies range from the making of protest signs to the commission of arson. In light of this, it would be fatal to make any general claims about the nature of animal activism. Even the seemingly narrower terms, such as 'direct action'[223] and 'DIY (Do-It-Yourself) activism,'[224] are of little analytical value. For example, both removing an injured animal from a facility, and blocking the entrance to that facility could be considered 'direct action,' and yet the ethical and legal issues at stake are very different. A careful grouping of animal activists' strategies is important

219 Becker, Markus/ Müller, Peter, Wie ein Ex-NPD Funktionär zur Tierschutzpartei kam, Der Spiegel, 28 January 2020, available at: https://www.spiegel.de/politik/deutschland/tierschutzpartei-eu-abgeordneter-martin-buschmann-war-bei-der-npd-a-dd4aa257-0b15-4cd8-add8-455e52dd7662 (last accessed 23 February 2022).

220 Gelber, Katharine/ O'Sullivan, Siobhan, Cat got your tongue? Free speech, democracy and Australia's 'ag-gag' laws, Australian Journal of Political Science 56 (2021), 19–34, 29.

221 On effectiveness see Sebo, Jeff/ Singer, Peter, Activism, in: Lori Gruen (ed.), Critical Terms for Animal Studies (Chicago: University of Chicago Press 2018), 33–46. Effectiveness is a much-discussed issue in the context of animal activism that cannot be addressed at length here.

222 Munro 2012, 174.

223 Hardman, Ivar, In Defense of Direct Action, Journal of Controversial Ideas 1:1 (2021), 1–24, 4.

224 Munro, Lyle, Strategies, Action Repertoires and DIY Activism in the Animal Rights Movement, Social Movement Studies 4:1 (2005), 75–94.

to avoid overbroad claims when talking about animal activism. Further, it is crucial for setting the limits of the claims made in this dissertation. As such, the next paragraphs explore the range of criteria employed in this dissertation to categorize or distinguish the strategies of animal activists.

A single criterion alone is insufficient to distinguish the strategies employed by animal activists. The obvious criterion that comes to mind would be the lawfulness of a given act. However, a categorization along the lines of the law comes with certain pitfalls. The lawfulness of certain acts might depend on the jurisdiction in question or a mere administrative act. For example, lawfulness might depend on an administrative authorization of a demonstration at a given time and place. The category becomes even more indeterminate when newly emerging forms of protests (e.g., in the online sphere) are concerned, and when activists operate transnationally or on the high seas as (e.g., as the Sea Shepperd Conservation Society does.)[225]

Other criteria frequently employed are those of violence and coercion. A categorization along the lines of violence and non-violence is also problematic for reasons explored further in Chapter 7. Violence can have a very particular meaning in law and depending on the area of law concerned. It can be reinterpreted to include acts that few would call violent in common parlance.[226] On the other hand, non-violence might also be too favorable to activity groups who refrain from physical violence but engage in severe intimidation and threats.

One criterion to which I will frequently point in this dissertation is coerciveness. Similar objections can be made regarding coerciveness as with regard to violence. It should therefore be stated upfront that I do not have a distinctively legal definition of coercion in mind. Rather, the definition considers that coercion occurs when someone is made to do something or refrain from doing something, not because of a change of heart on the moral question related to it, but because of the conduct or threats of negative consequences by the coercer. The negative consequences must have a certain degree of severity, so the coerced cannot be expected to tolerate them.[227] In terms of threshold, I consider that reporting about breaches of animal welfare law would not suffice for coercion, while e.g.,

225 O'Sullivan, Siobhan/ McCausland, Clare/ Brenton, Scott, Animal Activists, Civil Disobedience and Global Responses to Transnational Injustice, Res Publica 23 (2017), 261–280.

226 See Chapter 7.

227 This definition does contain most elements of a legal definition, but it consciously avoids some of the most difficult questions, such as e.g., causality, whether the

vandalism would. I consider the criterion of coerciveness useful for the dissertation at hand, because it allows one to draw conclusions as to the deliberative and democratic potential of an act.

In the literature on animal activism and civil disobedience, authors also speak of deliberative and non-deliberative methods. I will adopt this vocabulary in Chapter 5. However, at this earlier point in the dissertation, it is less helpful as a criterion as its meaning will depend on the theory of deliberative democracy one subscribes to. A similar attempt at categorization is between confrontational and conciliatory strategies.[228] Finally, one can also distinguish based on who is being targeted by activism: a potential ally who might be convinced to go vegan and join the movement, for example, or a researcher conducting animal experiments.

In the end, none of the criteria discussed above is optimal when taken alone, yet together they can assist in categorizing the strategies of animal activists. For the purpose of this dissertation, I suggest distinguishing between: lawful protest, civil disobedience, animal rescue, and violent, coercive action without deliberative potential. In the category of lawful protest, I characterize activities that are in accordance with the law, not only in principle, but also based on whether the actors have obtained the necessary permissions from authorities. That could include demonstrations, petitions, authorized sit-ins, legal intervention, and other activities. It should be noted that albeit lawful, these strategies can still be objectionable. This is exemplified by the PETA case cited above: while banned in Germany, the controversial 'Holocaust on your plate' campaign was allowed to continue in Austria after a Court decision.[229]

The category of civil disobedience is defined in detail in Chapter 7. I argue that the creation of undercover footage by means of trespass can be an example for this form of protest. However, unauthorized demonstrations obstructing the work of an animal facility, might also be described as civil disobedience. Importantly, there is not necessarily an organizational distinction: The Humane Society of the United States has, for example, been

coerced must believe the coercer to be able to act upon her threats, and about the legitimacy of the aim pursued and its relationship to the threat made.

228 Sebo/ Singer 2018, 38.

229 Oberster Gerichtshof [Highest Court] 12 October 2006, 6 Ob 321/04f, available at: https://rdb.manz.at/document/ris.just.JJT_20061012_OGH0002_0060OB00321_04F0000_000 (last accessed 25 February 2022).

associated both with lawful campaigns and with the creation of undercover footage.[230]

Unlike other authors, I do not consider animal rescue as civil disobedience, since rescue concerns the removal of individual animals from danger, rather than aiming at communication with a broader audience.[231] I suggest that it be considered a separate category, unless a specific case entails a strong communicative component.

The final category, that of coercive action that is sometimes violent and without deliberative potential, and which includes arson, threats, and terrorization. These strategies are sometimes discussed under the headline of eco-terrorism, but this phrase should not be used indiscriminately.[232] Especially in the United States, organizations like the Animal Liberation Front and the Earth Liberation Front have deployed the above tactics. In so doing, they put the mental and physical wellbeing of others at risk. This is especially the case when activists target individuals rather than facilities, not only through physical acts such as vandalism but also by publishing their home addresses to an audience open to violence. Coercive action is typically aimed at those who activists consider to be directly responsible for harm to animals. Most animal activists do not tolerate these activities. They not only refrain from these tactics, but condemn them, considering them to be incompatible with the ethics that the movement seeks to promote.[233] The arguments from deliberative democracy made in this dissertation cannot be extended to coercive, violent action. This dissertation does not offer a justification or excuse, whether moral, political, or legal for these acts.[234]

Finally, one could debate whether ethical veganism and vegetarianism as well as animal studies scholarship constitute animal activism. I will leave discussion of these questions to social movement scholars. When I refer to animal activism in this dissertation, they are not included, as they do

230 Recent examples of e.g., undercover investigations can be found on their website: Humane Society of the United States, available at: https://www.humanesociety.org/search?keys=undercover (last accessed 23 February 2021).

231 On animal rescue as civil disobedience see Tony Milligan, Civil Disobedience: Protest, Justification, and the Law (New York: Bloomsbury Academic 2013), 117–126; Milligan, Tony, Animal Rescue as Civil Disobedience, Res Publica 23 (2017), 281–298.

232 See e.g., Cooke, Steve, Animal Rights and Environmental Terrorism, Journal of Terrorism Research 4:2 (2013), 26–36.

233 Sebo/ Singer 2018, 43 f.

234 For an attempt at a moral justification see Hardman 2021.

not imply the same potential for political conflict and ambivalence towards democratic procedures.

4.3 The Case of Undercover Footage

This dissertation is concerned with the creation and dissemination of undercover footage specifically. I have consciously chosen this focus for several reasons. The creation and dissemination of undercover footage is a popular activist strategy. Empirical evidence as to its effectiveness is increasing, but still scarce.[235] A recent study by sociologist Laura Fernández indicates that visual outputs (including undercover footage, but also documentaries etc.) played a role in forming and sustaining the moral convictions of animal activists.[236] For 75 % of the 60 interviewed animal liberation activists, images, especially audiovisual images, played a key role in their decisions to engage in animal activism and to turn vegan.[237] However, Frenández also stresses that, for most interviewees, 'rational thinking and information' was the main reason for their decisions, but that these aspects were 'awakened' by visual recordings.[238]

The idea that visual material from animal facilities plays an important role for animal activism is also conceivable for other reasons. In the jurisdictions at stake here (Germany and the United States) agriculture is largely industrialized, and a large percentage of the population lives in urban areas. Interactions with farmed animals are very rare, to say the least. Few consumers have visited agricultural facilities in which the animal products they consume are produced. Siobhan O'Sullivan described how animals were pushed further outside of metropolitan areas over time, resulting in drastically decreased visibility.[239] Undercover footage creates transparency for citizens. As such, it may be a powerful tool for making animals visible, which O'Sullivan argued, may lead to increased animal protection.[240] The

235 Fernández, Laura, Images That Liberate: Moral Shock and Strategic Visual Communication in Animal Liberation Activism, Journal of Communication Theory 45:2 (2021), 138–158.
236 Ibid., e.g., 142 f., 151.
237 Ibid., 142 f. Fernández interviewed activists in Denmark, Sweden, and Spain.
238 Ibid., 143.
239 O'Sullivan, Siobhan, Animals, Equality and Democracy (Basingstoke, UK: Palgrave Macmillan 2011), 2 f.
240 Ibid., 60 f.

idea that undercover footage creates transparency and informed the public is essential to the arguments in this dissertation.

However, it should be acknowledged that another key purpose of undercover footage is to create 'moral shock.'[241] Activists may say that moral shock is a direct consequence of transparency: it is the exposure to frequent, normalized practices that sparks moral shock in the audience. Critics on the other hand will likely argue that activists seek out the most horrendous scenes and cut footage in a certain way in order to take certain images out of context. Both arguments have merit, and in the end, it will depend on the footage in question which prevails. Interestingly, the 'moral shock' aspect of undercover footage can have some unintended consequences amongst the audience. Some viewers cannot bear the emotional impact of being exposed to displays of extreme violence and choose to avoid it.[242] Further, legal scholars Sherry Colb and Michael Dorf argue that routine exposure to graphic images and the violence involved in animal slaughter might numb consumers.[243] While it might be 'morally appropriate' to expose consumers of animal products to the violence that they commission by purchasing those products, doing so on a regular basis might be counterproductive from an activist's perspective.[244]

From the perspective of law and democratic theory, the creation and dissemination of undercover footage is perhaps the most interesting strategy of animal activists. It is located between legality and illegality, as well as between deliberation and coercion. It involves interferences with the law, as in the jurisdictions discussed here, where there are provisions against trespassing as well as against gaining employment under false pretense in order to create footage without consent. Yet, the constitutionality of some of these laws and the interpretation thereof (in the United States) as well as their applicability and possible defenses (in Germany) are in dispute.

A central reason behind these disputes is the potential contribution that the acts in question might make to public deliberation and to democracy. While the creation of footage is doubtlessly coercive and non-deliberative, its dissemination can spark and inform public discourse on the matter of animal welfare, which is widely considered of interest to the public. It may even entail the exposure of legal or moral wrongs and provide

241 Moral shock is the key focus of the inquiry by Fernández. Fernández 2021, 139.
242 Ibid.,147.
243 Colb, Sherry/ Dorf, Michael, Beating Hearts: Abortion and Animal Rights (New York: Columbia University Press 2016), 163.
244 Ibid., 161.

remedy through law enforcement. Further, it engages both those considered to carry responsibility for wrongs (e.g., facility operators) and the general public. As such, the case of undercover footage combines many, if not all, of the parameters delineated above. Consequently, undercover footage challenges democracy and the legal order, but also has the potential to contribute to the fulfillment and improvement thereof. Returning to the categories above, I suggest discussing the dissemination of footage under the category of 'lawful protest,' and the creation of it under the category of 'civil disobedience,' although that does not imply that these labels are appropriate in every one of the real-world examples that exist generally, or which are discussed in this dissertation specifically.

4.4 Why not Whistleblowing?

The abovementioned characteristics of undercover footage, especially the aspect of lawbreaking for the purpose of exposing wrongdoing, may remind one of so-called 'whistleblowing.' In fact, the term whistleblowing is frequently used in US discourse on undercover footage.[245] I consciously chose to avoid the term whistleblowing in this dissertation. Like civil disobedience, whistleblowing is a loaded term which invites comparison with other activists who sparked public debate, such as, for example, Edward Snowden or Chelsea Manning. The public perception of whistleblowers in Germany and in the United States may differ significantly. In a legal study with comparative element, the term cannot be invoked without a thorough analysis of the differences in perception and basis on which those differences arise. Certainly, this challenge should not deter one from employing a concept if it promises to be useful. In fact, in Chapter 7, I face similar challenges when employing the term civil disobedience

I opted for civil disobedience over whistleblowing for two reasons: first, the primary lens adopted in this dissertation is democracy, and deliberative democracy more specifically. As I will show in Chapters 7 and 8, literature

245 See e.g., Gibbons, Chip, Ag-Gag Across America: Corporate-backed Attacks on Activists and Whistleblowers, Center for Constitutional Rights and Defending Rights & Dissent, 2017, 4, available at: https://ccrjustice.org/sites/default/files/attach/2017/09/Ag-GagAcrossAmerica.pdf (last accessed 3 August 2021); in academic literature see e.g., Shea, Matthew, Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-Gag Laws, Columbia Journal of Law and Social Problems 48:3 (2015), 337–371, 338, 340.

on civil disobedience in the field of political theory complements the literature on (deliberative) democracy well. It can help us to make sense of the distinctively democratic questions arising from undercover footage. On the topic of law and democracy in particular, the notion of civil disobedience provides the more promising insights than the notion of whistleblowing.

Second, despite its prevalence in existing literature, the notion of whistleblowing may not be well suited to describing the creation of undercover footage. What characterizes prominent whistleblowers is that they work *from within* an institution: whistleblowers face a conflict between loyalty towards an employer or their superior at work, and their conscience which demands the exposure of certain materials to halt wrongdoing.[246] This is not usually the case for most animal activists. Certainly, it is possible that those working in the animal industry object to certain practices and/ or create undercover footage, and in so doing become animal activists. These could be paradigmatic cases of whistleblowing. However, this dissertation is primarily interested in the distinctively democratic challenges of animal activism, which, *inter alia*, arise from the animal activists conceiving of themselves as opponents to the industry, and who either infiltrate it under false pretense or who secretly enter facilities without the knowledge of those in charge. This distinguishes them from the case of the up-to-this-point loyal employee who turns into a whistleblower. Both this conceptual difference, and the focus on democracy, make whistleblowing a less suitable analytical tool for this dissertation. Nevertheless, whistleblowing would be an alternative lens through which animal activism and undercover footage could be analyzed in the future. The findings of this dissertation, especially in the comparative Chapter 12, might be a useful starting point for such further research. Importantly, looking at the creation of undercover footage as whistleblowing and as civil disobedience need not to be mutually exclusive.[247]

246 On the conflict of loyalty in whistleblowing an in civil disobedience see Scheuerman, William E., Whistleblowing as Civil Disobedience, in: William E. Scheuerman (ed.), The Cambridge Companion to Civil Disobedience (Cambridge: Cambridge University Press 2021), 384–406, 388.

247 See also ibid.

4.5 Gaps in the Existing Research

Literature on animal activism is relatively scarce. Besides the literature from the field of sociology, which I referred to above, animal activism has also gained some attention in moral and political philosophy. Some of this attention is owed to the 'militancy objection' against animal rights: if animals had moral rights, including a right not to be killed, would humans (animal activists) have the moral right to assist them in self-defense?[248] This would imply that humans may use violence against other humans to protect animals.[249] Most recently, Blake Hereth considered this problem. They acknowledge that if animals have moral rights comparable to those of humans, this would have severe consequences for our moral rights or even obligations to assist in the form of a third-party defense.[250] However, Hereth adopts a pacifist view according to which violence in the form of third-party defense is always impermissible, regardless of whether humans or animals are concerned.[251]

The question of whether and to what extent the protection of animals from harm can justify violence against humans has bearings on animal activism. This has recently been addressed by an author writing under the pseudonym Ivar Hardman in the Journal of Controversial Ideas. This author argued that even coercive and violent strategies are prima facie morally permissible against those who would otherwise harm animals.[252] According to Hardman, coercion and violence as deployed *inter alia* by ALF can be morally justified.[253]

The above view is not convincing. The author employs a series of examples to reach such a conclusion, and many of them seem to suffer from a minimalist understanding of necessity and proportionality.[254] Specifically, the author does not explain e.g., why the destruction of research equipment, after animals have been removed facilities, is necessary and propor-

248 Hereth, Blake, Animal Rights Pacifism, Philosophical Studies 178 (2021), 4053–4082; see also Hadley, John, Animal Rights and Self-Defense Theory, The Journal of Value Inquiry 43 (2009), 165–177.
249 Ibid.
250 Hereth 2021.
251 Ibid.
252 Hardman 2021, 1.
253 Ibid., 15.
254 Ibid., 13 (F8), 15 (Elkton example).

tionate.[255] In so doing, the author ignores the temporal aspect of proportionality and necessity, as well as the author's own implicit assessment that a non-state actor may only take action after failed attempts to get assistance from the authorities. Granted, those who have harmed animals before might do the same to other animals in the future. But in the meantime, activists have other – legal – means at their disposal to prevent that.

Another problem which Hardman does address, is that coercive direct action may undermine social trust and the rule of law.[256] Here, the author grapples with differences between direct action and civil disobedience to show that the former does not pose a greater threat to the rule of law than the latter.[257] I disagree with that position for reasons that the Hardman touches upon in a footnote:[258] civil disobedience is aimed at communication, it seeks to instigate change through the democratic process, while direct action circumvents that very process by being focused on '*rescue* and *prevention*.'[259] Unlike Hardman, I believe this renders a justification of the latter *more* demanding if not impossible, considering that animal activists are not enforcing the law or the moral consensus of society when destroying (publicly funded) laboratory equipment.

Rather than making claims as to the moral permissibility of animal activism, this dissertation addresses the equally, if not more, pressing question of how to address the phenomenon of animal activism and its claim to moral permissibility *in a liberal democracy, and in a Court of law*. In so doing, it fills a gap in existing literature on animal activism. In fact, in a recent dissertation on animal activism in Europe, Melvin Josse explicitly pointed to a lack of literature analyzing animal activism through the lens of democracy, rather than of animal rights.[260]

In legal scholarship, animal activism has received little attention so far. Specific legislation in the United States, so-called 'ag-gag' and 'eco-terrorism' legislation constitutes an exception; this area has been covered by legal

255 Ibid.
256 Ibid., 16 f.
257 Ibid., 19 f.
258 Ibid., 22 ft. 41.
259 Ibid.
260 Josse, Melvin, Repression and Animal Advocacy, PhD thesis submitted at the University of Leicester, School of History, Politics, and International Relations, 2021, 127, available at: https://leicester.figshare.com/articles/thesis/Repression_and_Animal_Advocacy/18319376 (last accessed 6 April 2022).

scholars.[261] Further, animal activism features in studies on protecting animals through human rights, notably in the jurisprudence of the ECtHR.[262] In Germany, practitioners have mostly published case notes on specific instances of animal activism that resulted in Court cases.[263] The lack of more comprehensive legal literature on animal activism outside of the United States is not surprising, considering that a distinct 'animal activism law' does not exist. After all, 'ag-gag' aside, depending on the activist strategy in question, the same statutes and precedent may apply to anti-abortion activism or corporate whistleblowing. And yet, as I will show in this dissertation, distinctive arguments beyond strictly legal thought are employed in legal cases arising from animal activism. This is why I see the need for employing political theory, and democratic theory specifically, to explain and evaluate legal responses to animal activism in general, and undercover footage in particular.

Considering the above, I will draw on political philosophy and political science literature on animal activism and its relationship with democracy, and with deliberative democracy more specifically. I consider this stream of literature connected to the political turn in animal ethics.[264] *Zoopolis* is commonly considered a seminal work in this field, as Sue Donaldson and Will Kymlicka developed a political theory of animal rights in which they stress questions of animal membership in society.[265] Other central issues discussed by Alasdair Cochrane, Eva Meijer, Bernd Ladwig and Angie Pepper, for example, include the question of representation, communication, political agency and ultimately political rights for animals.[266] Additionally,

261 See e.g., Landfried, Jessalee, Bound & Gagged: Potential First Amendment Challenges to "Ag-Gag" Laws, Duke Environmental Law & Policy Review, 23 (2013), 377–403. See also Chapter 10 with further references.

262 Sparks, Tom, Protection of Animals Through Human Rights: The Case-Law of the European Court of Human Rights, in: Anne Peters (ed.), Studies in Global Animal Law (Berlin: Springer 2020), 153–171.

263 Vierhaus, Hans-Peter/ Arnold, Julian, Zur Rechtfertigung des Eindringens in Massentierhaltungsanlagen, NuR 41 (2019), 73–77; Scheuerl, Walter/ Glock, Stefan, Hausfriedensbruch in Ställen wird nicht durch Tierschutzziele gerechtfertigt, NStZ (2018), 448–451.

264 Cochrane, Alasdair/ Garner, Robert/ O'Sullivan, Siobhan, Animal Ethics and the Political, Critical Review of International Social and Political Philosophy 21 (2018), 261–277.

265 Donaldson, Sue/ Kymlicka, Will, Zoopolis (Oxford: Oxford University Press 2011).

266 Cochrane, Alasdair, Sentientist Politics: A Theory of Global Inter-Species Justice (Oxford: Oxford University Press 2018); Meijer, Eva, When Animals Speak. Toward an Interspecies Democracy (New York: New York University Press 2019); Donald-

Siobhan O'Sullivan and others put a spotlight on issues of democracy and the status quo of society and animal law. Importantly, O'Sullivan pointed out that some animal species lack visibility in society, raising the question of whether communities would condone certain farming practices if they were required to look at them.[267] This implies questions on the democratic legitimacy of existing animal protection standards. Further, O'Sullivan and others discussed whether animal activism can be considered civil disobedience.[268] Finally, some research exists on whether animal activism is compatible with deliberative democracy,[269] and I will borrow those frameworks that are endorsed in this literature to examine the propositions employed in legal discourse on animal activism and undercover footage in Chapter 5.

The political turn in animal ethics has not (yet) gained a foothold in law.[270] The aspirational, or even utopian, character of some of the themes discussed above, such as those of animal representation and animal agency, might deter legal scholars from engaging with the political turn. However, this same lack of engagement must not be applied to the case for animal activism, as this is a phenomenon that already exists and is governed by existing law. The lack of distinctively legal literature on animal activism constitutes a deficit, since the law not only determines the lived reality of animal activists, but also plays a decisive role in determining which information reaches the public. Animal activism may instigate societal change that can ultimately lead to animal law reforms with democratic legitimacy. Given this crucial role of animal activists, it is unfortunate that there exists little academic knowledge on them and their strategies. Similarly, looking at arguments employed against animal activists in the courtroom might help to develop a more nuanced understanding of why animal law reforms are

son, Sue, Animal Agora: Animal Citizens and the Democratic Challenge, Social Theory and Practice 46:4 (2020), 709–735; Ladwig, Bernd, Politische Philosophie der Tierrechte (Berlin: Suhrkamp 2020); Pepper, Angie, Political Agency in Humans and Other Animals, Contemporary Political Theory 20 (2021), 296–317.

267 O'Sullivan 2011, 8.

268 McCausland, Clare/ O'Sullivan, Siobhan/ Brenton, Scott, Trespass, Animals and Democratic Engagement, Res Publica 19 (2013), 205–221.

269 See e.g., Hadley, John, Animal Rights Advocacy and Legitimate Public Deliberation, Political Studies 63 (2017), 696–712; Humphrey, Mathew/ Stears, Marc, Animal Rights Protest and the Challenge to Deliberative Democracy, Economy and Society 35:3 (2006), 400–422. See also Chapter 5 with further references.

270 An important exception discussing animals and representation is Peters, Anne, Animals in International Law, in: Collected Courses of the Hague Academy of International Law – Recueil des Cours Vol. 410 (Leiden: Brill 2020), 509 f.

often lagging behind expectations, and extend that understanding beyond the commonplace explanations of economic power and anthropocentrism. As I will show in this dissertation, the difficult relationship between animal activism and democratic procedures can be traced in legal responses to undercover footage.

Part II: The Dissemination of Undercover Footage and the Deliberative Ideal

When animal activists or journalists disseminate undercover footage from animal facilities, they may face lawsuits from animal facility operators. Undercover footage does not only bring animal suffering closer to the public's eyes. It can also jeopardize businesses and put the livelihood of those working in the industry at risk. If associated with poor animal welfare conditions, animal facility operators may face inquiries from the authorities, and individuals might have to answer to criminal charges. Even if the conditions or conduct in a given facility are not in violation of the applicable law, facility operators might lose associates and customers alike. Undercover footage, for example of research involving animals, may trigger strong emotional responses from an audience. This effect may be further enhanced by the way footage is cut, as well as by commentary.

How do Courts decide whether undercover footage may be disseminated? Which role does democracy play in this process? In the following two Chapters, I will examine how German Courts and the ECtHR have approached cases concerning the dissemination of undercover footage.

5. Animal Activism and the Rules of Deliberative Democracy: The Tierbefreier Case

In 2014, the ECtHR decided the case *Tierbefreier e.V. v. Germany*.[1] The applicant association, Tierbefreier e.V. ('Tierbefreier,') had disseminated undercover footage from an animal testing laboratory.[2] The Court found that an injunction against the association, ordering them to desist from disseminating the footage, did not constitute a violation of their right to freedom of expression enshrined in Article 10 of the ECHR.[3]

1 ECtHR, *Tierbefreier e.V. v. Germany*, App. no. 45192/09, 16 January 2014.
2 Ibid., paras. 5 ff.
3 Ibid., para. 60.

This Chapter revolves around that case, which I will refer to as the *Tierbefreier* case.[4] In this case, the Courts, in effect, held that the speech of militant animal activists is less protected than that of others. The central reason for a lower protection in the case of the animal activists was that Tierbefreier had shown disrespect for the 'rules of the intellectual battle of ideas' ['Regeln des geistigen Meinungskampfs'] in the past.[5] According to the domestic Court, Tierbefreier violated these rules by endorsing criminal acts, and by accusing the testing laboratory of 'torture and murder.'[6] The 'rules' do not match the lines between legality and illegality, and they remain ambiguous.

This Chapter argues that the 'rules of the intellectual battle of ideas' reflect the paradigm of deliberative democracy. The arguments of the Courts rested on the fact that Tierbefreir breached the rules by employing so-called 'non-deliberative methods.' Building on literature from the field of political philosophy,[7] I consider animal activists' use of non-deliberative methods in the broader political context in which they operate. Animal activists are struggling in these non-perfect deliberative systems, as any deliberation takes place in a political arena which is characterized by inequalities between animal advocates and their opponents and steeped in a tradition of using animals for human ends. I show that relying on the 'rules' of deliberative democracy to limit the weight of freedom of expression disproportionately affects political minorities generally, and animal activists specifically. However, I also critically examine arguments in the literature according to which deliberative democracy can accommodate non-deliberative methods. It is concluded that the Courts could have reached the same outcome without relying on the 'rules,' and without opening the door to burden placing on the speech rights of political minorities.

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4 ECtHR, *Tierbefreier e.V. v. Germany*, App. no. 45192/09, 16 January 2014.

5 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (132, 135 ff); see also ECtHR, *Tierbefreier e.V. v. Germany*, App. no. 45192/09, 16 January 2014, para. 11.

6 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (136).

7 See e.g., Humphrey, Mathew/ Stears, Marc, Animal Rights Protest and the Challenge to Deliberative Democracy, Economy and Society 35:3 (2006), 400–422; Garner, Robert, Animal Rights and the Deliberative Turn in Democratic Theory, European Journal of Political Theory 18:3 (2019), 309–329; Parry, Lucy J., Don't put all your speech-acts in one basket: situating animal activism in the deliberative system, Environmental Values 26 (2017), 437–455; D'Arcy, Stephen, Deliberative Democracy, Direct Action and Animal Advocacy, Journal for Critical Animal Studies 5:2 (2007), 1–16.

The differential treatment of animal activists and other parties arises as the domestic Courts had to decide on a number of cases concerning the dissemination of the same footage by other individuals, *inter alia* the journalist who had created the footage.[8] However, the Hamm Regional Court, which was the highest domestic Court concerned with the case, found that the case against Tierbefreier differed from the other cases.[9] While in part revising injunctions against others, it upheld the comprehensive injunction against Tierbefreier, ordering them to desist from disseminating any of the footage from the laboratory.[10] The Hamm Regional Court took into account prior conduct of Tierbefreier, which, according to the Court, showed the association's disrespect for the 'rules of the intellectual battle of.[11] This choice gives rise to the implication that the speech of militant animal activists is less protected than those of others.[12]

The *Tierbefreier* case provides an introduction to legal responses to undercover footage in Germany and at the ECtHR and sheds light on the factors which determine the outcome of cases at the intersection of norms effecting the wellbeing of animals, and norms effecting freedom of expression. Further, and more importantly, the case problematizes the relationship between undercover footage and other strategies of animal activists which are less compatible with deliberative ideals.

The following analyzes the *Tierbefreier* case and reconstructs it through the lens of deliberative democracy. It employs deliberative democracy to explain and evaluate the reasoning of the Courts. In so doing, the Chapter

8 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 77/04, ZUM-RD 579, 2004 (highest domestic Court decision against the journalist); OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 97/04 (highest domestic Court decision against an animal activist from the city of Münster; not published). For a summary in English see ECtHR, *Tierbefreier e.V. v. Germany*, App. no. 45192/09, 16 January 2014, para. 22.

9 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (135).

10 Ibid., 132. For a summary of the domestic court proceedings against Tierbefreier in English see ECtHR, *Tierbefreier e.V. v. Germany*, App. no. 45192/09, 16 January 2014, paras. 9–21.

11 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (132, 135–137); see also ECtHR, *Tierbefreier e.V. v. Germany*, App. no. 45192/09, 16 January 2014, para. 11.

12 Steinbeis, Maximilian, Militanz mindert Meinungsfreiheit, Verfassungsblog, 16 January 2014, available at: https://verfassungsblog.de/militanz-mindert-meinungsfreiheit/ (last accessed 9 February 2022).

will focus on the notion of 'rules of the intellectual battle of ideas.'[13] The goal is to interpret this notion and examine its implications for animal activists and legal responses to undercover footage. The reasoning, as based on these 'rules,' can be supported, but also challenged, by different streams of deliberative democracy. Finally, the Chapter illustrates how basing a decision on these 'rules,' or a similar notion, disadvantages animal activists and other political minorities.

5.1 Legal Analysis

5.1.1 Background and Facts

In March 2003, a journalist entered into an employment contract with an animal testing laboratory.[14] The laboratory operator was authorized to conduct animal testing pursuant to § 8 of the Animal Protection Act [Tierschutzgesetz], and to breed and keep animals, pursuant to § 11 of the Animal Protection Act.[15] In violation of a contractual confidentiality clause, the journalist used a hidden camera to create approximately 40 hours of footage, showing the treatment of animals in the testing laboratory. Together with a British animal welfare organization, he turned the footage into a film of approximately 20 minutes, titled 'Poisoning for profit.'[16] Parts of the footage were broadcast on TV, including by the German public-service broadcaster 'ZDF,'[17] receiving widespread public attention.[18] The Public Prosecutor's Office issued preliminary criminal proceedings against the laboratory operator, based on allegations of animal cruelty (§ 17 Animal Protection Act).[19] The proceedings were terminated due to a lack of

13 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (132, 135–137); see also ECtHR, *Tierbefreier e.V. v. Germany*, App. no. 45192/09, 16 January 2014, para. 11.
14 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (131); for a summary of the background of the case in English see ECtHR, *Tierbefreier e.V. v. Germany*, App. no. 45192/09, 16 January 2014, paras. 5–8.
15 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (131).
16 Ibid.
17 Ibid.
18 Ibid.
19 Ibid., 132.

sufficient grounds for suspicion ['mangels hinreichenden Tatverdachts'].[20] The film 'Poisoning for profit' was made available online, *inter alia* on the website of the German animal activist group Tierbefreier.[21] According to the Hamm Regional Court, the core message of the film was that the laboratory operator systematically flouted applicable animal protection law.[22]

5.1.2 The Case Against Tierbefreier in the Context of Parallel Proceedings

In 2004, the laboratory operator sought civil injunctions against the journalist who had created the footage, as well as a number of activists and their associations, amongst them Tierbefreier, all of whom had disseminated or were planning to disseminate the film.[23] The Münster District Court ordered Tierbefreier to desist from publicly displaying, or otherwise making publicly available, the footage produced on the laboratory operator's premises without consent.[24] On appeal, the Hamm Regional Court fully affirmed the injunction against Tierbefreier.[25] However, the Court revised similar injunctions against others, including one against the journalist responsible for creating the footage.[26] The Court found that the film, as well as the use of the footage by some private broadcasting companies, violated the rights of the plaintiff due to its 'misleading main theme' ['irreführendes Leitmotiv'], the conveying of the message that the laboratory operator systematically ignored the law.[27] It was found that that that message was presented as fact, not as a suspicion.[28] However, the injunction did not prohibit the use of the original footage by the journalist, nor the creation of a

20 Ibid.
21 Ibid.
22 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 77/04, ZUM-RD 579, 2004 (588).
23 For an overview on the proceedings see ibid., 580; Not all of the decisions are publicly available. For the case against an individual activist who planned to use the material during a demonstration see LG Münster [Münster District Court] 4 February 2004, ZUM-RD 262, 2004 (264).
24 ECtHR, *Tierbefreier e.V. v. Germany*, App. no. 45192/09, 16 January 2014, para. 9. The original decision of the lower Court is not publicly available.
25 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005.
26 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 77/04, ZUM-RD 579, 2004 (588).
27 Ibid.
28 Ibid.

new film from it, as long as it did 'not disseminate a misleading message, be it through distorting commentary or through suggestive editing' ['Er darf […] keine irreführende Botschaft verbreiten, sei es durch verfäschenden Begleittext oder durch suggestive Schnittführung'].[29]

The Hamm Regional Court's decision in the case against the journalist is also noteworthy for its engagement with expert opinions on conditions in the laboratory,[30] and strong considerations of animal law issues. Most significantly, the Court stated that the question of the lawfulness of the conditions in the laboratory was not a sufficiently clear-cut criterion to speak against the publication of illegally obtained footage, as the law under which ethically objectionable conditions are permitted might be in need reform.[31] This particular issue is of great importance, and will be discussed in Chapter 6 as its paramount importance for the intersection of animal law and freedom of expression in Germany calls for analysis.

The case against the journalist, as compared with that against Tierbefreier, shows that the Hamm Regional Court did not take issue with the publication of the footage as such, as it made a strong case for why the publication of that footage was in the public interest. The decision also highlights an alternative to the comprehensive injunction sought, being the limiting order requiring the journalist to desist from using the footage to convey a misleading message. In light of this parallel proceeding, it becomes clear that it is the 'rules of the intellectual battle of ideas' that was the decisive factor in the case against Tierbefreier.

The laboratory operator also sought injunctions against two animal rights organizations and internet providers in Switzerland, ordering them to desist from disseminating the footage.[32] The Münchwilen District Court rejected the request, finding it was doubtful whether the practices revealed in the footage were lawful under animal protection law, and that the defendant's right to freedom of expression prevailed as a result.[33]

29 Ibid.
30 Ibid., 585 ff.
31 Ibid., 584 f.
32 ECtHR, *Tierbefreier e.V. v. Germany*, App. no. 45192/09, 16 January 2014, para. 28.
33 Ibid.

5.1.3 Applicable Law

The Münster District Court granted the injunction against Tierbefreier based on §§ 823 (1), 1004 (1) of the Civil Code. The Hamm Regional Court affirmed the injunction, arguing that it could additionally be based on § 823 (2) of the Civil Code in conjunction with § 186 of the Criminal Code.[34] It considered the laboratory operator's 'general personality right' ['allgemeines Persönlichkeitsrecht'],[35] which, for legal entities, derives from Article 2 (1) of the Basic Law.[36] According to the Hamm Regional Court, the laboratory operator, a corporation, is also protected by § 186 of the Criminal Code (malicious gossip [üble Nachrede]).[37] In favor of Tierbefreier, the Hamm Regional Court considered the right to freedom of expression enshrined in Article 5 (1) of the Basic Law, and reinforced by the constitutional law provision on animals in Article 20a of the Basic Law.[38] The Animal Protection Act played a subsidiary role in the case; the Hamm Regional Court merely noted that criminal investigation proceedings against laboratory employees for animal cruelty (§ 17 Animal Protection Act), were not fruitful.[39]

The ECtHR considered the case against Tierbefreier under Article 10, Article 14 in conjunction with Article 10, and Article 6 of the ECHR.[40]

5.1.4 Münster District Court Decision

The Münster District Court issued a preliminary injunction ['einstweilige Verfügung'] against Tierbefreier on 20 January 2004, pursuant to §§ 935, 940 of the Civil Procedure Code, ordering them to desist from disseminat-

34 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (132).
35 Ibid.
36 BVerfG [Federal Constitutional Court] 9 October 2002, 1 BvR 1611/96, 1 BvR 805/98, NJW 3619, 2002 (3622).
37 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (132), citing BGH [Federal Court of Justice] 8 January 1954, 1 StR 260/53, NJW 1412, 1954 (1412).
38 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (134 f).
39 Ibid., 132.
40 ECtHR, *Tierbefreier e.V. v. Germany*, App. no. 45192/09, 16 January 2014.

ing the footage from the laboratory.[41] According to the Court, the dissemination of footage constituted a 'business related and unlawful interference with the established and operated business enterprise' ['betriebsbezogener und rechtswidriger Eingriff in den eingerichteten und ausgeübten Gewerbebetrieb'] of the plaintiff, which could not be justified by freedom of expression (Article 5 (1) Basic Law).[42] The Court later affirmed the injunction.

In addition to an interference with the established and operated business enterprise, the Court found that the publication of footage interfered with the personality rights of the plaintiff, thus with both Article 2 (1) and Article 14 of the Basic Law.[43] In favor of the defendant, the Court considered both Article 5 and Article 20a of the Basic Law.[44] Interestingly, the Court considered it irrelevant whether the footage depicted unlawful conditions in the laboratory.[45] According to the Münster District Court, there was no significant interest in publication, for such an interest could only exist where the defendant had no other, less incisive means available to reveal unlawful conditions or abuses.[46] The Court held that as long as 'legally regulated and functioning state licensing and supervisory procedures' ['gesetzlich geregeltes und funktionierendes staatliches Genehmigungs- und Aufsichtsverfahren'] exist, there is no sufficient interest in publication.[47] Consequently, the interests of the laboratory operator prevailed.

5.1.5 Hamm Regional Court Decision

As alluded to above, the decisions on appeal reveal differential treatment of those involved. The Hamm Regional Court revised the decisions against the journalist, ordering him to desist from disseminating the film 'Poisoning for profit,' but leaving him with the opportunity to use the footage for a new film on the proviso that it did not convey a misleading message.[48]

41 LG Münster [Münster District Court] 20 January 2004, 14 O 25/04.
42 Ibid.
43 Ibid., paras. 30, 34.
44 Ibid., para. 35.
45 Ibid., para. 38.
46 Ibid., para. 39.
47 Ibid.
48 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 77/04, ZUM-RD 579, 2004 (588).

However, the Hamm Regional Court upheld the comprehensive injunction against Tierbefreier, ordering them to desist from disseminating not only the film 'Poisoning for profit,' but also any of the original footage.[49] This conclusion was based on Tierbefreier's past conduct, which indicated that they did not ensure the 'rules of the intellectual battle of ideas.'

In favor of Tierbefreier, the Hamm Regional Court considered freedom of expression enshrined in Article 5 (1) of the Basic Law.[50] It noted that Article 5 (1) does not protect the obtaining of information by illegal means; but does cover the dissemination of illegally obtained information.[51] Further, Article 5 (1) sentence 2 of the Basic Law was applicable, either as freedom of reporting by means of film, or as freedom of the press.[52] Tierbefreier's right to freedom of expression was reinforced by Article 20a of the Basic Law, the constitutional law provision setting out state objectives regarding the protection of animals ['Staatszielbestimmung'].[53] The Court left no doubt that society attaches high significance to animal protection, in particular in the context of animal testing, and that animal protection, therefore, is a matter of public interest.[54] Nevertheless, the Court stated clearly that the question of whether the critique of animal testing is justified or not, was not at stake.[55] What mattered in this regard, according to the Court, was only that animal protection is regarded as a matter of public interest ['Gemeinwohlbelang'] and as value of constitutional rank.[56]

49 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (132).

50 Ibid., 134.

51 Ibid.

52 Ibid.

53 Ibid., 134 f. It is undisputed that Article 20a of the Basic Law does not confer to anyone subjective rights. Instead, the Courts have to take Article 20a Basic Law into account when interpreting legal concepts which are not precisely defined ['unbestimmte Rechtsbegriffe'], when exercising discretion ['Ermessensausübung'] and in similar weighing exercises ['ähnliche Abwägungsvorgänge']; Huster, Stefan/Rux, Johannes, Art. 20a, in: Volker Epping, Christian Hillgruber (eds.), Beck Online Kommentar zum Grundgesetz (München: C.H. Beck 50st ed., 2022), para. 32.

54 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (134).

55 Ibid.

56 Ibid. In noting that animal protection has been regarded as matter of public interest in the past, the Hamm Regional Court cited: BVerfG [Federal Constitutional Court] 2 October 1973, 1 BvR 459 477/72, NJW 30, 1974; BVerfG [Federal Constitutional Court] 6 July 1999, 2 BvF 3–90, NJW 3253, 1999.

In favor of the plaintiff, the Hamm Regional Court considered the laboratory operator's personality right ['Persönlichkeitsrecht'], derived from Article 2 (1) of the Basic Law.[57] It noted that corporations are entitled to the protection of their personality rights to the extent that is required for them to exercise their function.[58] Thus, as a rule, the plaintiff is entitled to decide which information she wants to have disseminated about herself.[59] Article 2 (1) of the Basic Law further protects the freedom of a juristic person organized under private law ['juristische Person des Privatrechts'] to engage in economic activity, which is interfered with when footage is created secretly in the sphere of her domiciliary right ['Hausrecht'].[60] If a supposedly loyal employee spies on the corporation employing him, the minimum level of due protection of trust is obstructed, especially if the obtained information is being used for an attack against the corporation.[61] However, the Court noted that the laboratory operator did not enjoy a specially protected interest in secrecy beyond these considerations.[62] The conditions under which animals are kept in a laboratory do not deserve special confidentiality protection.[63] Significantly, such a special interest in secrecy is not triggered by the fact that the average viewer considers even the depiction of a lawful animal experiment to be shocking.[64]

The Court employed a balancing test designed to balance between the rights of the plaintiff and those of the defendant.[65] I will explain this test in more detail in Chapter 6, however in this context the decisive criterion of this test, according to the Court, was the relationship between ends and means.[66] By 'ends' the Court means the purpose of the expression at issue: the more the expression contributes to the intellectual battle of ideas, and the less it is directed against a private legal interest – in the private sphere, in pursuit of a selfish goal – the more weighty is freedom of expression.[67] The 'means' in the case at hand were the publication of information which

57 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (132).
58 Ibid.
59 Ibid., 133.
60 Ibid.
61 Ibid.
62 Ibid.
63 Ibid.
64 Ibid.
65 Ibid., 135.
66 Ibid.
67 Ibid.

was unlawfully obtained through misrepresentation, and used for an attack against the target of the misrepresentation.[68] The means in this case was found to constitute a 'not insignificant interference' ['nicht unerheblichen Eingriff'] into the sphere of that person and additionally constitutes a grave contradiction with the unity of the legal order ['Unverbrüchlichkeit des Rechts'].[69] In this situation, as a rule, publication of the information should not take place.[70] An exception is to be made only where the importance of the information for the public, and for the public formation of opinion, clearly outweigh the disadvantages for the party concerned and for the validity of the legal order ['Geltung der Rechtsordnung'].[71] As a rule, this will not be the case, if the unlawfully obtained information only reveals lawful conditions or practices[72] as the lawfulness of the conditions indicates that they are not sufficiently grave for their revelation to be in the public interest.[73]

In the parallel case against the journalist who created the footage, the Court explicitly noted that this threshold (the revealing of conditions or practices which are themselves unlawful) is not a sufficiently clear-cut criterion, as the Animal Protection Act – the law which determines the lawfulness of the conditions in the laboratory – might need reform.[74] The Court omitted making a comparable clarification in the case against Tierbefreier.

It is the distinguishing element between these cases that is the central takeaway for our analysis. As, what distinguished Tierbefreier from the defendants in the parallel cases, was that they had not ensured the 'rules of the intellectual battel of ideas' in the past.[75] In the above test, freedom of expression (Article 5 (1) of the Basic Law) derives its weight from the contribution that the dissemination of the footage would make to the intellectual battle of ideas.[76] However, the Court found that freedom of

68 Ibid.
69 Ibid.
70 Ibid.
71 Ibid.
72 Ibid.
73 Ibid. On this argument see in more detail Chapter 6.
74 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 77/04, ZUM-RD 579, 2004 (584 f).
75 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (135 f).
76 Ibid., 135.

expression has to step back and behind the plaintiff's personality right, if the defendant who was disseminating the footage has sustainably shown that they do not ensure respect for the 'rules of the intellectual battle of ideas.'[77] In this context, the Court made a number of examples of how Tierbefreier did not act in accordance with those 'rules.'[78] Tierbefreier had, for example, endorsed vandalism, protests in front of the homes of the laboratory employees, and other direct action,[79] which examples will be explored in more detail below.

Finally, it should be said that the Court emphasized that it did not seek judgement on the aim of Tierbefreier (namely the abolition of animal testing), and that its judgement did not prevent the association from holding and voicing a position on this subject.[80] However, it held instead that if the defendant uses unlawfully obtained information and addition methods outside of the 'rules of the intellectual battle of ides,' the relation between ends and means must be evaluated.[81] This includes considering *through whom* the dissemination of the unlawfully obtained information is done.[82] In the case at hand, the plaintiff could not be expected to tolerate an aggressive opponent like Tierbefreier fighting it with unlawfully obtained footage, said the Court.[83]

5.1.6 ECtHR Decision

The decision upholding the comprehensive injunction against Tierbefreier gave rise to Tierbefreier's application to the ECtHR, pursuant to Article 34 of the ECHR.[84] The applicant organization complained in particular about a violation of their rights to freedom of expression (Article 10 (1) ECHR) and equal treatment (Article 10 in conjunction with Article 14 ECHR).[85]

77 Ibid.
78 Ibid., 135 f.
79 Ibid.
80 Ibid., 137.
81 Ibid.
82 Ibid.
83 Ibid.
84 ECtHR, *Tierbefreier e.V. v. Germany*, App. no. 45192/09, 16 January 2014, paras. 1, 9 ff.
85 Ibid., para. 3.

Tierbefreier argued, *inter alia*, that they did not approve of the commission of criminal acts.[86] They pointed out that their methods, specifically disseminating flyers and organizing demonstrations, were legitimate means in an intellectual debate.[87] Further, Tierbefreier argued that the film 'Poisoning for profit' had been produced by a third party, and that they had assumed the conveyed message, regarding the systematical fouling of the law in the laboratory, to be correct.[88] In any case, the core message of the film was that animal testing was cruel, irrespective of its lawfulness.[89] Finally, Tierbefreier argued that the applicant association's right to freedom of expression should prevail over the company's personality rights.[90]

The government's submissions, in essence, reflected the Hamm Regional Court's reasoning. The government added that the dissemination of the footage could lead to the commission of crimes and protests involving violent acts.[91] Further, the government submitted that, in assessing the domestic authorities margin of appreciation, it had to be taken into account that Tierbefreier 'did not make a constructive contribution towards the public debate on animal experiments,' as they instigated false impressions.[92] It was submitted that the domestic Courts had adequately assessed the relationship between means and ends, especially considering that Tierbefreier breached the 'rules of the intellectual battle of ideas.'[93] Finally, it was submitted that it was necessary to prohibit Tierbefreier from using any of the footage, as they would otherwise use it to create a new 'similarly distorting, sensational film.'[94]

In its reasoning, the ECtHR found that the injunction did interfere with the applicant association's right to freedom of expression,[95] but that this interference had a legal basis in the applicable domestic law and was thus 'prescribed by law.'[96] Further, the Court found that the interference

86 Ibid., para. 35.
87 Ibid, para. 36.
88 Ibid., para. 37.
89 Ibid.
90 Ibid., para. 39.
91 Ibid., paras. 41 ff.
92 Ibid., para. 43.
93 Ibid., paras. 44 f.
94 Ibid., para. 46.
95 Ibid., para. 47.
96 Ibid., para. 48.

pursued a legitimate aim, namely the protection of the laboratory operator's reputation, and thus the 'reputation or rights of others.'[97]

In a next step, the Court was required to determine whether the interference was 'necessary in a democratic society.'[98] Like in other cases involving freedom of expression, the Court stressed that freedom of expression extends to ideas 'that offend, shock or disturb.'[99] It held that the need for exceptions must be established convincingly and strictly construed[100] and that expressions of opinion made in debate on a matter concerning the public interest receive a 'special degree of protection.'[101]

The ECtHR considered the domestic Courts' assessment of the facts and its balancing of the right to freedom of expression and the rights of the laboratory operator.[102] According to the ECtHR, the domestic Courts were careful in their examination whether the injunction would violate the applicant association's right to freedom of expression.[103] In so doing they acknowledged that dissemination the footage was specially protected by freedom of expression as it related to a question of public interest, referring to the provision on animals in Article 20a of the Basic Law.[104] In favor of the laboratory operator, the domestic Courts took into account that the footage was obtained unlawfully.[105] The ECtHR stressed that the applicant association had failed to deliver evidence of the allegations made in the film, namely that the practices of the laboratory owner violated the law.[106] Finally, the Court noted the consideration by the Hamm Regional Court of the fact that Tierbefreier 'disrespected the rules of the intellectual battle of ideas' in the past and was expected to continue doing so.[107] This justified, according to the ECtHR, issuing a further reaching injunction against the applicant, as compared to others who had disseminated the same footage.[108] Regarding the 'rules of the intellectual battle of ideas,' the ECtHR found that '[t]he German Courts' argumentation based on "rules of the intellectual

97 Ibid., para. 49.
98 ECtHR, *Tierbefreier e.V. v. Germany*, App. no. 45192/09, 16 January 2014, paras. 50 ff.
99 Ibid., para. 51.
100 Ibid.
101 Ibid.
102 Ibid., para. 52.
103 Ibid.
104 Ibid.
105 Ibid., para. 53.
106 Ibid., para. 54.
107 Ibid., para. 56.
108 Ibid., para. 55 f.

battle of ideas" thus takes into account the context in which the statement is made, in particular the aspect of fairness and the limits set by criminal law.'[109]

Thus, according to the ECtHR, the domestic Courts correctly examined the risk of Tierbefreier re-offending.[110] The ECtHR emphasized the civil as opposed to criminal nature of the sanction, and the possibility to review it in the case of a change of circumstances.[111] Further, Tierbefreier was not prevented from continuing to express criticism of animal experiments.[112] Overall, the ECtHR found that the domestic Courts 'struck a fair balance between the applicant's right to freedom of expression and the [laboratory operator's] interest in protecting its reputation.'[113] It also denied a violation of Article 14 in conjunction with Article 10 of the ECHR, and of Article 6 of the ECHR.[114]

5.2 'The Rules of the Intellectual Battle of Ideas:' A Normative Reconstruction

In the above analysis, I identified a decisive argument in the Hamm Regional Court's reasoning being that Tierbefreier disrespected the 'rules of the intellectual battle of ideas,' and showed that this argument was accepted by the ECtHR. Thus, it was due to these 'rules' that Tierbefreier's right to freedom of expression was less protected than that of other people and entities. As Michael Steinbeis, the founder of the constitutional law blog *Verfassungsblog,* summarized: 'German Courts may at times ascribe less weight to the freedom of expression of militant activists than to that of nice, polite ordinary guys' ['[d]eutsche Gerichte dürfen der Meinungsfreiheit militanter Aktivisten bisweilen ein geringeres Gewicht zumessen als der von netten, höflichen Normalos'].[115] But what exactly is the 'inner logic'[116] of the Courts' reasoning in the *Tierbefreier* case? In the next Section I will explore the questions; how does the reliance on the 'rules' of the intellectual battle of ideas impact the speech rights of animal activists; and what does

109 Ibid., para. 56.
110 Ibid., para. 57.
111 Ibid., para. 58.
112 Ibid.
113 Ibid., para. 59.
114 Ibid., para. 65.
115 Steinbeis 2014.
116 Ibid.

it imply about the relationship between animal activism, freedom of expression, and democracy?

In answering these questions, I will first clarify what the Hamm Regional Court meant by 'rules of the intellectual battle of ideas.' This constitutes the first part of my normative reconstruction. I then argue that these 'rules' are indicative of the 'rules' of deliberative democracy. This link allows me to turn to a specialized body of literature in political theory, which explores the relationship between deliberative democracy and animal activism, the second part of my normative reconstruction. Based on the findings of political theorists, I will argue that employing the 'rules of the intellectual battle of ideas' as a decisive factor in a legal dispute involving the speech rights of animal activists is (i) disproportionate considering the disadvantaged position of animal activists in the political system, (ii) potentially in conflict with deliberative ideals, and finally (iii) unnecessary in the case at hand.

Before I begin, two clarifications are required regarding the aim and the scope of the argument. Firstly, it should be said upfront that the following argument takes issue only with the notion of 'rules of the intellectual battle of ideas' in legal reasoning, but not with the outcome of the case at hand. Most importantly, it is not a defense of animal activists deploying unlawful methods or disseminating misleading information. What I will challenge in the following is not the outcome of the case, but the particular argument employed by the Courts to support it.

Secondly, the issue at stake for this discussion arises from a tension between the right to freedom of expression and the rights of others, which is a notoriously complex and dynamic legal field. The Chapter cannot cover this topic comprehensively. I consciously chose to isolate the notion of 'rules of the intellectual battle of ideas' from a theoretical perspective, not in denial of, but rather as a response to its being rooted in this complex field. Where necessary, I will refer to connected legal questions discussed in other parts of this dissertation. Being aware of possible new developments in the field, the level of abstraction serves to ensure the continuing relevance of the argument. I focus on the tension between deliberative democracy and activism, which – as I will show later – is well captured by the notion of 'rules of the intellectual battle of ideas' and crucial to the intersection of law, freedom of expression, and democracy.

5.2.1 Defining the 'Rules of the Intellectual Battle of Ideas'

The Hamm Court's finding on Tierbefreier's disrespect for the 'rules of the intellectual battle of ideas' tipped the scales in favor of the rights of the laboratory operator, which the ECtHR endorsed in finding no violation of Tierbefreier's right to freedom of expression.[117]

However, this idea comes with a number of problems; one of which is a lack of definition for these 'rules.' They are neither clearly defined in the case itself, nor known from existing jurisprudence. While the history of the notion of 'intellectual battle of ideas' dates back to the 1950s – at the birth of the Federal Constitutional Court – the 'rules' of this battle are unique to the *Tierbefreier* case. In fact, the Hamm Regional Court's decision remains the only published decision of German Courts in which the term has been used in this form. The only attempt at a definition can be found in the German government's submission in the ECtHR case:

> 'The rules of the intellectual battle of ideas were not subject to an express definition. They derived from the principle that an expression of opinion warranted special protection if it contributed to a debate of public interest. The rules were breached if the outcome of the intellectual debate was influenced by unfair means. Polemic statements or statements provoking specific emotions and moods did not yet constitute unfair means. Unfair means were, however, employed if a public exchange of opinion was suppressed by intimidation or agitation, or if a distorted impression was created through misinformation. The consequence of a breach of the rules of the intellectual battle of ideas was that the weight of freedom of opinion was reduced.'[118]

The Hamm Regional Court, instead of defining the 'rules of the intellectual battle of ideas,' gave examples of how Tierbefreier disobeyed them. *Inter alia*, the content on the Tierbefreier website indicated that the association endorsed criminal acts: 'A life of [an animal] will always be more important for us than a broken door, a destroyed experiment laboratory or a meat transport set on fire' ['Ein Leben [eines Tieres] wird für uns immer mehr wert sein als eine aufgebrochene Tür, ein zerstörtes Versuchslabor oder ein

117 ECtHR, *Tierbefreier e.V. v. Germany*, App. no. 45192/09, 16 January 2014, para. 56.
118 Ibid., para. 45.

in Brand gezündeter Fleischtransporter'].[119] On their website, Tierbefreier further displayed solidarity with 'autonomous animal rights activists,' by offering support to those who 'risk criminal prosecution' by covering their legal costs.[120] Further, Tierbefreier gave a voice to animal activists who use methods outside of the 'rules of the intellectual battle of ideas' by disseminating footage of activists blocking the entrance to the premises of the testing laboratory in question.[121] The association accused the laboratory owner of 'torture and murder,' which, according to the Hamm Regional Court, were unfounded and sensational accusations ['haltlose, reißerische Bezichtigungen'].[122] In addition, Tierbefreier supported intimidation against persons associated with the laboratory, by financially supporting autonomous groups who, for example, entered private property of a high-level executive of the laboratory company or disseminated leaflets in the residential neighborhoods of laboratory employees.[123] Furthermore, Tierbefreier hacked the website of the laboratory and targeted it with spam e-mails.[124]

The above examples clarify which conduct the Hamm Regional Court took issue with. However, it does not constitute a definition of the 'rules of the intellectual battle of ideas.' If anything, the 'rules' are outlined in negative terms: the examples give us only a description of what conduct is outside of these 'rules,' but not what conduct would fall within them. Crucially, the threshold remains ambiguous. Is it only the accumulation of all these examples that constituted the finding that Tierbefreier did not ensure the rules of the intellectual battle of ideas? How many instances of such conduct or statements exceed the threshold? As the Court also conceded, some of the above examples likely did not violate applicable laws, such as the accusations of 'murder and torture,' or the dissemination of leaflets.[125] What if a defendant used only these likely lawful strategies? It seems that one can disrespect the 'rules of the intellectual battle of ideas' without crossing the boundaries of the law. Then, should even those activists who stay within the boundaries of the law be concerned about the weight of their right to freedom of expression if, at some later point

119 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (135).
120 Ibid., 135 f.
121 Ibid., 136.
122 Ibid.
123 Ibid.
124 Ibid.
125 Ibid.

in time, they obtain undercover footage supporting their cause? Thus, in applying the 'rules of the intellectual battle of ideas' to the prior conduct of Tierbefreier, the Hamm Regional Court has not drawn a line between legal and illegal means, but has instead introduced the breach of 'rules' as intermediate category the definition of which remains unclear.

5.2.2 The Intellectual Battle of Ideas

In search for further guidance on the 'rules,' one might be inclined to turn to the 'intellectual battle of ideas' as such. Contrary to the 'rules,' the notion of intellectual battle of ideas has a long tradition in domestic case law relating to the publication of unlawfully obtained information. It dates back to the 1950s, the early years of the Federal Constitutional Court (FCC).

In 1956, the FCC declared the communist party (KPD) to be unconstitutional, and thus prohibited. In elaborating on the incompatibility of the 'dictatorship of the proletariat' ['Diktatur des Proletariats'] with the liberal and democratic basic order ['freiheitlich demokratische Grundordung'], the FCC emphasized the importance of intellectual freedom of the individual, and the intellectual battle or dispute of ideas, for the functioning of a liberal democracy:

> 'the individual shall (…) to the largest extend possible responsibly contribute to decisions for society as a whole. The state has to open him the way thereto; this happens in the first place by the *intellectual battle, the dispute of ideas*, being free, in other words through granting intellectual freedom. The freedom of intellect is crucial for the system of liberal democracy, it is the proposition for the functioning of this order; it safeguards [the liberal democratic order] from numbness and shows the abundance of possible solutions for substantive problems'
>
> ['der Einzelne soll (…) in möglichst weitem Umfange verantwortlich (…) an den Entscheidungen für die Gesamtheit mitwirken. Der Staat hat ihm dazu den Weg zu öffnen; das geschieht in erster Linie dadurch, daß der *geistige Kampf, die Auseinandersetzung der Ideen* frei ist, daß mit anderen Worten geistige Freiheit gewährleistet wird. Die Geistesfreiheit ist für das System der freiheitlichen Demokratie entscheidend wichtig, sie ist geradezu eine Voraussetzung für das Funktionieren dieser Ordnung;

> sie bewahrt es insbesondere vor Erstarrung und zeigt die Fülle der Lösungsmöglichkeiten für die Sachprobleme auf']126 (emphasis added).

Two years later, in 1958, the notion reappeared (with reference to the previous mentioning) in the jurisprudence of the FCC, this time in the context of the balancing the right to freedom of expression against the personality rights of others and related values. In this context, the FCC stated:

> '[t]he protection of the private legal interest has to step back, the more [the expression] at stake is not directly directed against this legal interest in the private, namely in commercial communication and in pursuit of a selfish aim, but a contribution to the intellectual battle of ideas in a question significantly concerning the public through someone who is legitimized thereto; here the presumption is for the admissibility of the free speech'
>
> ['Der Schutz des privaten Rechtsguts kann und muß um so mehr zurücktreten, je mehr es sich nicht um eine unmittelbar gegen dieses Rechtsgut gerichtete Äußerung im privaten, namentlich im wirtschaftlichen Verkehr und in Verfolgung eigennütziger Ziele, sondern um einen Beitrag zum geistigen Meinungskampf in einer die Öffentlichkeit wesentlich berührenden Frage durch einen dazu Legitimierten handelt; hier spricht die Vermutung für die Zulässigkeit der freien Rede'].127

From this point on, the notion of intellectual battle of ideas frequently appears in decisions relating to the right to freedom of expression, especially (but not exclusively) in cases where the speech in question includes unlawfully obtained information.128 As such, the notion of 'intellectual battle of ideas' refers to the content of a statement, and is closely linked to the inquiry into whether publication is in the public interest.

126 BVerfG [Federal Constitutional Court] 17 August 1956, 1 BvB 2/51, BVerfGE 5, 85 (205).

127 BVerfG [Federal Constitutional Court] 15 January 1958, 1 BvR 400/51, BVerfGE 7, 198 (212). In this decision, the Court stressed the importance of freedom of expression to the liberal democratic order and as important basis of other freedoms.

128 Although it was also mentioned in other contexts. See e.g., BGH [Federal Court of Justice] 20 January 1959, 1 StR 518/58, NJW 636, 1959; concerning § 193 Criminal Code [safeguarding legitimate interests] as an expression of Article 5 Basic Law, thus safeguarding the 'battle of opinions.' § 193 Criminal Code will be explained in more detail in Chapter 9.

However, what is at stake in the *Tierbefreier* case is a disrespect for the '*rules*' of the intellectual battle of ideas. Disrespect for the 'rules' is something that is linked to the person, or in this case, association who disseminates the footage, and their conduct in the past, rather than the public interest in the information that is being conveyed.[129] Therefore, further examining of the case law and literature on the intellectual battle of ideas itself is not helpful in determining the threshold of the 'rules.'

In the search of the 'rules of the intellectual battle of ideas' in existing jurisprudence, one can ask if the Court draws on a concept that was implicit in previous decisions, potentially under a different name. Disputes arising from calls for boycott provide a fruitful area to search for such an idea, as they are an analogous type of case that defines, in positive terms, the content of the 'rules.' Tierbefreier's campaign against the testing laboratory was not (only) a call for boycott. Nevertheless, it displayed some similarities with a call for boycott. For example, as the plaintiff and the Hamm Regional Court pointed out, the dissemination of footage by Tierbefreier was a 'puzzle piece' in a campaign against the laboratory, aiming at its closure.[130] The Court attached significance to Tierbefreier campaigning not only against animal testing, but specifically against the plaintiff. This constitutes a similarity with calls for boycott. Further, the campaign resembled a call for boycott in that it was based on political disagreement and enforced with controversial means. Consequently, looking at case law on such calls for boycott provides promise in the search for clarification as to which means are permissible to enforce such a call for boycott, and thus compatible with the 'rules.'

A landmark case occurred in 1969[131] in which the FCC decided on the constitutional complaint ['Verfassungsbeschwerde'] of a newspaper editor who published a radio and television program not only of West Germany, but also of the sector under Soviet administration.[132] As a result, a number of publishing houses wrote to the newspaper retailers, asking them to re-

129 This understanding is rooted in the Hamm Regional Courts reasoning. The Court emphasized that it matters for the relation between ends and means *through whom* the plaintiff's rights are being interfered with. OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (137).

130 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (136).

131 BVerfG [Federal Constitutional Court] 26 February 1969, 1 BvR 619/63, NJW 1161, 1969.

132 Ibid., 1161.

frain from selling the respective newspaper under threat that the publishing houses would consider cutting ties with them.[133] A Court of appeals concerned with the case denied the newspaper editor's claim for damages.[134] In the constitutional complaint, the newspaper editor submitted that this decision denying damages violated his basic rights.[135] Finding that the letter of the publishing houses was a call for boycott, and finding that this call for boycott was based on an expression of opinion, the FCC reasoned that the call would be especially protected by Article 5 (1) of the Basic Law if 'it was deployed as a means of intellectual battle of ideas in a question significantly concerning the public,' meaning that it was based on a concern for 'political, economic, social or cultural matters' of the public, rather than a private dispute ['wenn er als Mittel des geistigen Meinungskampfes in einer die Öffentlichkeit wesentlich berührenden Frage eingesetzt wird, wenn ihm also keine private Auseinandersetzung, sondern die Sorge um politische, wirtschaftliche, soziale oder kulturelle Belange der Allgemeinheit zugrunde liegt'].[136]

Such a requirement would, arguably, be met in the *Tierbefreier* case. Although Tierbefreier targeted the laboratory specifically, it did so based on the opinion that animal testing is morally wrong and should be abolished. It is widely accepted in the jurisprudence of German Courts that animal welfare constitutes a concern of the public.[137] Under these circumstances, a call for boycott could be protected by Article 5 (1) of the Basic Law, according to the reasoning of the FCC.[138]

According to the FCC:

> 'a call for boycott is not protected by the right to freedom of expression, if it is not only based on intellectual arguments, thus limiting itself to the persuasive power of statements, explanations and considerations, but additionally deploys means which deprive the addressees of the oppor-

133 Ibid.

134 Ibid. The claim in this case was based on intentional damage, § 826 Civil Code ['vorsätzliche, sittenwidrige Schädigung'].

135 BVerfG [Federal Constitutional Court] 26 February 1969, 1 BvR 619/63, NJW 1161, 1969 (1161).

136 Ibid.

137 In cases unrelated to undercover footage German Courts go even further and describe animal welfare as a matter of the 'common good' ['Gemeinwohl']: BVerfG [Federal Constitutional Court] 2 October 1973, 1 BvR u. 477/72, NJW 30, 1974; BVerfG [Federal Constitutional Court] 6 July 1999, 2 BvF 3–90, NJW 3253, 1999.

138 BVerfG [Federal Constitutional Court] 26 February 1969, 1 BvR 619/63, NJW 1161, 1969 (1161).

tunity to make their decisions in complete inner freedom and without economic pressure. This includes especially threats or announcements of grave disadvantages and the exploitation of social or economic dependency, if used to add emphasis to the call for boycott. The freedom of intellectual dispute is an indispensable requirement for the functioning of liberal democracy, because only [the freedom of intellectual dispute] can ensure the public discussion about matters of general interest and national political significance.'

['Ein Boykottaufruf wird durch das Grundrecht der freien Meinungsäußerung dann nicht geschützt, wenn er nicht nur auf geistige Argumente gestützt wird, sich also auf die Überzeugungskraft von Darlegungen, Erklärungen und Erwägungen beschränkt, sondern darüber hinaus sich solcher Mittel bedient, die den Angesprochenen die Möglichkeit nehmen, ihre Entscheidung in voller innerer Freiheit und ohne wirtschaftlichen Druck zu treffen. Dazu gehören insbesondere Androhung oder Ankündigung schwerer Nachteile und Ausnutzung sozialer oder wirtschaftlicher Abhängigkeit, wenn dies dem Boykottaufruf besonderen Nachdruck verleihen soll. Die Freiheit der geistigen Auseinandersetzung ist eine unabdingbare Voraussetzung für das Funktionieren der freiheitlichen Demokratie, weil nur sie die öffentliche Diskussion über Gegenstände von allgemeinem Interesse und staatspolitischer Bedeutung gewährleistet'].[139]

Ultimately, the FCC found that the means deployed by the publishing houses were not in accordance with Article 5 (1) of the Basic Law, and that the decision to deny the editor damages violated his basic rights.[140]

Again, the actions of the activist group Tierbefreier exceed a call for boycott in the strict sense, as they are trying to force the closure of the laboratory using several means in addition to boycott. Nevertheless, the 1969 case is relevant since – like the *Tierbefreier* case – it arose from a politically motivated campaign that was targeted against an individual person or corporation. The lines cited above add to our understanding of the 'rules of the intellectual battle of ideas,' by elaborating which means are

139 Ibid., 1162.

140 This conclusion was largely based on the economic power the publishing houses had over the newspaper retailers, and the fact that parties of the original dispute, the publishing houses and the newspaper editor, could invoke Article 5 of the Basic Law; BVerfG [Federal Constitutional Court] 26 February 1969, 1 BvR 619/63, NJW 1161, 1969 (1162 f).

permissible in a campaign concerning a matter of public interest targeted against an individual person or corporation.

One can say that maintaining freedom of decision making, especially freedom from coercion or exploitation of economic and social dependencies, is the central element. But more importantly, unlike the examples given by the Hamm Regional Court in the *Tierbefreier* case, the above quote outlines the permissible means in positive terms: a call for boycott must be based on intellectual arguments, on persuasion by statements, explanations, and considerations. Finally, the freedom of intellectual dispute is linked to the functioning of liberal democracy. This leads to the second part of my normative reconstruction of the case: the claim that the 'rules of the intellectual battle of ideas' are indicative of a stream of political theory, namely deliberative democracy.

5.2.3 Animal Activists and Deliberative Democracy

In the previous Section, I contoured the 'rules of the intellectual battle of ideas,' showing that the rules are not a legal concept in the traditional sense. By employing the notion of 'rules of the intellectual battle of ideas,' the Hamm Regional Court engaged in practical reasoning and invoked a dimension beyond legal thought in the strict sense. Consequently, to interpret this notion, and to understanding its implications, we need to use non-legal intellectual tools. Such tools can be found in political theory which offers a specialized body of literature on animal activism and deliberative democracy.[141] In light of the above attempt to define the 'rules of the intellectual battle of ideas' based on the jurisprudence of the FCC, I claim that the 'rules of the intellectual battle of ideas' are indicative of the 'rules' of deliberative democracy. This claim is central to the following argument, as it operates to answer the remaining questions set out in the beginning of this normative reconstruction, most notably, the question regarding the threshold for a breach of the 'rules.'

Deliberative democracy is a key concept in this dissertation, as explained Chapter 3. I adopted the definition according to which it is 'grounded in an ideal in which people come together, on the basis of equal status and

141 Humphrey/ Stears 2006. Parry, Garner and others used similar notions, such as 'non-deliberative actions': Parry 2017; Garner 2019. D'Arcy used the term 'direct action:' D'Arcy 2007.

mutual respect, to discuss the political issues they face and, on the basis of those discussions, decide on the policies that will then affect their lives.'[142] In this Chapter, deliberative democracy as civic virtue is in the foreground: the deliberative ideal calls for citizens to engage in 'polite, emotionally detached, and persuasive dialogue oriented toward the common good.'[143] It prescribes an ideal of how citizens *ought* to behave.[144] At the same time, deliberative democracy has implications for democratic legitimacy, for in a deliberative system decisions derive legitimacy from being the outcome of deliberation.[145] For the following arguments it is essential to bear in mind these two dimensions of deliberative democracy; as civic virtue and as a source of legitimacy.

The 'rules of the intellectual battle of ideas' are strongly linked to the ideal of deliberative democracy. The means deployed by Tierbefreier to influence the 'intellectual battle of ideas,' such as intimidation, agitation or creating a wrong impression through misinformation, are at odds with the deliberative ideal; that is to say, they are 'non-deliberative methods.'[146] Whether all of the methods deployed by Tierbefreier are to be considered non-deliberative under all theories of deliberative democracy is up for debate, but this is not decisive for the argument at stake here.[147] Instead what matters at this stage is that the Hamm Regional Court and the ECtHR considered the methods to be non-deliberative. Therefore, all methods

142 Bächtiger, Andre/ Dryzek, John S./ Mansbridge, Jane/ Warren, Mark, Deliberative Democracy: An Introduction, in: Andre Bächtiger, John S. Dryzek, Jane Mansbridge, Mark Warren (eds.), The Oxford Handbook on Deliberative Democracy (Oxford: Oxford University Press 2018), 1–32, 1 f.

143 della Porta, Donatella/ Doer, Nicole, Deliberation in Protests and Social Movements, in: Andre Bächtiger, John S. Dryzek, Jane Mansbridge, Mark E. Warren (eds.), The Oxford Handbook on Deliberative Democracy (Oxford: Oxford University Press 2018), 392–403, 394.

144 Which methods or means of communication are permissible is subject to debate and to an extent depends on which theory of deliberative democracy one favors. On forms of deliberative communication see Polletta, Francesca/ Gardner, Beth, The Forms of Deliberative Communication, in: Andre Bächtiger, John S. Dryzek, Jane Mansbridge, Mark E. Warren (eds.), The Oxford Handbook on Deliberative Democracy (Oxford: Oxford University Press 2018), 70–85.

145 Gutmann, Amy/ Thompson, Dennis, Why Deliberative Democracy? (Princeton: Princeton University Press 2004), 9 f.

146 See e.g., Humphrey/ Stears 2006; Parry 2017; Garner 2019; D'Arcy 2007.

147 The most debatable example that is the accusation of 'murder and torture.' The terms are clearly used in a colloquial rather than a legal sense. Amy Gutmann and Dennis Thompson warn that deliberative theory should not accept a dichotomy between passion and reason. Gutmann/ Thompson 2004, 50.

listed by the Hamm Regional Court as conflicting with the 'rules of the intellectual battle of ideas' can also be referred to as 'non-deliberative methods,' they were considered to conflict with the prescription of how citizens ought to behave in deliberative democracy. In simpler terms, one could say Tierbefreier breached the 'rules' of deliberation.

I began this normative reconstruction by asking the central question: how the notion of 'rules of the intellectual battle of ideas'– or for that matter, the 'rules' of deliberative democracy – impact the speech rights of animal activists when used in legal reasoning? This Section examines the core arguments and categorization of the contentious methods deployed by Tierbefreier activists. It does so pursuant to the categories established by political theorists within the body of specialized literature on deliberative democracy and animal activism provided in the field of political theory. This serves three purposes: firstly, it further substantiates the claim that the rules of the intellectual battle of ideas are indicative of deliberative democracy. Secondly, it gives a reader not familiar with democratic theory a better understanding of *why* the methods of Tierbefreier are, at least *prima facie*, in conflict with deliberative ideals. Thirdly, it provides the basis to answer the question of how democracy and the speech rights of animal activists are impacted by the 'rules of the intellectual battle of ideas.'

Humphrey and Stears published the first article to deal specifically with animal activism and deliberative democracy.[148] They acknowledge in this piece the diversity of methods deployed by animal activists, but identified non-deliberative strategies as key for the movement.[149] They argue that activists are rarely successful in placing their issues on the political agenda with deliberative methods, because, even if they explain their case very well and appeal to reason, fellow citizens are unwilling to be convinced by something that would require them 'to alter established patterns of behavior or to question deeply held views or cognitive styles.'[150] Humphrey and Stears specifically point to 'cost-levying' and 'exaggeration of moral disagreement' as non-deliberative methods deployed by animal activists.[151] Cost-levying is based on the assumption that opponents in political questions can be made to behave differently than they originally wished to if

148 Humphrey/ Stears 2006.
149 Ibid., 404 ff.
150 Ibid., 407.
151 Ibid., 404.

the costs of their initial preference would be increased.[152] For instance, by harassing the employees of the animal testing laboratory,[153] Tierbefreier activists sought to raise the costs of working at the laboratory. By hacking the website of the laboratory,[154] they increased the costs for the laboratory, by obstructing its work. Similarly, they increased the laboratory employees' costs of working at the laboratory by disseminating leaflets and stickers in their private residential neighborhoods.[155] Businesses associated of the laboratory were similarly targeted and pressured to encourage them to cut ties with the laboratory.[156]

The accusation that the laboratory is responsible for 'murder and torture' is a paradigmatic example for the second strategy: 'rhetoric exaggeration of moral disagreement.' Precisely, the accusation of 'murder and torture' is salient in the animal rights movement and has featured in at least one other high-profile ECtHR case, namely *Steel and Morris v. United Kingdom*.[157] In a leaflet campaign, activist of Greenpeace London accused McDonalds *inter alia* of 'murder and torture' for their sourcing of meat.[158] Animal activists often use language that maximizes the difference between their position and the position they oppose.[159] According to Humphrey and Stears, this strategy stands in square contrast to the deliberative ideal, according to which all should seek to minimize the distance between their own and their opponent's position and emphasize any shared moral assumptions.[160]

152 Ibid., 405.
153 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (136).
154 Ibid.
155 Ibid.
156 Ibid.
157 ECtHR, *Steel and Morris v. United Kingdom*, App. no. 68416/01, 15 February 2005, para. 12. McDonalds initiated successful libel proceedings against the activists on the domestic level. The trial took over 9 years. However, the ECtHR found that in ruling against the activists, the domestic Courts had violated the applicants' right to freedom of expression enshrined in Article 10 of the ECHR (see para. 98) and right to a fair trial enshrined in Article 6 (1) of the ECHR (see para. 72).
158 Interestingly this particular language was in the focus of McDonalds. Another NGO distributed leaflets with the same language in 1987 and 1988, and McDonalds refrained from pressing libel proceedings after the NGO made some changes, including from 'murder and torture' to 'butchering and slaughtering.' See ECtHR, *Steel and Morris v. United Kingdom*, Application No. 68416/01, 15 February 2005, para. 26.
159 Humphrey/ Stears 2006, 408 f.
160 Ibid., 409.

Accusations of 'murder and torture,' although clearly used in the colloquial rather than legal sense, express how Tierbefreier despises the laboratory and contests animal experiments. They use passionate language to express strong moral disagreement, thus invoking 'exaggeration of moral disagreement' as a strategy.[161]

Humphrey and Stears argue that deliberative democracy, notably even in an 'ideal' form, remains an overly prescriptive approach and does not allow animal activists an effective voice:[162] 'Democracy demands that we ensure that all citizens are granted an equal chance to challenge the conventional wisdoms that govern our society: democratic activists such as those in the animal rights movement have properly recognized that fact, deliberative democrats have not.'[163]

The Humphey and Stears article became the starting point for a scholarly debate on the relationship between animal activism and deliberative democracy. In contrast to Humphrey and Stears, Stephen D'Arcy paints a positive picture of animal activism and deliberative democracy.[164] According to D'Arcy, what he refers to as 'direct action' can be compatible with deliberative democracy.[165] Based on the deliberative theory of legitimacy he argues that 'decisions arising from counter-deliberative background conditions such as the irrational influence of "cognitive frames" and stark imbalances of power' do not have deliberative legitimacy or moral authority.[166] Therefore, according to D'Arcy, deliberative theory allows for 'non-deliberative resistance' against those decisions.[167] D'Arcy contrasts 'direct action' against deliberative methods and does so, largely, based on a consideration

161 Again, whether the exaggeration of moral disagreement in this form really is non-deliberative could be challenged. Amy Gutmann and Dennis Thompson warn that deliberative theory should not accept a dichotomy between passion and reason. Gutmann /Thompson 2004, 50. However, this is a matter of political theory and not determinative of the legal argument here.

162 'In any "realistic utopia" there will exist forms of conventional wisdom and widely shared cognitive frames that will inherently disadvantage groups seeking to present alternative conceptions of fundamental moral and political principles. Any theory of democracy that wishes to remain open to such transformative forms of politics, and which values some notion of genuine political equality in public debate, will thus have to be less normatively prescriptive than existing theories of deliberation, even in the ideal.' Humphrey/ Stears 2006, 417.

163 Ibid., 419.

164 D'Arcy 2007.

165 Ibid., 13 f.

166 Ibid.

167 Ibid.

of who is being targeted: the general public, who can be convinced with reason-based arguments; or direct opponents of the movement, who are arguably not receptive for those arguments.[168] This is why actions targeting those opponents are characterized by the exertion of pressure, rather than deliberation.[169]

This distinction, based on the groups targeted and methods required for each group, offers an interesting new perspective on the *Tierbefreier* case. An animal testing laboratory operator falls into the category of opponents who are unlikely to be convinced by deliberation. The Hamm Regional Court seems to also attach relevance to this distinction. The Court found that the dissemination of footage functioned as a 'puzzle piece' in a campaign aiming for the closure of the laboratory.[170] This consideration completes the picture of Tierbefreier as using non-deliberative methods, and the Hamm Regional Court basing its decision on this finding.

Authors have expressed optimism about animal protection goals and deliberative democracy, based on different grounds. Lucy Parry argues that 'inclusive, authentic and consequential deliberation can facilitate animal protection goals.'[171] This angle seems very promising as it emphasizes the potential of deliberative democracy for animal protection goals without glossing over the use of non-deliberative methods by animal activists. Robert Garner emphasizes the 'rationalistic basis of animal rights philosophy' and the 'aspirational character of deliberative democracy,' and argues that deliberative democracy does not prohibit animal activists from using non-deliberative tactics in a political system that magnifies inequalities and disadvantages animal activists.[172]

At the other end of the spectrum, John Hadley argues that animal rights philosophy is a 'religion-like ideology,' and that animal activists are 'fundamentalists' who will always put animal protection goals before deliberative democracy.[173] Finally, Bernd Ladwig may have most aptly combined the insights from both views when arguing that a necessary precondition for the consideration of animal interests in the deliberative process is dependent

168 Ibid., 2 f.
169 Ibid.
170 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (136).
171 Parry 2017, 442.
172 Garner 2019.
173 John Hadley, Religiosity and Public Reason: The Case of Direct Action Animal Rights Advocacy, Res Publica 23 (2017), 299–312.

on a 'veritable cultural revolution' ['veritable Kulturrevolution'] in which animal activist groups play a key role, *inter alia* by employing confrontative strategies.[174]

These varying positions tell us at least two things about the *Tierbefreier* case. First, they show why the conflict between activists and deliberative democracy arises; by pointing to the prescriptive nature of deliberative democracy, but also by discussing the uncompromising demands of animal activists. Second, they help us understand why activists like Tierbefreier resort to non-deliberative methods: they expect to be unsuccessful within the existing non-ideal deliberative process, although in theory, deliberation would hold promise for animal protection.

5.2.4 Implications of the 'Rules' for Animal Activists' Freedom of Expression

In light of the above explanation placing animal activism in the context of deliberative democracy, I turn back to the notion of 'rules of the intellectual battle of ideas' in freedom of expression disputes and its impact on freedom of expression, animal activism, and democracy. Animal activists are struggling in non-perfect deliberative systems,[175] as any deliberation takes place in an anthropocentric political arena characterized by inequalities between animal advocates and their opponents. These inequalities arise from long established traditions of using animals for human ends which are built into our legal order result in, for example, largely ambiguous animal protection laws, as well as limited legal instruments providing for humans to represent animals' interests in the legal and political systems. Deliberation, and its outcomes, are necessarily tainted by these conditions. Therefore, animal activists, like activists in other social movements, often resort to non-deliberative methods.[176] In light of this it is: (i) disproportionate; (ii) potentially in conflict with deliberative ideals; and (iii) unnecessary to place an extra burden on the speech rights of animal activists. Yet, this is what the invoca-

174 Ladwig, Bernd, Politische Philosophie der Tierrechte (Berlin: Suhrkamp 2020), 296.

175 Humphrey and Stears suggested that animal activist would continue to struggle even in a 'better' deliberative system. 'Humphrey/ Stears 2006, 417. Parry challenges this assumption, arguing that animal perspectives could be given serious consideration in the deliberative system Parry 2017, 442.

176 This point is closely linked to a debate in Chapters 7 and 8 on democratic approaches to civil disobedience.

tion of the 'rules of the intellectual battle of ideas' as a decisive argument in a legal dispute has allowed.

5.2.4.1 Disproportionate Effects on Political Minorities and Animal Activists

The first concern around the use of the 'rules of the intellectual battle of ideas' is one of inequality. It may disproportionally affect political minorities and limit their right to freedom of expression.

I have argued that the 'rules of the intellectual battle of ideas' are essentially also the 'rules' of deliberative democracy, and that these 'rules' are often bent or broken by political minorities and social movements. Therefore, attaching legal significance to these rules affects not only the causes of social movements, but also the speech rights of the individuals who pursue them. In writing about deliberative democracy, Amy Gutmann states that deliberative standards are 'not legally binding and therefore do not restrict anyone's right to free speech.'[177] Certainly, in the case at hand, the Hamm Regional Court clarified that Tierbefreier were allowed to continue holding and voicing their opinion. In so far as deliberative standards were not made legally binding, but they nevertheless played a decisive role in the legal case, as they tipped the scale in favor of the plaintiff, and against the speech rights of the defendant. Since the Hamm Regional Court admitted that some of the 'rule'-breakings were likely not unlawful,[178] the concept could be applied even when activists use non-deliberative methods, such as emotional language and lawful protest, without crossing the boundaries of the law.

Now one could object that the issue of disrespect for the 'rules' was only relevant given that the activist group Tierbefreier used unlawfully obtained information. But this again adds to the burden on placed political minorities, for they often have no legal means to create footage otherwise. There exist few lawful means through which to create footage of ethically questionable practices and conditions inside animal facilities, and deliberation surrounding these conditions and practices without proof is impossible. In other words, a plain reading of the Hamm Regional Courts' decision suggests that the reasoning applies only in a narrowly construed case and is triggered only in the event of the cumulation of several circumstances.

177 Gutmann/ Thompson 2004, 51.

178 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (135 f).

But under closer inspection, it seems that the circumstances presented as exceptional are rather common for social movements generally and animal activism more specifically. Animal activists will likely have disrespected the 'rules' in the past, and they will likely resort to unlawfully obtained information to make their point. Thus, the concept of rules the of intellectual battle of ideas is triggered under conditions that mostly apply to activists of marginal political groups.

As a result, using the 'rules' as a decisive criterion in a legal dispute re-enforces a pre-existing disadvantageous position within the political process. If applied in other cases and contexts, the 'rules of the intellectual battle of ideas' may disproportionally affect the speech rights of political minorities. In the case at hand, allowing Tierbefreier to use the remaining footage only under the proviso that it is not used to create false impressions would have been a more inclusive strategy, allowing the activists the opportunity to take part in the intellectual battle of ideas.

5.2.4.2 Furthering Deliberation Through Non-Deliberative Acts

The second concern arising from the use of the 'rules' is that doing so may be conflict with the very deliberative ideals that the 'rules' seek to protect. Indeed, one may question whether the Hamm Regional Court contributed to deliberative ideals by invoking Tierbefreier's use of non-deliberative methods against them. Although the arguments in the in the following will not be supported in this dissertation, they have some merit and should be considered accordingly.

Recall that not all theorists of deliberative democracy reject the use of non-deliberative methods entirely: Gutmann and Thompson suggest that non-deliberative methods are acceptable when it comes to issues that would otherwise not reach the political agenda, especially if the methods eventually lead to an increase in deliberation.[179] This point is well reflected in the literature on deliberative democracy and animal activism. Parry, for example, argues that non-deliberative actions may contribute to inclusive

179 Gutmann and Thompson suggested that non-deliberative methods are acceptable when it comes to issues that would otherwise not reach the political agenda, especially if the methods eventually lead to more deliberation. In that case, the requirement of deliberation should be suspended. Gutmann/ Thompson 2004, 51.

deliberation.[180] As Garner points out, the current political struggle about animal rights is characterized by political inequalities between animal advocates and their opponents who hold an interest in the continued use of animals.[181] The current political landscape is far from the deliberative ideal, in that any deliberation about animals takes place in an environment prejudiced against animal rights and steeped in a long tradition of the use of animals for food and research.[182]

The deficits of deliberation on animal issues are further exacerbated by the concealed nature of animal use. This problem is acknowledged by legal scholars, too. In the context of a proposed obligation for food producers to make disclosures about their treatment of animals, Leslie and Sunstein argue:

> 'moral beliefs, with respect to treatment of animals, should be made a more significant part of democratic discussion and debate, in a way that would undoubtedly cause changes in both practice and beliefs. Animal welfare is infrequently a salient issue in political life in part because the underlying conduct is not seen. Indeed, many consumers would be stunned to see the magnitude of suffering produced by current practices. But *deliberative discussion cannot occur unless citizens have the information with which to engage in it*' (emphasis added).[183]

Leslie and Sunstein did not make this statement in the context of animal activism, but rather in the context of a proposed policy reform. Nevertheless, their work illustrates that the lack of genuine deliberation on animal protection, and the need for improvement, is not a conviction shared only amongst activists and critical animal studies scholars, but is also recognized by legal scholars with moderate stands on animal protection.

The widely recognized lack of genuine deliberation on animal protection provides the background from which animal activists' feel the need to resort to non-deliberative methods. This opens the door for an argument that deliberative democracy should accommodate the use by animal activists of non-deliberative methods in a bid to remedy these existing shortcomings.

180 Parry 2017, 448 f. Hadley 2017 represents the opposing view, arguing that animal activism is coercive, and animal rights ideals are as such competing with deliberative ideals.

181 Garner 2019, 316.

182 See also Humphrey/ Stears 2006, 416; D'Arcy 2007, 10.

183 Leslie, Jeff/ Sunstein, Cass R., Animal Rights without Controversy, Law and Contemporary Problems 70:1 (2007), 117–138, 131.

Stephen D'Arcy argues that deliberative democracy accommodates a range of activities of animal activists, namely:

> 'non-deliberative attempts to resist present practices whose legitimacy is in doubt, and to challenge people and institutions to face up to the real character, morally speaking, of their own conduct, and to rethink it in light of the powerful arguments against its permissibility. The aims of such action are deliberative aims, even though the means are not (directly) deliberative means.'[184]

However, the crucial question is: first, can non-deliberative methods contribute to more and better deliberation in the future; and, second, is this really what animal activists want to achieve? Answering these questions with certainty would require empirical evidence. However, it seems reasonable to assume that, at the very least, animal activism raises awareness while also placing animal protection issues on the public agenda. Depending on the kind of activism, it can also increase the quality of deliberation – not only by introducing a new view, but also by delivering information that would otherwise not be accessible to the public. The dissemination of footage is an excellent example of the deliberative potential of activism: it creates transparency that is necessary for deliberation.[185] This is especially true for the case of research involving animals, a topic which the average consumer is rarely confronted with in everyday life. The dissemination of footage may constitute one of very few instruments available to deliver that information as is required for a deliberative discussion. Consequently, some non-deliberative methods, such as the dissemination of undercover footage, could increase deliberation downstream.

The second question raised above, that of animal activists' intention to increase deliberation, is more contentious. It seems unlikely that furthering deliberation is the *primary goal* of animal activists. Rather, their predominant aim is more likely to be one of ending animal farming, animal testing or other practices contravening their respective agendas of animal liberation, animal rights etc. *regardless of how this is achieved*. In other words, increased deliberation is certainly not necessary to animal activists, and perhaps not even desired. In the case of Tierbefreier, it seems that the affiliated activists did not seek public deliberation and reconsideration, but

184 D'Arcy 2007, 14.

185 For a different view see Hadley 2017, 310, arguing that the use of graphic images is coercive and therefore a challenge for deliberative democracy.

rather the specific result of an end to animal testing; a goal for which a democratic consensus is not in sight. The name of the association translates to 'animal liberators.' As the name indicates, the association falls on the less compromising end of the spectrum of animal activism which I outlined in Chapter 4. This uncompromising nature may indicate that, not only the methods, but also the goals of the association are non-deliberative. Even if one permits that deliberative democracy can permit non-deliberative means in furtherance of deliberative ends, it cannot sanction the use of non-deliberative means to further non-deliberative ends.

In fact, I remain skeptical of the position that deliberative democracy can accommodate non-deliberative means, even if they are used for deliberative ends. Deliberative democracy should accommodate some forms of communication that are considered non-deliberative, according to a traditional account for deliberative democracy.[186] For example, besides the use of images, emotive language and communication about feelings, rather than rational arguments, comes to mind.[187] Deliberative democracy should make room for this kind of communication. But the same does not hold for other acts such as – to use examples from the case at hand – the promotion of criminal acts.

As I argue in Chapter 7, deliberative democrats must resort to a deliberative account of civil disobedience to vindicate these methods. To some – and in particular to activists – there may not be a great difference between arguing that deliberative democracy allows non-deliberative methods on the one hand, and arguing that these methods can be vindicated as (democratic) civil disobedience on the other. However, I consider this difference to be essential: it shifts the burden of explanation and justification. Those who invoke non-deliberative methods should have to explain themselves to the public. The deliberative approach to civil disobedience[188] allows them to do so, without normalizing the use of non-deliberative methods. Even a non-perfect deliberative process will only get less and less deliberative if non-deliberative methods are normalized as regular elements of this process. The distinction between sanctioning non-deliberative methods as an ordinary part of deliberative democracy, and capturing them as a form of disobedience, is essential to defining appropriate legal responses

186 Young, Iris Marion, Activist Challenges to Deliberative Democracy, Political Theory 29:5 (2001), 670–690, 675.

187 Ibid.

188 Smith, William, Civil Disobedience and Deliberative Democracy (Abingdon: Routledge 2013).

to phenomena such as undercover footage. While the first warrants careful consideration of the deliberative potential of these acts as a contribution to public debate, the second provides a more narrowly circumscribed forum for this defense within the boundaries of the criminal law.

In a nutshell, I consider that non-deliberative means mobilized for a non-deliberative goal cannot be accommodated by deliberative democracy. I consider Tierbefreier to fall into this category. If activists aim at increasing deliberation can a place for their actions be found in a deliberative democracy, and these acts can be discussed as civil disobedience which will be discussed in Chapters 7–9. However, it does not contravene deliberative democracy to limit the freedom of expression of activists who pursue non-deliberative goals with non-deliberative methods.

Finally, in the quote above, D'Arcy also alludes to another aspect of deliberative democracy, and that is the legitimacy derived from deliberation.[189] Earlier I pointed out that deliberative democracy does not only prescribe how citizen ought to act and communicate, it is also a basis for democratic legitimacy.[190] In a case parallel to the *Tierbefreier* case, the Hamm Regional Court found that the lawfulness of the conditions revealed by the undercover footage was not a sufficiently clear-cut criterion to determine the public interest in publication, for the norms of the Animal Protection Act, which allowed for the practices depicted in the footage, might be in need of reform.[191] This issue is also salient in other cases featured in this dissertation, most importantly the 'organic chicken' case discussed in Chapter 6, and will therefore not be elaborated here. However, the salient feature of this case is that the Court recognized a tension between what the current animal protection norms are, and what they might in the event of their reform. Given that legal reform in a democracy depends on democratic legitimacy, this suggests that in a more 'ideal' open, neutral, and respectful discussion, as prescribed by deliberative democracy, the public may agree on reforms of animal protection law including the restricting of conditions such as the ones documented in the laboratory.[192] Under such

189 D'Arcy 2007, 11 f.

190 This dimension of deliberative democracy should be included when discussing deliberative democracy and activism. See also Young 2001, 672.

191 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 77/04, ZUM-RD 579, 2004 (584 f).

192 Considering that the public is increasingly supportive of more animal protection, it is reasonable to assume that in a genuine deliberative process, the support for this view would further increase, and at some conditions that are difficult for the public

circumstances, D'Arcy submits that deliberative theory allows for the use of non-deliberative methods for a deliberative aim.

As indicated above, I do not subscribe to this view. Nevertheless, it points to a tension in the Court's reasoning: The Hamm Regional Court invoked the defendant's failure to comply with deliberative standards in favor of the plaintiff. As a result, there exists a tension between the Court's recognition of possible democratic deficits in animal protection law on one hand, and its heavy reliance on deliberative 'rules' in judging the actions of Tierbefreier on the other. If deliberative ideals matter to the Court – and it seems that they do – then this point would have warranted further reasoning in the *Tierbefreier* case.

5.2.4.3 Why resort to the 'rules of the intellectual battle of ideas?'

The third, and final, concern surrounding recourse to the 'rules of the intellectual battle of ideas,' is that it was unnecessary. It is doubtlessly justified to subject the publication of unlawfully obtained footage to a strict legal review. However, under the umbrella term 'rules of the intellectual battle of ideas' the Hamm Regional Court collects *prior* conduct of Tierbefreier, of which some was in breach of the law.[193] The law, especially §§ 185 ff. of the Criminal Code, provide sufficient 'rules for the intellectual battle of ideas.' It is not clear why the Court did not rely only on unlawful acts in the past, but instead on a breach of less clear-cut 'rules.' The Court could have limited its reasoning to prior unlawful conduct by Tierbefreier, which strongly indicates that, if allowed to continue using the footage, the association would again do so in a way that violates the rights of the laboratory operator, notably by making false allegations. Invoking the 'rules of the intellectual battle of ideas' was not necessary to reach this conclusion. In strictly limiting the reasoning to the law, the Court could have avoided the challenges described above.

Finally, and on a more positive note, one can assume that the Court consciously chose to invoke the 'rules of the intellectual battle of ideas' in

to face would be subject to increasing regulation. At a minimum, it seems reasonable to expect the public would agree that animals should be treated with some respect when used for research purposes. On deliberation about animal welfare standards see also Garner 2019, 316.

193 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (135 f).

order to make a more nuanced argument. But then it would have had to at least consider the impact of the 'rules' on the disadvantaged position of animal activists and on democracy. Again, this bears no direct implications regarding the outcome of the case, but to apply the 'rules of the intellectual battle of ideas' consistently, the Hamm Regional Court would have had to consider a much broader context than just the prior conduct of Tierbefreier. More specifically, it would have had to address difficult questions about the structural factors that shape the 'intellectual battle of ideas' around animal protection.

5.3 Summary and Main Findings

In this normative reconstruction, I have linked the 'rules of the intellectual battle of ideas' to the rules of deliberative democracy. I questioned the viability of this concept in freedom of expression disputes on the grounds that an overreliance on it bears the potential to disadvantage political minorities, and that by invoking deliberative ideals against the speech rights of animal activists, the Courts overlooked the more long-term deliberative potential of the activists' speech. Finally, I argued that invoking the 'rules' was unnecessary in the case at hand. While the outcome of the case, as well as the parallel cases, in the domestic Courts is sensible and well-balanced, it is regrettable that the Hamm Regional Court based it on non-compliance with 'the rules the of intellectual battle of ideas' in the past rather than on unlawful actions.

The ECtHR heavily relied on this concept without subjecting it to the scrutiny that should have been triggered by its potential impact on the speech rights of unpopular political minorities. The ECtHR decision says that '[t]he German Courts' argumentation based on "rules of the intellectual battle of ideas" thus takes into account the context in which the statement is made, in particular the aspect of fairness and the limits set by criminal law.'[194] Now looking at this quote in light of the above normative reconstruction, this assessment of the domestic Court's decision seems disputable. Certainly, the Hamm Regional Court took into account the context of the expression in question, it considered fairness *in* the broader context – but not the fairness *of* this broader context. Doing so would have required the Court to look at the reasons why Tierbefreier resorted to

194 ECtHR, *Tierbefreier e.V. v. Germany*, App. no. 45192/09, 16 January 2014, para. 56.

contentious methods. Involving, first and foremost, the existing imbalance between animal activists with regard to access to information and economic means. It would further require considering questions of animal law, such as the low legal standards for animal protection, the enforcement gap in animal law, and the lack of legal instruments available to represent the interests of animals in the legal system.

5.4 Conclusion and Outlook

Elements of deliberative democracy are featured in legal responses to undercover footage. Most significantly, the 'rules of the intellectual battle of ideas' allude to the 'rules' of deliberative democracy as prescriptive ideal of how citizens ought to behave. More subtly, democracy, and deliberative democracy specifically, might also feature in the notion of contribution to the 'public interest' which is essential in negotiating between the right to freedom of expression and the rights of others when it comes to unlawfully obtained information, including undercover footage. I will explore this issue in greater depth in Chapter 6. However, it will be shown that references to democracy in cases relating to undercover footage are characteristic of the jurisprudence of German Courts, and not universally applicable. John Hadley's position, which proclaims incompatibility between animal activism and deliberative democracy,[195] may lend support to the approach taken in ag-gag jurisdictions in the United States, where the creation of undercover footage is subject to particularly strict regal responses, as I show in Chapter 10.

Now going beyond existing jurisprudence, an argument could be made in support of undercover footage as non-deliberative strategy with deliberative potential. This relates to Chapters 7 and 8, where I consider that animal activism and undercover footage might qualify as civil disobedience. Here, deliberative democracy is salient: recent literature in political theory suggests that civil disobedience is contingent upon deficits in the democratic process.[196] Most pertinently, William Smith points out that civil disobedi-

195 Hadley 2017.

196 Markovits, Daniel, Democratic Disobedience, The Yale Law Journal 114 (2005), 1897–1952, 1902; Smith, William, Civil Disobedience and Deliberative Democracy (Abingdon: Routledge 2013), 9.

ence 'can be framed as a contribution to a process of public deliberation, or can be a non-deliberative act designed to stimulate a deliberative process.'[197]

6. Animal Activists as Public Watchdog? The Organic Chicken Case

Besides animal activists, the media also disseminate undercover footage. In Chapter 5, I illustrated how the question of *who* disseminates footage can be decisive for its lawfulness. This Chapter zooms in on the distinction between activists and the media, asking: does existing jurisprudence privilege the media and professional journalism as compared to animal activists? Can democratic theory support such a distinction? And what does this imply for animal activists and undercover footage?

In 2018 the German Federal Court of Justice (FCJ) held in a civil case, that a publicly funded broadcasting company was operating within its right to freedom of expression when it broadcast footage created by a third party allegedly while trespassing.[198] The case will be referred to as the 'organic chicken case.' The FCJ denied the claimant, a collective of farms organized as a legal entity under German law, an injunction against the public broadcasting company.[199] The FCJ allowed the continued dissemination of the footage and nuanced the decisive legal standards applicable. Although the decision constituted, on its face, a victory for those involved in the dissemination of undercover footage, the decision also implies a distinction between animal activists and the media. It seems that only the latter will benefit from the reasoning of the Court, since the Court emphasized the role of the media as 'public watchdog' ['Wachhund der Öffentlichkeit'].[200]

First, analyzing the decision from a legal perspective, I argue that the decision implies that media can go further than activists in disseminating undercover footage: German Courts apply the notion of 'public watchdog' and the privileges associated with it only to the media, and not to NGOs or activists.[201] Considering the public watchdog as a functional concept, I critically examine this distinction: a public watchdog serves the revelation of public grievances, ensures the flow of information, and contributes to

197 Smith 2013, 32.
198 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018.
199 Ibid.
200 Ibid., 2880.
201 See Chapter 6.

the public formation of opinion.[202] From this I conclude that anyone who fulfills these functions could qualify as public watchdog. Further, I show that the ECtHR – who also shaped the usage of the public watchdog by German Courts – refers to NGOs, including animal activists' associations as public watchdog.[203] Against this backdrop, the current approach of German Courts reserving the privileges of public watchdog for the media seems can be challenged.

In a second step, I analyze the reasoning of the Court and the notion of the public watchdog normatively, through the lens of democratic theory and the ethics of journalism. Support for a distinction between the media and activists can be found in a traditional conception of deliberative democracy. I employ 'democratic journalism theory'[204] to normatively reconstruct the notion of the public watchdog in legal reasoning. The traditional approach to deliberative democracy can provide support for privileging the media, given that the media, compared to activists, are expected to foster rational discourse. However, critics may argue that, in reality, certain media outlets, such as tabloids, ignore this expectation, while some citizen journalists or even activists may live up to it. In any case, it seems questionable whether a sharp line between activists and the media can be drawn in today's media landscape. Therefore, I argue that the benefits of the public watchdog should not depend on *who* disseminates undercover footage, but *how* it is done.

202 See e.g., BGH [Federal Court of Justice] 27 September 2016, VI ZR 250/13, NJW 482, 2017 (485).

203 Animal activist associations see ECtHR, *Animal Defenders International v. the United Kingdom*, App. no. 48876/08, 22 April 2013, para. 103; individuals see e.g., ECtHR, *Başkaya and Okçuoğlu v. Turkey*, 8 July 1999, App. nos. 23536/94 and 24408/94, paras. 61–67.

204 I borrow this term from Ward, Stephen, Ethics and the Media: An Introduction (Cambridge: Cambridge University Press 2011), 105.

6.1 Legal Analysis

6.1.1 Background and Facts

On two consecutive nights in May 2012, an animal activist entered the premises of an egg farm and created footage.[205] The farm belonged to a collective which produces and sells products labeled as organic.[206] Although it could not be established with certainty, the Courts concerned with the case supposed that the activist was trespassing.[207] The activist filmed different areas of the farm, including the facilities where chickens were kept,[208] and captured, *inter alia*, a high number of chickens many of whom were lacking a substantial part of their plumage, as well as dead birds amongst the living.[209]

The activist handed the footage to a publicly funded broadcaster who showed it on TV twice in September 2012.[210] The episodes were titled 'How cheap can organic be?' and 'Organic animal agriculture and its shadows.'[211] As the titles indicate, the central issue of the broadcasts was the claim that affordable, mass-produced organic products have little to do with what consumers imagine to be organic or humane farming practices.[212] The name of the collective, to which the farm belonged, was mentioned,[213] and it was explicitly noted that the depicted scenes did not violate the law; in particular applicable EU law.[214]

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205 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018. Date and place of the scene were documented on film. See LG Hamburg [Hamburg District Court] 13 December 2013, 324 O 400/13, BeckRS 199308, 2013 (para. 36).

206 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2877).

207 Ibid., 2881; OLG Hamburg [Hamburg Regional Court] 19 July 2016, 7 U 11/14, BeckRS 131241, 2016 (para. 11); LG Hamburg [Hamburg District Court] 13 December 2013, 324 O 400/13, BeckRS 199308, 2013 (para. 36). Cirsovius argues the FCJ only subscribed to the lower Court's view regarding the unlawfulness of the trespass for procedural reasons. Cirsovius, Thomas, Information hat Vorrang!, Anmerkung zum Urteil des BHG vom 10.4.2018 – VI ZR 396/16, NuR 40 (2018), 765–768, 767.

208 LG Hamburg [Hamburg District Court] 13 December 2013, 324 O 400/13, BeckRS 199308, 2013 (para. 36).

209 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2877).

210 Ibid.

211 Ibid.

212 Ibid., 2877 f.

213 Ibid., 2877.

214 Ibid., 2878.

6.1.2 Procedural History and Applicable Law

The farming collective sought an injunction against the broadcasting company, hoping to prevent it from broadcasting the footage in the future. The Hamburg District Court granted the injunction in December 2013.[215] The decision was upheld by the Hamburg Regional Court in July 2016,[216] but overturned by the FCJ in April 2018.[217]

The injunction first granted by the lower Courts, and later denied by the FCJ, was based on § 1004 (1) sentence 2 of the Civil Code in analogical application, in conjunction with § 823 (1) of the Civil Code.[218] The FCJ also considered an injunction based on § 1004 (1) sentence 2 of the Civil Code in analogous application, in conjunction with § 824 (1) of the Civil Code.[219] The decision required a balancing between the rights of the farming collective and those of the broadcasting company. In favor of the collective, the Courts considered the right to an established and operated business enterprise [eingerichteter und ausgeübter Gewerbebetrieb], granted in Article 12 (1) of the Basic Law in conjunction with Article 19 (3) of the Basic Law.[220] This right essentially protects businesses which would otherwise be insufficiently protected by tort law.[221] In favor of the broadcasting company, the Courts considered the right to freedom of expression enshrined in Article 5 (1) of the Basic Law.[222] The alleged violation of the criminal provision on trespass, § 123 of the Criminal Code, was invoked by the plaintiff and played a role in the balancing exercise.[223] Further, the Courts heavily relied on the so-called Wallraff/Springer decision of the FCC, which, in simple

215 LG Hamburg [Hamburg District Court] 13 December 2013, 324 O 400/13, BeckRS 199308, 2013.
216 OLG Hamburg [Hamburg Regional Court] 19 July 2016, 7 U 11/14, BeckRS 131241, 2016.
217 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018.
218 LG Hamburg [Hamburg District Court] 13 December 2013, 324 O 400/13, BeckRS 199308, 2013 (para. 32); OLG Hamburg [Hamburg Regional Court] 19 July 2016, 7 U 11/14, BeckRS 131241, 2016 (para. 9); BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2879).
219 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2878).
220 Ibid., 2879 f.
221 Förster, Christian, § 823 Schadensersatzplicht, in: Georg Bamberger, Herbert Roth, Wolfgang Hau, Roman Possek (eds.), Beck'scher Online Kommentar (München: C.H. Beck, 62th ed., 2022), paras. 178–180.
222 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2880).
223 LG Hamburg [Hamburg District Court] 13 December 2013, 324 O 400/13, BeckRS 199308, 2013 (para. 6).

terms, provides that the media may publish unlawfully obtained material if the public has a legitimate interest in its publication, and if this interest outweighs the legal interests of the plaintiff.[224]

6.1.3 Arguments of the Parties

The plaintiff, the farming collective, argued that publication of the footage was illegal as it was obtained in violation of § 123 of the Criminal Code (trespass),[225] and that its publication was not justified by public interest as it did not depict violations of the applicable animal welfare laws, such as the Animal Protection Act.[226]

The defendant (the publicly funded broadcaster) argued that the fact of the footage being obtained through trespass should not weigh heavily given that it was not the defendant, but a third party, who had obtained the footage, and that it was impossible to obtain authentic footage by legal means.[227] The defendant further submitted that the images aimed to inform the public that a certain conduct was legal, yet incompatible with the general legal order and the values and goals of the public.[228] The footage concerned animal welfare and consumer protection, and thus matters of public interest.[229] It was submitted that the issues were of high importance to the 'intellectual battle of ideas in a matter significantly concerning the public' ['geistiger Meinungskampf in einer die Öffentlichkeit wesentlich berührenden Frage'].[230]

6.1.4 Hamburg District Court Decision and the Wallraff/Springer Test

Overall, the District Court followed the arguments submitted by the plaintiff. The Court found that the possibility of repeated publication of the

224 BVerfG [Federal Constitutional Court] 25 January 1984, 1 BvR 272/81, NJW 1741, 1984 (1743).
225 LG Hamburg [Hamburg District Court] 13 December 2013, 324 O 400/13, BeckRS 199308, 2013 (para. 6).
226 Ibid., paras. 8 f.
227 Ibid., paras. 29 f.
228 Ibid., para. 26.
229 Ibid., para. 27.
230 Ibid., para. 26.

footage posed a threat to the farming collective's personality rights, which include privacy rights ['allgemeines Unternehmenspersönlichkeitsrecht'].[231] The Court first considered, in favor of the plaintiff, that that the footage had been created while trespassing, although by a third party and not by the defendant.[232] The District Court then balanced the interests of the broadcasting company and the farming collective, following the standard established by the FCC in its well-known Wallraff/Springer decision.[233]

Under the Walraff/Springer test, the publication of illegally obtained materials is not illegal *per se*.[234] However, for the publication of illegally obtained materials to be legal, there is a higher threshold to be met. The extent to which freedom of expression, as granted in Article 5 (1) of the Basic Law, must be taken into account depends on two factors:[235] the purpose of the speech at issue;[236] and the means.[237] The right to freedom of expression weighs heavier if the speech 'is a contribution to the intellectual battle of ideas in a question considerably affecting the public.'[238] The second factor determining the extent to which the right to freedom of expression has to be considered relates to the means:[239] as a rule, if the means are illegal – like trespass, for example – the materials cannot be legally published, for doing so would pose a threat to the unity of the legal order, and interfere with the interests of the other party.[240]

However, the FCC left room for an exception; namely if the information is of high importance to the public, and if there would be obvious disadvantages for the formation of public opinion, which outweighs the disadvantages of the publication for the other party and the validity of the legal order.[241] Usually, this exception will not apply unless publication reveals unlawful conduct.[242] If the revealed conduct is not illegal, this

231 Ibid., para. 32.
232 Ibid., paras. 36, 42; saying that trespass was 'written on the forehead' ['auf die Stirn geschrieben'] of the footage.
233 Ibid., paras. 44 f.
234 Ibid, with reference to BVerfG [Federal Constitutional Court] 25 January 1984, 1 BvR 272/81, NJW 1741, 1984 (1743).
235 Ibid.
236 Ibid.
237 Ibid.
238 Ibid.
239 Ibid.
240 Ibid.
241 Ibid.
242 Ibid.

indicates that the public interest in publication is not sufficient to activate the exception.[243]

Since the District Court deemed the means by which the footage was obtained to be illegal, it concluded that the rule, according to which the broadcasting company had to refrain from publication, applied.[244] The Court found that the footage did not document violations of the Animal Protection Act or other unlawful conditions in the facilities.[245] Furthermore, the Court denied the existence of other conditions grave enough to justify publication.[246] Thus, the interest in highlighting a gap between the consumers' idea of 'organic,' and what it actually entails, was, according to the Court, not a sufficient reason.[247] Curiously, the Court suggested that the legitimate interest of the public to be informed about this issue could be satisfied without visual images, and thus without trespass.[248]

The Court grappled with the question of whether the conditions in the facility were illegal. It examined whether the Animal Protection Act required the separation of birds affected by so-called feather pecking from the rest of the flock. Feather pecking refers to the occurrence by which laying hens in unnaturally large flocks tend to peck one another's feathers, causing damage to their plumage. The District Court accepted that the insufficient plumage of the flock displayed in the footage resulted from 'the disease of feather pecking' ['Krankheit des Federpickens'].[249] Yet, according to the Court, this was not a condition that would require the separation of the flock pursuant to § 2 of the Animal Protection Act, for approximately half of all laying hens in conventional as well as organic agriculture suffer from this disease.[250] The Court found that the defendant failed to establish why feather pecking – 'although mass-phenomenon – still constitutes a condition the revealing of which is of outstanding public interest' ['obgleich Massenphänomen – dennoch um einen Umstand handelt, dessen Aufdeckung von überragendem öffentlichen interesse ist'].[251]

243 Ibid.
244 LG Hamburg [Hamburg District Court] 13 December 2013, 324 O 400/13, BeckRS 199308, 2013 (para. 46).
245 Ibid., para. 51.
246 Ibid., para. 48.
247 Ibid., para. 49.
248 Ibid., para. 50.
249 Ibid., para. 55.
250 Ibid.
251 Ibid.

The reasoning of the Court in this instance is representative of a common line of argument in animal law. In essence, the Court inferred legality from the widespread existence of feather-pecking. This implies that the industry norm cannot violate the Animal Protection Act, simply because it is the industry norm. Interestingly, the Court transferred this argument to the public interest inquiry that determines the scope of Article 5 (1) of the Basic Law when it required the defendant to explain why a 'mass-phenomenon' is of outstanding public interest. The Court dismissed the idea that the fact that the objectionable condition is a 'mass-phenomenon' is precisely why it could trigger the public interest. Perhaps even more so than if it was a one of incident, since these – in the words of the Court – 'ethically reprehensible or morally accusable' ['ethisch verwerflich oder moralisch vorwerfbar'][252] conditions are not addressed by the Animal Protection Act. As will be discussed below, the FCJ took these considerations into account in overturning the lower Court's decision.

6.1.5 Federal Court of Justice Decision

Following the Hamburg District Court decision, the broadcaster appealed without success; the Hamburg Regional Court affirmed the decision.[253] Like the District Court, the Regional Court assigned significant weight to the fact that the farming collective had not engaged in unlawful conduct and that their practices were consistent with those of other providers of 'organic' products.[254]

However, the FCJ overturned the decisions. First, the FCJ noted that the dissemination of the footage constituted an interference with the farming collective's general personality right, including a right to privacy, guaranteed in Article 2 (1) in conjunction with Article 19 (3) of the Basic Law, and Article 8 of the ECHR.[255] More precisely, the footage touched upon the 'plaintiff's social claim of validity as a commercial enterprise' ['sozialer Geltungsanspruch der Kl. als Wirtschaftsunternehmen'].[256] The Court held

252 Ibid., para. 57.
253 OLG Hamburg [Hamburg Regional Court] 19 July 2016, 7 U 11/14, BeckRS 131241, 2016.
254 Ibid., para. 12.
255 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2879).
256 Ibid.

that the disseminated footage could impact the reputation of the farming collective as the depicted conditions were contrary to the farming collective's public image.[257] Further, the FCJ noted that the dissemination of the footage touched upon the plaintiff's business which is protected via the right to an 'established and operated business enterprise' ['eingerichteter und ausgeübter Gewerbebetrieb'] (see above).[258]

However, the FCJ found that the interference with the rights of the plaintiff was not unlawful.[259] The defendant's aim to inform the public, and her right to freedom of expression and freedom of the press, enshrined in Article 5 (1) of the Basic Law and Article 10 ECHR, outweighed the interests of the plaintiff.[260] The FCJ held that the both the right to privacy and the right to an established and operated business enterprise are open provisions ['offene Tatbestände'] meaning that their content and boundaries have to be determined by balancing them against the interests of others on a case by case basis.[261]

The FCJ placed a central emphasis on the role of the media as a 'public watchdog.' The FCJ first stressed that the publication of unlawfully obtained material was included in the protection of freedom of expression in Article 5 (1) of the Basic Law.[262] The Court found then that the press, as 'public watchdog,' was required to raise awareness about misconduct.[263] Most importantly, the Court noted that excluding the publication of unlawfully obtained materials from Article 5 (1) of the Basic Law would mean the denial of protection in those situations where it was needed the most.[264] The Court then stressed the importance of the purpose of the publication: '[t]he basic right to freedom of opinion is assigned more weight, the more it [the topic at hand] constitutes a contribution to the intellectual battle of ideas in a question considerably concerning the public' ['[d]em Grundrecht auf Meinungsfreiheit kommt umso größeres Gewicht zu, je mehr es sich um einen Beitrag zum geistigen Meinungskampf in einer die Öffentlichkeit

257 Ibid.
258 Ibid.
259 Ibid., 2880.
260 Ibid., 2879.
261 Ibid.
262 Ibid., 2880.
263 Ibid.
264 Ibid.

wesentlich berührenden Frage handelt'].[265] In so far as this factor was concerned, the FCJ agreed with the lower Courts.

However, the FCJ departed from the lower Courts when it considered it essential that it was not the broadcasting company who committed the trespass.[266] If this had been the case, according to the FCJ, the standard applied by the District Court would have been correct; publishing the footage would have been illegal unless it would have revealed significant and, as a rule, *illegal* misconduct.[267] However, as the broadcasting company obtained the footage from a third party, the FCJ found that, instead of meeting the above standard, there could be a comprehensive balancing of the circumstances.[268] As such, the FCJ considered a number of factors, *inter alia*, the fact that the defendant did not break the law, but only took advantage of others doing so;[269] that the materials revealed the circumstances of poultry keeping;[270] that the criticism against the farming collective was truthful;[271] and that the report did not excessively attack the plaintiff.[272] The FCJ observed that there was an objective reason for targeting the farming collective which was its advertisement with 'happy' chickens and organic products, which was critically examined in the footage.[273]

Perhaps the most important element of the FCJ reasoning is that the Court re-assessed the weight of the right to freedom of expression in the specific case at hand. The Court concluded that the defendant contributed to the intellectual battle of ideas on a question considerably concerning the public.[274] Like the lower Courts, the FCJ understood the broadcasting of the footage to focus on the gap between the ethical standards that consumers expect from organic products, and the reality depicted in the footage.[275] The Court found that it is the task of the media, as 'public watchdog,' to engage with these gaps and to inform the public: '[t]he function of the press is not limited to the revelation of criminal offences

265 Ibid.
266 Ibid.
267 Ibid.
268 Ibid., 2881.
269 Ibid.
270 Ibid.
271 Ibid.
272 Ibid., 2882.
273 Ibid.
274 Ibid., 2881.
275 Ibid.

or breaches of the law; […] it [the press] exercises an important function for a democratic state governed by rule of law, by informing the public of topics of general interest' ['[d]ie Funkion der Presse ist nicht auf die Aufdeckung von Straftaten oder Rechtsbrüchen beschränkt […]; sie nimmt im demokratischen Rechtsstaat vielmehr auch insoweit eine wichtige Aufgabe wahr, als sie die Bevölkerung über Themen von allgemeinem Interesse informiert'].[276]

6.1.6 Implications for the Link Between Animal Welfare and Freedom of Expression

The FCJ decision at hand is highly relevant for freedom of expression. It remedied shortcomings of the lower Court's decision. The District Court had not only understated the importance of consumer protection and animal welfare as matters of pubic interest. It also, in so doing, made the reach of freedom of expression depended on animal welfare law.

As mentioned, the District Court argued that the revelation of ethically objectionable but lawful and overwhelmingly common conditions did not constitute a public interest sufficient to outweigh the interests of those responsible for these conditions.[277] This line of argument represents a formalistic consideration of the right to freedom of expression, depriving it of its function to enable public discourse. By making such an argument, the District Court rendered the boundaries of the right to freedom of expression dependent on lower norms, namely those of the Animal Protection Act, interpreted through the lens of industry standards.

If not even food production constitutes an overwhelming public interest, what does then? The public interest is then de facto limited to the revealing of unlawful conditions or conduct. As a consequence, the Animal Protection Act sets limits to the enjoyment of the right to freedom of expression of activists and even the media. The function of the right to freedom of expression is thus limited to the enforcement of existing legal standards. The publication of, and only of, unlawful conditions or conduct, is possible; it is impossible to criticize the existing legal standards. Freedom of expression is denied the possibility to serve as a catalyst to change the law. The FCJ decision successfully resolved this issue, by stressing the role of the press

276 Ibid.

277 LG Hamburg [Hamburg District Court] 13 December 2013, 324 O 400/13, BeckRS 199308, 2013 (paras. 44 f.).

as 'public watchdog' and stating that its function is not limited to revealing breaches of the law.

The FCJ decision is remarkable in its addressing of the ambiguity of the Animal Protection Act through a robust protection of the freedom of expression. This differs from the position of the District Court who essentially transferred the shortcomings of animal law into a freedom of expression dispute: suggesting that industry norms were determinative of whether a certain condition was a violation of the Animal Protection Act and a matter of public interest. The FCJ took the diametrically opposed stand, by finding that the gap between consumer expectations and the reality of legally permissible organic farming was a matter of public interest. In so doing, the Court recognized the strong nexus between freedom of expression, animal welfare and consumer interests.

For animal activists, the decision might nevertheless give rise to criticism. The Court emphasized that there would have been a higher threshold if the footage had been illegally obtained and disseminated by the same person or entity. The decision thus privileges the media, but not the activists on the ground. This finding will be central to the legal and normative reconstruction of the decision.

6.1.7 Links to Other Relevant Cases

The FCJ decision is illustrative of a broader trend of considering animal welfare as an element of 'organic' farming. The Court made clear that consumers understand 'organic' animal farming to entail animal welfare. While it has long been recognized by domestic and supranational Courts that animal welfare is a matter of public interest,[278] the link to 'organic' farming is more recent. Most famously, it was advanced in February 2019 by the Court of Justice of the European Union (CJEU) in *Oeuvre d'assistance aux bêtes d'abattoirs (OABA) v Ministre de l'agriculture et de l'alimentation, Premier minister, Bionoor, Ecocert France, Institut national de l'origine et de*

278 See e.g., on the domestic level (animal welfare as matter of the 'common good' ['Gemeinwohl'] BVerfG [Federal Constitutional Court] 2 October 1973, 1 BvR u. 477/72, NJW 30, 1974; BVerfG [Federal Constitutional Court] 6 July 1999, 2 BvF 3–90, NJW 3253, 1999; on the supranational level ECtHR, *Bladet Tromsø and Stensaas v. Norway*, App. no. 21980/93, 20 May 1999, paras. 63–64, 73; ECtHR, *Steel and Morris v. UK*, App. no. 68416/01, 15 February 2005, para. 88; ECtHR, *Verein gegen Tierfabriken Schweiz v. Switzerland*, App. no. 32772/02, 30 June 2009, para. 92.

la qualité (INAO).[279] The CJEU held that animal products resulting from animal slaughter without prior stunning could not be labelled with the EU organic logo, as consumers should be able to expect 'organic' products to entail the highest animal welfare standards.[280] Like the FCJ in the case at hand, the CJEU considered animal welfare and organic farming to be connected in the eyes of the consumers.

The organic chicken case is also closely linked to, yet distinct from, the *Tierbefreier* case, which was discussed in the previous Chapter 5. Although the same laws and similar legal standards apply here as in the *Tierbefreier* case, the case at hand did not hinge on the 'rules of the intellectual battle of ideas.' Rather, the Courts focused on the question of how to balance the public's interest in information about animal welfare (short of a breach of animal welfare law) against the rights of corporate entities. In doing so, the FCJ relied, *inter alia*, on the role of the media as 'public watchdog,' rather than on the rights of activists.

Similarly, the case connects to the trespassing cases discussed in Chapter 8 as the allegation of trespass features prominently in the arguments of the plaintiff. However, the connection between the recent trespass cases discussed in Chapter 8 and the case at hand should not be overstated. Legal scholar Thomas Cirsovius argues that the alleged act of trespass preceding the dispute at hand was likely legally justified pursuant to the standards set by the Naumburg Regional Court.[281] This claim cannot be supported. Both the lower Courts and the FCJ found that the conditions in the facilities were not unlawful. Even if the conditions were unlawful, (e.g., in light of the feather-pecking) it would have had to be shown that the activist fulfilled other criteria set by the Naumburg Court, such as informing the authorities about the illegal conditions, before resorting to trespass. As explained in Chapter 8, this is decisive to determining whether the act of trespass was justified. Even if, as Cirsovius claims, the conditions in the facilities breached animal welfare law,[282] a legal justification of the alleged act of trespass remains uncertain.

279 CJEU, *Oeuvre d'assistance aux bêtes d'abattoirs (OABA) v. Ministre de l'agriculture et de l'alimentation, Premier minister, Bionoor, Ecocert France, Institut national de l'origine et de la qualité (INAO)*, C-497/17 ECLI, 26 February 2019.

280 Ibid., para. 51.

281 Cirsovius 2018, 767. OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018.

282 Cirsovius 2018, 767.

6.2 The Media as 'Public Watchdog' in Legal Reasoning

In the case at hand, the FCJ nuanced the standards applicable to cases concerning the publication of undercover footage. What distinguishes the case from other cases discussed in this dissertation is that it concerns the media, rather than animal activists. This distinction is highlighted in two aspects of the Court's reasoning in two ways. First, the Court considered it highly relevant that it was not the defendant, but a third party, who obtained the footage, likely by illegal means.[283] This factor is not always decisive,[284] but it was considered important here. Second, the Court stressed the media function as 'public watchdog.'[285] In a democratic state governed by the rule of law, the media as 'public watchdog' hold the function not only of revealing breaches of the law, but also of informing the public about matters of public interest.[286] Other Courts have since cited this central part of the decision in, *inter alia*, a case arising from the publication of undercover footage from a hospital[287] and to the publication of illegally obtained private chat messages with racist and anti-democratic content by the employee of a member of a regional parliament.[288]

However, neither the term 'public watchdog' nor the underlying idea are new to the jurisprudence of German Courts. In 2015, the FCJ already stated that: '[t]the control- and surveillance function of the press is not limited to the revelation of criminal acts' [Die Kontroll- und Überwachungsfunktion der Presse ist nicht auf die Aufdeckung von Straftaten beschränkt].[289] Nev-

283 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2881).

284 For example, after the FCJ decision discussed here, the Hamburg Regional Court allowed for the dissemination of undercover footage revealing grievances in a hospital, although there was a strong personal link between those obtaining and disseminating the footage. See OLG Hamburg [Hamburg Regional Court] 27 November 2018, 7 U 100/17, ZUM-RD 320, 2019 (323). This issue also featured in Chapter 5: A journalist who created undercover footage in a testing laboratory and was permitted to disseminate parts of it. See OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 77/04, ZUM-RD 579, 2004 (583).

285 This issue was also emphasized by Gostomzyk, Tobias, Anmerkung zu BGH VI ZR 396/16, NJW (2018), 2877–2882.

286 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2881).

287 OLG Hamburg [Hamburg Regional Court] 27 November 2018, 7 U 100/17, ZUM-RD 320, 2019 (324).

288 OLG Karlsruhe [Karlsruhe Regional Court] 13 February 2019, 6 U 105/18, ZUM 478, 2020 (490).

289 BGH [Federal Court of Justice] 30 September 2014, VI ZR 490/12, ZUM-RD 83, 2015 (88).

ertheless, the notion of the 'public watchdog' remains elusive and is in need of further explanation. Crucially, it raises questions about the role of both the press and activists *vis-à-vis* democracy.

Against this backdrop, the legal analysis of the FCJ decision in the organic chicken case centers the notion of the public watchdog: this Section will argue that, if applied consistently, the notion of the 'public watchdog' implies that (animal) activist organizations could benefit from similar privileges as the media. In so doing, I will first show why the FCJ decision invokes a privilege of the media as compared to activists. In particular, I will analyze German Courts' jurisprudence on the notion of the 'public watchdog.' Finding that it is closely linked to the jurisprudence of the ECtHR, I subsequently analyze the relevant jurisprudence of the ECtHR to further delineate the criteria used to define the 'public watchdog.' I show that, unlike German domestic Courts, the ECtHR considers NGOs, including animal advocacy associations and even some individuals, to benefit from the special protection afforded to 'public watchdogs.'

6.2.1 The Public Watchdog in the Jurisprudence of German Courts

The English phrases 'public watchdog' or 'social watchdog' (not their German translation) feature in domestic cases concerning the right of access to State-held information. The German administrative Courts refer to the ECHR system in some cases.[290] The ECtHR interprets Article 10 (1) of the ECHR as conferring to NGOs and media the right to access State-held information.[291] The ECtHR elaborated on this matter in detail in 2016 in *Magyar Helsinki Bizottság v. Hungary*.[292] In the German domestic system, the FCC has not yet confirmed that such a right can be derived from the Basic Law directly.[293] Rather, its basis must be found in other laws

290 See e.g., BVerwG [Federal Administrative Court] 29 June 2016, 7 C 32/15, NVwZ 1566, 2016 (1570); VGH München [Munich Administrative Court] 2 February 2014, 5 ZB 13.1559, NJW 1687, 2014 (1689).

291 See ECtHR, *Magyar Helsinki Bizottság v. Hungary*, App. no. 18030/11, 8 November 2016.

292 Ibid.

293 Although compelling arguments can be made in favor, see Grabenwarter, Christoph, Art. 5 Abs. 1, Abs. 2 GG in: Theodor Maunz, Günter Dürig (founders), Roman Herzog, Rupert Scholz, Matthias Herdegen, Hans H. Klein (eds.), Grundgesetz Kommentar (München: C.H. Beck Verlag, last updated November 2021), para. 374.

governing freedom of information and transparency which can vary in from state to state.[294] This explains why, in cases concerning requests for information from public authorities, German Courts frequently invoke the ECtHR system.[295] However, these decisions concern public law and are of very limited relevance to the matter at issue here.

More importantly for the issue at stake, the 'public watchdog' is employed in civil disputes concerning conflicts between the freedom of the press or freedom of expression and a person's personality rights, extending to privacy rights.[296] With few exceptions, the Courts use the German language term 'Wachund der Öffentlichkeit.'[297]

An analysis of these cases sheds some light on what the notion expresses, revealing three elements. Clearly, the first central element is the revelation not only of criminal acts, but also of other of grievances of public significance.[298] The second element mentioned is the more general idea that the 'flow of information' ['Informationsfluss'] is to be protected by the freedom of the media.[299] Thirdly, and most frequently invoked, the Courts point to the democratic function of the media that requires contributing to the public formation of opinion ['öffentliche Meinungsbildung'].[300] The Courts

294 Engelbrecht, Kai, Informationsfreiheit zwischen Europäischer Menschenrechtskonvention und Grundgesetz – Bedeutung der EGMR-Entscheidung in der Rs. Magyar Helsinki Bizottság für das deutsche Recht, ZD (2018), 108–113.

295 Engelbrecht 2018.

296 OLG Karlsruhe [Karlsruhe Regional Court] 13 February 2019, 6 U 105/18, ZUM 478, 2020 (490); OLG Düsseldorf [Düsseldorf Regional Court] 7 November 2019, 16 U 161/18, BeckRS 30090, 2019; OLG Köln [Köln Regional Court] 22 March 2018, 15 U 121/17, ZUM-RD 396, 2019 (398); BGH [Federal Court of Justice] 12 June 2018, VI ZR 284/17, GRUR 1077, 2018 (1080); BGH [Federal Court of Justice] 6 February 2018, VI ZR 76/17, GRUR 549, 2018 (551).

297 It seems that only the Cologne Regional Court invokes the English language version: see OLG Köln [Cologne Regional Court] 16 March 2017, 15 U 134/16 BeckRS 133470, 2017 (concerning reporting based on suspicion ['Verdachtsberichterstattung']); OLG Köln [Cologne Regional Court], 18 April 2019, 15 U 215/18, GRUR-RS 35727, 2019 (reporting about a celebrity).

298 OLG Karlsruhe [Karlsruhe Regional Court] 13 February 2019, 6 U 105/18, ZUM 478, 2020 (489); BGH [Federal Court of Justice] 17 December 2019, VI ZR 504/18, NJW 2032, 2020 (2033).

299 OLG Karlsruhe [Karlsruhe Regional Court] 13 February 2019, 6 U 105/18, ZUM 478, 2020 (489).

300 BGH [Federal Court of Justice] 18 December 2018, VI ZR 439/17, MMR 824, 2019 (825); BGH [Federal Court of Justice] 30 October 2012, VI ZR 4/12, GRUR 94, 2013 (96); OLG Düsseldorf [Düsseldorf Regional Court] 7 November 2019, 16 U 161/18, BeckRS 30090, 2019.

contrast this democratic function against the mere 'satisfaction of curiosity of the audience' ['Befriedigung der Neugier des Publikums'].[301] The three elements are best summed up in a 2016 FCJ decision:

> 'The press assumes an important function as 'public watchdog' in a democratic state governed by the rule of law by informing the general public and, should the occasion arise, pointing to public grievances, whereby [the press] assumes a significant function within the public formation of opinion'
>
> ['[D]ie Presse nimmt im demokratischen Rechtsstaat als „Wachhund der Öffentlichkeit" eine wichtige Funktion wahr, indem sie die Bevölkerung informiert und gegebenenfalls auf öffentliche Missstände hinweist, womit sie eine bedeutende Rolle im Rahmen der öffentlichen Meinungsbildung übernimmt'].[302]

In the following, I will refer to the three elements or functions as (1) accountability; (2) imparting information; and (3) contributing to the public formation of opinion. It should be noted that these elements were synthesized from published Court decisions explicitly referring to the 'public watchdog.' Nevertheless, they seem to align with the functions ascribed to the media in the jurisprudence of German Courts more broadly. Donald Kommers and Russell Miller find that in the jurisprudence of the FCC, the medias 'primary purposes are: to create information; distribute the news; and contribute to the development of public opinion.'[303] Thus, the functions of the 'public watchdog' are at least indicative of the role ascribed to the media more generally.

In addition, the above analysis shows that the Courts use the notion functionally: rather than as a label conferred to entities by virtue of their formally being members of the media: the 'public watchdog' describes a set of functions an entity afforded this status is expected to fulfill. This set of functions is delineated in relation to democracy: they describe what the media are expected to contribute to a democratic state.

Despite these findings, the notion appears rather elusive. It is a non-legal and metaphorical expression. Embedded in a balancing of the different

301 Ibid.

302 BGH [Federal Court of Justice] 27 September 2016, VI ZR 250/13, NJW 482, 2017 (485).

303 Kommers, Donald/ Miller, Russell, The Constitutional Jurisprudence of the Federal Republic of Germany (Durham: Duke University Press 3rd ed., 2012), 508.

interests at stake, the weight attached to the 'public watchdog' is not always clear. But more importantly, the above elements were only mentioned, and not elaborated, in the relevant decisions. Theoretical explorations, which would allow to infer the boundaries of the term, are absent from the decisions. In other words, it remains unclear what requirements an entity must meet in order to qualify as a 'public watchdog.' Against this backdrop, other sources are needed to shed light on the 'public watchdog' function and what it may entail for animal activists. In the following, I will draw on the jurisprudence of the ECtHR and – in the normative reconstruction section – literature from the field of political theory and ethics of journalism.

6.2.2 The Public Watchdog in the Jurisprudence of the ECtHR

When employing the notion of the public watchdog, the German Courts often reference jurisprudence of the ECtHR.[304] As early as 2006, the FCC explicitly noted that the ECtHR attaches importance to the function of the press as 'public watchdog.'[305] Against this backdrop, the reconstruction of the FCJ decision in the organic chicken case can be assisted by the case law of the ECtHR.

The notion of the 'public watchdog' has been frequently employed by the ECtHR.[306] According to the ECtHR database, the first mention appeared as early as 1985 in the case *Barthold v. Germany*.[307] This case concerned injunctions against a veterinary surgeon who had given an interview to the press calling for a nightly veterinary service in Hamburg.[308] The German Courts found that doing so constituted an advertisement for the

304 OLG Köln [Cologne Regional Court] 8 October 2018, 15 U 110/18, NJW-RR 240, 2019 (243); BGH [Federal Court of Justice] 2 May 2017, VI ZR 262/16, GRUR 850, 2017 (853); BGH [Federal Court of Justice] 12 June 2018, VI ZR 284/17, GRUR 1077, 2018 (1080); OLG Köln [Cologne Regional Court] 22 March 2018, 15 U 121/17, ZUM-RD 396, 2019 (398); BGH [Federal Court of Justice] 12 June 2018, VI ZR 284/17, GRUR 1077, 2018 (1080); BGH [Federal Court of Justice] 6 February 2018, VI ZR 76/17, GRUR 549, 2018 (551).

305 BVerfG [Federal Constitutional Court] 13 June 2006, 1 BvR 565/06, NJW 2835, 2006 (2836).

306 For an overview see Registry of the ECtHR, Guide to Article 10 of the European Convention on Human Rights (updated 30 April 2021), 51 f., available at https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf (last accessed 10 April 2022).

307 ECtHR, *Barthold v. Germany*, App. no. 8734/79, 25 March 1985, para. 58.

308 Ibid., para. 10 f.

applicant and thus breached Rules of Professional Conduct applicable to his profession and the Unfair Competition Act.[309] The Court found that the injunctions constituted an interference with Article 10 of the Convention (freedom of expression) and were not necessary in a democratic society, *inter alia* because the application of the law by the domestic Courts was 'liable to hamper the press in the performance of its task of purveyor of information and public watchdog.'[310]

The notion of the 'public watchdog' as it appears in the jurisprudence of the ECtHR in cases concerning freedom of expression and freedom of the media is well explained in *Jersild v. Denmak*:

> 'It is nevertheless incumbent on [the press] to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog". Although formulated primarily with regard to the print media, these principles doubtless apply also to the audio-visual media.'[311]

Accordingly, the ECtHR ties the role of the 'public watchdog' and the strong protection of freedom of expression of the media to the public receiving information.[312]

Besides the media, other entities such as NGOs can perform the role of 'public' or 'social watchdog.' This also applies to animal rights NGOs. In *Animal Defenders International v. The United Kingdom* the Court held that 'it must be noted that, when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press.'[313]

The role of 'public watchdog' is also relevant when members of animal protection NGOs seek access to state held information. In *Guseva v. Bul-*

309 Ibid, para. 15.
310 Ibid., para. 58.
311 ECtHR, *Jersild v. Denmark*, App. no. 15890/89, 23 September 1994, para. 31. See also ECtHR, *Bladet Tromsø and Stensaas v. Norway*, App. no. 21980/93, 20 May 1999, para. 62.
312 See also ECtHR, *The Observer and the Guardian v. the United Kingdom*, App. no. 13585/88, 26 November 1991.
313 ECtHR, *Animal Defenders International v. the United Kingdom*, App. no. 48876/08, 22 April 2013, para. 103; see also ECtHR, *Vides Aizsardzības Klubs v. Latvia,* App. No. 57829/00, 27 May 2004, para. 42.

garia, the ECtHR held that a member of an animal welfare association who sought information about the treatment of stray animals from public authorities, fell within the scope of freedom of expression. The gathering of information was relevant to 'informing the public on this matter of general interest.'[314] The authorities' denial to grant access to the requested information constituted an interference with Article 10 of the ECHR, not least due to the applicant's role as member of an NGO performing functions of a 'public' or 'social watchdog.'[315]

However, the Court has gone even further than this and has noted that the 'public' or 'social watchdog' function, and the associated high level of protection afforded under Article 10 of the ECHR, may even be extended to individuals such as 'academic researchers,' 'authors of literature on matters of public concern' and even 'bloggers and popular users of the social media.'[316] Commentators have noted that this considerably expands the notion of the 'public watchdog.' It is not yet clear where the line is to be drawn, especially online; which actors are to benefit from this extension of the function and what their corresponding duties are.[317]

On a similar note, Judge Wojtyczek criticized the Court's approach in a dissenting opinion in *Guseva v. Bulgaria*.[318] The implicit distinction between those subjects who qualify as watchdogs and other persons may no longer be appropriate today. Since public debate has been democratized (notably due to the internet) all those who, for example, impart information and take part in debates 'on matters of public interest' online, are journalists and 'social watchdogs.'[319] Against this backdrop, as Judge Wojtyczek aptly

314 ECtHR, *Guseva v. Bulgaria*, App. no. 6987/07, 17 February 2015, para. 41.
315 Ibid., paras. 53–55.
316 ECtHR, *Magyar Helsinki Bizottság v. Hungary*, App. no. 18030/11, 8 November 2016, para. 168; for academic researchers see e.g., ECtHR, *Başkaya and Okçuoğlu v. Turkey*, App. nos. 23536/94 and 24408/94, 8 July 1999, paras. 61–67; for authors of literature see e.g., ECtHR, *Chauvy and Others v. France*, App. no. 64915/01, 29 June 2004, para. 68; ECtHR, *Lindon, Otchakovsky-Laurens and July v. France*, App. nos. 21279/02 and 36448/02, 22 October 2007, para. 48.
317 Brings-Wiesen, Tobias, Völkerrecht, in: Gerald Spindler, Fabian Schuster (eds.), Recht der elektronischen Medien Kommentar (München: C.H. Beck Verlag 4th ed., 2019), para. 52.
318 ECtHR, *Guseva v. Bulgaria*, App. no. 6987/07, 17 February 2015, Dissenting opinion of Judge Wojtyczek.
319 Ibid., para. 7.

notes, making distinctions based on a persons' or entities' 'status' as watchdog raises equality concerns.[320]

6.2.3 Duties and Responsibilities of the 'Public Watchdog' in the Jurisprudence of the ECtHR

So far, the legal reconstruction has shown that the notion of the 'public watchdog' is functional, and that it covers, in the jurisprudence of the ECtHR, actors beyond the press, specifically NGOs and even individuals such as bloggers. In light of this, it seems that the notion could be applied to anyone who performs the functions associated with the press, namely, those of: accountability; imparting information; and contributing to the public formation of opinion. It can be argued that animal activists must be eligible for a conferral of the privileges associated with the 'public watchdog.' However, in order to benefit from this possibility, activists have to also comply with certain requirements, to which this Section now turns.

The special protection conferred to 'public watchdogs' under Article 10 of the ECHR is not unconditional. Those acting as 'public watchdogs' must comply with certain duties and responsibilities; they are obliged to engage in 'responsible journalism:'

> 'by reason of the "duties and responsibilities" inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.'[321]

This concept extends, not only to the content of information,[322] but also *inter alia* the lawfulness of a journalist's conduct. When assessing whether a

320 Ibid.

321 See ECtHR, *Goodwin v. the United Kingdom*, App. no. 17488/90, 27 March 1996, para. 39; ECtHR, *Fressoz and Roire v. France*, App. no. 29183/95, 21 January 1999, para. 54; ECtHR, *Bladet Tromsø and Stensaas v. Norway*, App. no. 21980/93, 20 May 1999, para. 65.

322 ECtHR, *Bladet Tromsø and Stensaas v. Norway*, App. no. 21980/93, 20 May 1999, para. 65 f.; ECtHR, *Fressoz and Roire v. France*, App. no. 29183/95, 21 January 1999, para. 52 f.; ECtHR, *Krone Verlag GmbH v. Austria*, App. no. 27306/07, 19 June 2012, paras. 46 f.; ECtHR, *Novaya Gazetaand Borodyanskiy v. Russia*, App. no. 14087/08, 28 March 2013, para. 3; ECtHR, *Yordanova and Toshev v. Bulgaria*, App. no. 5126/05, 2 October 2012, paras. 53, 55.

journalist has acted responsibly, compliance with the law 'is a most relevant, albeit not decisive' factor.[323]

In *Petikänien v. Finland*, the Court made clear that, despite the essential role of media in a democracy, journalists

> 'cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that, as journalists, Article 10 affords them a cast-iron defence […] a journalist cannot claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions.'[324]

Further, the Court also questioned responsible journalism in a case where the law was not violated, but where the applicants systematically disregarded 'the normal channels open to journalists' to receive certain information, thus circumventing 'the checks and balances established by the domestic authorities that regulate access and dissemination.'[325] The Court also found that the duties and responsibilities of journalists are particularly important now due to the high influence of the media in today's society. Individuals face 'vast quantities of information' from a growing number of different media outlets. In this context, it is argued, journalistic ethics are becoming more and more important.[326]

Despite the above, the reliance on 'responsible journalism' has been subject to criticism. In a dissenting opinion in *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, the Judges Sajò and Karakaş cautioned against an overreliance on 'responsible journalism' when granting states a wider margin of appreciation. If states are allowed to determine the boundaries of responsible journalism, they may consider those positions critical of the state as 'not journalistic but plainly illegal as a form of terrorism or a threat to national security,' which is an understanding not supported in

323 ECtHR, *Pentikänien v. Finland*, App. no. 11882/10, 20 October 2015, para. 90.

324 ECtHR, *Pentikänien v. Finland*, App. no. 11882/10, 20 October 2015, para. 91; see also ECtHR, *Stoll v. Switzerland*, App. no. 69698/01, 10 December 2007, para. 102; ECtHR, *Bladet Tromsø and Stensaas v. Norway*, App. no. 21980/93, 20 May 1999, para. 65.

325 ECtHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, App. no. 931/13, 27 June 2017, para. 185.

326 ECtHR, *Stoll v. Switzerland*, App. no. 69698/01, 10 December 2007, para. 104.

Article 10 of the ECHR.[327] Finally, the Court also recognizes that journalists may face a conflict between their duty to abide by criminal law, and their role as 'public watchdog.' For example, the Court held that:

> 'the concept of responsible journalism requires that whenever a journalist – as well as his or her employer – has to make a choice between the two duties and if he or she makes this choice to the detriment of the duty to abide by ordinary criminal law, such journalist has to be aware that he or she runs the risk of being subject to legal sanctions, including those of a criminal character, by not obeying the lawful orders of, inter alia, the police.'[328]

In doing so, the Court held that the same considerations as apply to journalists also apply to NGOs when they exercise the role of 'public watchdog.'[329] In support of this view, the Court referred to the Code of Ethics and Conduct for NGOs, 'according to which "an NGO should not violate any person's fundamental human rights", "should give out accurate information ... regarding any individual" and "the information that [an NGO] chooses to disseminate to ... policy makers ... must be accurate and presented with proper context".'[330] This Code was published by the World Association of Non-Governmental Organizations in 2004. The Code also states that an NGO's 'activities, governance, and other matters shall conform to the laws and regulations of its nation and locality.'[331] Nevertheless, the Code adds that an NGO may, as part of its mission, work towards changing the respective laws.[332]

However, the requirements that apply in order for entities, and even more for individuals, to benefit from enhanced protection as 'public watch-

327 ECtHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, App. no. 931/13, 27 June 2017, Dissenting Opinion of Judges Sajó and Karakaş, para. 21.

328 ECtHR, *Pentikänien v. Finland*, App. no. 11882/10, 20 October 2015, para. 110.

329 ECtHR, *Magyar Helsinki Bizottság v. Hungary*, App. no. 18030/11, 8 November 2016, para. 159; ECtHR, *Medžlis Islamske Zajednice Brčko v. Bosnia and Herzegovina*, App. no. 17224/11, 27 June 2017, para. 87.

330 ECtHR, *Medžlis Islamske Zajednice Brčko v. Bosnia and Herzegovina*, App. no. 17224/11, 27 June 2017, para. 87, citing World Association of Non-Governmental Organizations, Code of Ethics and Conduct for NGOs (New York: 2004), 28, available at: https://baaroo.org/wp-content/uploads/2012/04/Code-of-Ethics-and-Conduct.pdf (last accessed 18 February 2019).

331 World Association of Non-Governmental Organizations, Code of Ethics and Conduct for NGOs (New York: 2004), 31 f.

332 Ibid., 31 f.

dogs' remain elusive. The jurisprudence does not deliver clear-cut criteria based on which one can assess the 'public watchdog' status of an entity or individual.

To sum up, one can say that NGOs, and even individuals, can be protected as 'public watchdogs' in the ECHR system to the same extent as can journalists, but to do so they must adhere to standards comparable to those of 'responsible journalism.' As the 'public watchdog' has been identified as a functional concept, and the Court explicitly stated that comparable considerations apply both to journalists and NGOs, it can be expected that, for activist associations to be protected, they must comply with high ethical standards. Most relevant to the topic at hand, they would likely not qualify as 'public watchdogs' in disseminating illegally obtained information or footage and this would likely be considered incompatible with 'responsible journalism.'

6.2.4 Tracing the Differences Between the Domestic and the ECtHR System

The legal analysis above has shown that the non-legal notion of the 'public watchdog' is present in the jurisprudence of the ECtHR, as well as in the decisions of domestic Courts, in both in private and public law disputes. However, there exists a striking difference between how the concept is invoked in the two systems. German Courts have, so far, only employed the notion of the 'public watchdog' in private law disputes regarding the press and the media, but not with regard to NGOs. Only in public law cases, in the context of the right to access State-held information, has the Federal Administrative Court named an environmental NGO a 'social' or 'public' watchdog, and did so with reference to the jurisprudence of the ECtHR.[333] In private law cases, where freedom of expression was at stake, the German Courts seem to deviate from the jurisprudence of the ECtHR while their usage of the notion explicitly draws on that jurisprudence.

One possible explanation is that in private law (unlike in public law) the foundations of the 'public watchdog' stem, in fact, from the domestic rather than the ECtHR system. It should be noted that a similar concept existed in the jurisprudence of the German Courts prior to the first mentioning of the 'public watchdog' in the jurisprudence of the ECtHR. In a 1982 case,

333 BVerwG [Federal Administrative Court] 29 June 2016, 7 C 32/15, NVwZ 1566, 2016 (1570).

the FCC, for example, referred to 'one of [the press'] special tasks, described as a public one' ['eine ihrer besonderen Aufgaben, die als eine öffentliche bezeichnet wird'].[334] In 1984 the FCC used the term 'control task of the press (…) to whose function it belongs to point to grievances of public significance' ['Kontrollaufgabe der Presse […], zu deren Funktion es gehört, auf Mißstände von öffentlicher Bedeutung hinzuweisen'].[335] In light of this, despite referring to ECtHR jurisprudence when employing the notion of 'public watchdog,' it remains unclear to what extent German Courts really rely on the jurisprudence of the ECtHR. The origin of the notion of the 'public watchdog' cannot be settled with certainty here. In any case, the ECtHR jurisprudence is relevant, not only because the domestic Courts frequently refer to it, but also because of the requirement to interpret German law in accordance with international law [völkerrechtskonforme Auslegung].

One possible explanation for the difference between the domestic and the ECtHR jurisprudence is that the domestic Courts hold on to a strict, categorical divide between the state, the people, and the media. Christian Wörth, in the only comprehensive study on democratic theory in the jurisprudence of the FCC completed at the time of writing, argued that the FCC, since the infamous Spiegel case,[336] works with the conception of a triangle between the people, the state, and the media.[337] This conception supports the hypothesis that there exists a categorical divide between the media on the one hand, and civil society, including activists, on the other. Such a divide could be informed by the theory of parallelism between the right to freedom of the press, and the right to freedom of expression in Article 5 (1) of the Basic Law. However, it is but one explanation for why the functions of the 'public watchdog' are only ascribed to members of the press in private law cases.

On this reading, the jurisprudence of German Courts would face serious challenges in an increasingly indeterminate media landscape. The lines between activists and professional journalists are blurring, especially in

334 BVerfG [Federal Counstitutional Court] 20 April 1982, 1 BvR 426/80, NJW 2655, 1982.

335 BVerfG [Federal Constitutional Court] 25 January 1984, 1 BvR 272/81, NJW 1741, 1984 (1743).

336 BVerfG [Federal Constitutional Court] 5 August 1966, 1 BvR 586/62, 610/63, 512/64, NJW 1603, 1966 (1604).

337 Wöhst, Christian, Hüter der Demokratie: Die angewandte Demokratietheorie des Bundesverfassungsgerichts (Wiesbaden: Springer VS 2017), 84 f.

the online sphere. In addition, excluding activists from the notion of the public watchdog might be problematic in light of the contrary ECtHR jurisprudence.

Importantly, these problems would not become redundant in the case that domestic Courts were to apply the notion to activists, for the notion itself remains elusive. In particular, is not clear what activists would have to do in order to be ascribed the privileges of 'public watchdogs.' Further, drawing on the dissenting opinion of Judge Wojtyczek in *Guseva v. Bulgaria*, the question remains whether any strict distinction should be maintained between watchdogs and other persons and entities, given that anyone taking part in public debate may function as watchdog.[338]

These findings underscore the limits of the legal analysis: illustrating that it neither sheds light on the theoretical grounds, nor on the future potential and implications of the notion of the 'public watchdog' in practice. Rather, this question can be better approached through a normative reconstruction in which we go beyond the strictly legal analysis.

6.3 Normative Reconstruction

I now turn to the normative reconstruction of the Courts' jurisprudence. The purpose of the normative reconstruction is to explain and to evaluate the notion of 'public watchdog' as it is employed in legal reasoning. This Section is based on the understanding that the 'public watchdog' is a central but elusive concept in existing legal reasoning, and especially in the 2018 FCJ organic chicken case at issue here. Despite its popularity in the jurisprudence of the ECtHR, and it's increasing presence in the jurisprudence of German Courts, the 'public watchdog' notion is but a metaphor. The normative reconstruction is required as the case law and other legal sources analyzed above fail to explain what exactly the Courts mean when they invoke the notion, and what is required for an entity or individual to claim this status. The normative reconstruction can further shed light on the implications of the 'public watchdog' for democracy.

Against this backdrop, I employ 'democratic journalism theory'[339] to normatively reconstruct the notion of the 'public watchdog' in legal reasoning.

338 ECtHR, *Guseva v. Bulgaria*, App. no. 6987/07, 17 February 2015, Dissenting opinion of Judge Wojtyczek.

339 Ward 2011, 105.

This Section will thus argue that the traditional conception of deliberative democracy can provide support for the privileging of the media as compared to activists. However, it is further argued that participatory models of democracy in particular, but also more inclusive models of deliberative democracy, can be invoked to identify activists as 'public watchdogs.' This Section refers mostly to journalism rather than the media or the press, as this is the terminology used in the relevant literature.

6.3.1 Democratic Journalism Theory

Democratic journalism theory describes a combination of democratic theory and the ethics of journalism that binds journalism and the associated ethics with democratic theory. I borrow this notion from Stephen Ward[340] who describes it as a form of media ethics that is defined by the belief that 'the most important ethical values are to be explained and justified with reference to democracy.'[341] This theory traces back to an understanding emerging around the turn of the 20st century, which stipulates that a libertarian conception of media freedom – freedom from censorship and regulation – is not sufficient to serve the public interest.[342] Rather, journalism required positive ethics to determine how to use these freedoms.[343] The furthering of democracy was identified as one of the key aims of journalism and its ways of serving society. Against this backdrop, media ethics draw on democratic theory: the question of which model of democracy is to be supported by journalism is crucial to the matter of which type of journalism is considered ethical.[344] In other words, the question of which model of journalism is supported, and which model of democracy it serves, are inevitably linked. As such, the desirable functions of the media are significantly shaped by the model of democracy one subscribes to.

'Democratic journalism theory' provides an interesting lens through which to explain and evaluate the reasoning of the FCJ in the organic chicken case as it sheds light on the question whether, why, and how privi-

340 Ward 2011, 105.
341 Ibid.
342 Ibid., 99.
343 Ibid., 100.
344 Ibid., 106; see also Strömbäck, Jesper, In Search of a Standard: four models of democracy and their normative implications for journalism, Journalism Studies 6:3 (2017), 331–345, 332 ff.

leging professional journalists over citizens journalists and activists can be justified. This Section will focus on the jurisprudence of German Courts, as the primary aim of the normative reconstruction is to explain and evaluate how the FCJ used the notion in the organic chicken case. However, the discussions in this Section are based on democratic theory and the ethics of journalism. Therefore, they are also informative for other jurisdictions, as the extra-legal evaluative frameworks may play a similar role in other legal systems. This is indicated by the link to the ECtHR system and will be explained further below.

6.3.2 The Functions Ascribed to the Media in Different Models of Democracy

As described above, three functions are ascribed to the media in civil cases in Germany that feature the 'public watchdog' notion: (1) the revelation of public grievances; (2) ensuring the flow of information; and (3) contributing to the formation of public opinion. To a large extent, these functions reflect those that are ascribed to the media in democracies generally. Brian McNair suggests five functions of what he calles the 'communicative media in "ideal-type" democratic societies.'[345] First, media 'must *inform* citizens of what is happening around them.'[346] This reflects what I described under the term 'imparting information.' Second, the media must also '*educate* as to the meaning and significance' of the information conveyed.[347] This point is also closely related to the function of 'imparting information.' Third, they must 'provide a *platform* for public political discourse, facilitating the formation of "public opinion", and feeding that opinion back to the public from whence it came.'[348] This reflects the function of contributing to the formation of public opinion identified above. Fourth, media must provide '*publicity* […] the "watchdog" role of journalism.'[349] As an example of this last point, McNair lists *inter alia* the Watergate scandal in the United States.[350] This is reflective of what I call the accountability function or

345 McNair, Brian, An Introduction to Political Communication (London: Routledge 3rd ed., 2003), 21.
346 McNair 2003, 21.
347 Ibid.
348 Ibid.
349 Ibid.
350 Ibid.

'public watchdog' function *stricto sensu*. Finally, McNair adds an '*advocacy*' or '*persuasion*' function: an outlet for political parties to voice their policies to the relevant audience.[351] This function is perhaps the least represented in the jurisprudence of German Courts, but it does relate to the 'formation of public opinion' function.

The brief comparison with McNair's list illustrates that the functions associated with the 'public watchdog' in the jurisprudence of German Courts correspond to functions ascribed to the media in 'ideal-type' democracies. It is up for debate whether there is a single set of functions that can be ascribed to the media in every democracy, as the above list might suggest. Jesper Strömbäck – like Ward – convincingly argues that there is more than one set of such functions: the desirable functions of the media are significantly shaped by the model of democracy one subscribes to.[352] Clearly, democracy needs freedom of the media and the freedom of the media needs democracy – but which model of democracy?[353] In the words of Stömbäck: 'what might be considered to be high quality news journalism from the perspective of one model of democracy might not be the same when taken from the perspective of another.'[354]

Strömbäck explores the implications that different models of democracy have in terms of what is expected from the media. He distinguishes between procedural, competitive, participatory, and deliberative models. In both a procedural or a competitive model of democracy, few normative demands can be made of the media.[355] Citizens have a passive role focused on voting, with it being up to those same citizens whether they vote at all, and thus there exists no need for them to be well informed.[356] In both of these models, the accountability function of the media is paramount.[357]

The participatory and the deliberative models ascribe more active roles to citizens.[358] For participatory democracy, a strong civil society is essential; citizens are expected to take part in decision-making and public life.[359] They therefore need certain information and knowledge in order to develop

351 Ibid., 22.
352 Strömbäck 2017; see also Ward 2011, 106.
353 Strömbäck 2017, 332 f.; see also Ward 2011, 106.
354 Strömbäck 2017, 334.
355 Ibid.
356 Ibid.
357 Strömbäck 2017, 341, used the term 'watchdog' to describe this function.
358 Ibid., 335, 340.
359 Ibid., 336.

their own views, which the media must provide. For example, they require information about existing societal problems and proposed solutions.[360] The media are intended, under this model, to 'allow people to speak for themselves' and set the agenda for news coverage.[361]

Democracy goes one step further when deliberative ideals are introduced: it places an emphasis on discourse being deliberative, journalists are expected to be 'fair-minded participants' who foster impartial, rational and intellectual discourse among the people.[362] The media should, in this model, provide an area for the exchange of strong arguments and should allow themselves to be convinced by others if those arguments have merit.[363]

All models of democracy require the media to respect democratic procedures and, with the exception of the procedural model, all require the media to provide an arena for political discourse and the dissemination of factually correct information.[364] All models feature the basic watchdog or accountability function.[365] However, as described above, participatory and deliberative democratic models go a step further. While the disseminating of factually correct information and the watchdog/accountability function remain of utmost importance, deliberative and participatory democracy require that they are complemented by the functions outlined above.[366]

These findings have significant implications for the normative reconstruction. First, they explain why the ECtHR, despite attaching importance to 'responsible journalism' and considering a wide range of actors eligible 'public watchdog' status, gives little guidance as to what constitutes responsible journalism and what is expected from the actors in a positive, rather than negative, sense. This might be related to there being more than one model of democracy represented amongst the member states of the Council of Europe. Between European states, there exists little consensus as to what makes a democracy 'good' and – consequently – what those values entail for the ethics of journalism. Turning to the domestic Courts' jurisprudence, the above analysis can assist in explaining and evaluating the reasoning of the Court.

360 Ibid., 336, 339.
361 Ibid., 339 f.
362 Ibid., 340.
363 Ibid., 341.
364 Ibid.
365 Ibid.
366 Ibid.

6.3.3 The Public Watchdog as a Functional Concept in the Jurisprudence of German Courts

We have observed that the functions ascribed to the 'public watchdog' in the jurisprudence of German civil Courts align broadly with functions ascribed to the media in democracy generally. However, the previous Section further illustrated that a more nuanced approach to the democratic function of the media crucially depends on the model of democracy one envisions. Against this backdrop, this Section will reconstruct the functions that are stressed by the German Courts through the lens of different models of democracy. The analysis is based on the main functions ascribed to the 'public watchdog' in the jurisprudence of German Courts: (1) the revelation of public grievances; (2) ensuring the flow of information; and (3) contributing to the public formation of opinion.

6.3.3.1 The Revelation of Public Grievances: Accountability

The first function ascribed to the media in decisions invoking the 'public watchdog' is that of the 'revelation of public grievances.' In democratic theory and the ethics of journalism, this function is often referred to as 'accountability' or 'watchdog function' (see above). One could say it is the only public watchdog function *stricto sensu*. The ECtHR seems, first and foremost, to consider this function when referring to the 'public watchdog.' It is closely linked to, but still distinct from, the function of imparting information. Jacob Rowbottom argues that, although these functions are often considered together, they are in fact different as they can have different implications.[367]

In the jurisprudence of German Courts, the two functions are usually taken together under the umbrella of 'public watchdog.' This corresponds to journalistic reality, as the different functions are, of course, closely linked and interrelated. In the organic chicken case, the accountability function and the function of imparting information are presented together:

367 Rowbottom, Jacob, Extreme Speech and the Democratic Functions of the Mass Media, in: Ivan Hare, James Weinstein (eds.), Extreme Speech and Democracy (Oxford: Oxford University Press 2012), 608–630, 609 f.

> 'The function of the press is not limited to the revelation of criminal offences or breaches of the law; […] [the press] exercises an important function for a democratic state governed by rule of law, by informing the public of topics of general interest' ['Die Funkion der Presse ist nicht auf die Aufdeckung von Straftaten oder Rechtsbrüchen beschränkt […]; sie nimmt im demokratischen Rechtsstaat vielmehr auch insoweit eine wichtige Aufgabe wahr, als sie die Bevölkerung über Themen von allgemeinem Interesse informiert'].[368]

It is important to note that the accountability function is not limited to government and public institutions, or to revealing abuses of power. There is also what Pippa Norris describes as 'a more diffuse and weaker secondary role, when disseminating general information about public affairs which was previously hidden from public attention, such as reporting hearings from public inquiries or Court prosecutions.'[369]

The publication of undercover footage relates to both aspects. It concerns the conduct of private rather than public actors, and of conditions that are not necessarily unlawful, but are ethically questionable and – although not entirely unknown – hidden from the public. At the same time, it relates of the actions of public actors, who fail to pass stricter animal welfare laws or who fail to enforce them. Even if one considers only private actors to be affected, Norris explained that the 'public watchdog' role is applicable in this area. It can 'strengthen corporate governance and the *managerial* accountability of CEOs to stockholders and consumers.'[370] In sum, it is clear that the accountability function can be served by the publication of undercover footage from animal facilities.

Strömbäck finds the watchdog or accountability function to be dominant in both competitive and procedural models of democracy.[371] The competitive model of democracy centers elections.[372] In that context, it is vital

368 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2881).

369 Norris, Pippa, Watchdog Journalism, in: Mark Bovens, Robert E. Goodin and Thomas Schillemans (eds.), The Oxford Handbook of Public Accountability (Oxford: Oxford University Press 2014), 525–542, 526.

370 Ibid. The understanding that the accountability function also extends to private actors is widely accepted in the field. Ward explains how it was extended to cover private corporations at the turn of the 20th century with the emergence of pluralistic societies and turn away from conceptions of liberalism as exclusively negative liberty. Ward 2011, 102 f.

371 Strömbäck 2017, 338 f.

372 Ibid., 334.

that citizens are enabled to 'choose between competing political elites.'[373] This requires, *inter alia*, that those in power, and their conduct, are monitored so that citizens can assess the fulfillment of election promises.[374] The competitive model can be contrasted against the participatory and the deliberative model which both demand that citizens and the media assume a more active role. The competitive model is characterized by the fact that citizens *react* rather than *act* – thus requiring that the media be, first and foremost, a watchdog in the sense of the 'accountability' function.[375]

Interestingly, empirical research indicates that the 'accountability function' is most prevalent in the Anglo-American culture.[376] In a 2002 study, only 12 % of journalists in Germany perceived 'investigat[ing] claims of government' as very or extremely important to their role. In Britain, on the other hand, 88 % of journalists subscribed to that view, and 67 % did so in the United States.[377] This indicates that in the Anglo-American context, the accountability function is paramount, whereas in the German context, other functions play a more important role.

Similarly, in the jurisprudence of German Courts, the accountability function is present, but it seems to be complemented by other functions. This indicates that they confer on the media a role going beyond what the procedural and competitive models of democracy would require, and points towards an endorsement of participatory or deliberative democracy.

6.3.3.2 Imparting Information

The second role ascribed to the 'public watchdog' in the jurisprudence of German Courts is that of informing the public. In the organic chicken case,

373 Ibid., 338.
374 Ibid., 339.
375 Ibid., 334.
376 Norris 2014, 528 f.
377 Deuze, Mark, National News Cultures: A Comparison of Dutch, German, British, Australian, and US Journalists, Journalism and Mass Communication Quarterly 79 (2002), 134–149, 141. This study has been cited by other authors in the field, e.g., Norris 2014, 528. However, it should be noted that most other roles such as e.g., 'reach widest possible audience,' 'provide analysis and interpretation' and 'get news to the public quickly,' were considered 'very' or 'extremely' important by fewer German journalists than by their US American or British counterparts. It seems German journalists were overall less likely to rate any role as 'extremely/very important.'

this idea appears within the notion of 'freedom of the flow of information' that is to be ensured by the press.[378]

According to Strömbäck's analysis, this function of journalism is shared by competitive, participatory, and deliberative models of democracy.[379] However, in the competitive model the need for the imparting of information is limited to political actors, especially officeholders and candidates.[380] This focus arises from the passive role played by citizens, whose only relevant task it is to vote in elections.[381] It is not up to the citizens to determine the political agenda beyond choosing between different candidates representing predetermined agendas.[382]

In the participatory and deliberative models, the normative obligation to impart information goes considerably further. The active role of citizens demands that they be informed of a wide array of issues, including societal problems and the democratic decision-making process.[383] Further, it is important that the population have a say in what topics are newsworthy.[384] In this model, the manner of communication should be capable of raising citizens' interest in politics and in participation.[385]

The participatory or deliberative view of the role of citizens and the press is reflected in the jurisprudence of both German Courts and the ECtHR, as both consider a wide range of topics to be worthy of communication. This is expressed by the fact that the criterion of the 'public interest' is salient in both systems. It is also evident in the organic chicken case which evolved around animal welfare and the interests of consumers: topics that go well beyond the assessment of the performance of politicians. Again, this finding is indicative of a participatory or deliberative model of democracy, whereby additional functions are required of the media.

378 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2880).
379 Strömbäck 2017, 341.
380 Ibid.
381 Ibid., 334 f.
382 Ibid.
383 Ibid., 339.
384 Ibid., 340.
385 Ibid.

6.3.3.3 Contributing to the Public Formation of Opinion and the Intellectual Battle of Ideas

The third role of the 'public watchdog' in the jurisprudence of German Courts is that of contributing to the formation of public opinion. This echoes the 'intellectual battle of ideas' that is of paramount importance in cases arising from the dissemination of undercover footage, such as the organic chicken case. Recall that '[t]he basic right to freedom of opinion is assigned more weight, the more it [the topic at hand] constitutes a contribution to the intellectual battle of ideas in a question considerably concerning the public.'[386]

The 'intellectual battle of ideas in a question considerably concerning the public' can be contrasted against what Pippa Norris calls, in her account of watchdog journalism, '"soft" news,' for example reporting on celebrities.[387] The German Courts seem to acknowledge similar distinctions when they emphasize the public watchdog's role in reporting about animal welfare or misconduct of politicians and their employees, as opposed to reporting on celebrities; news that merely speaks to the 'curiosity' of the audience.[388]

The criterion for journalism that requires them to contribute to the formation of public opinion or, as in the quote above, the intellectual battle of ideas, is characteristic of a more demanding model of democracy. Neither the procedural nor the competitive model expect this of journalism. While both models certainly tolerate this feature, they do not provide reasons to privilege or protect it as a fundamental element of the system. These models neither demand the citizen's voting decisions to be particularly well informed, nor encourage citizens to form their own opinions on political options beyond those represented by the candidates running for election. This level of citizen participation in public life is required only in participatory and deliberative models of democracy.

Chapter 5 linked the 'intellectual battle of ideas' to deliberative democracy. In so doing, it focused on the *rules* of the 'intellectual battle of ideas' and argued that they are indicative of the expression and communication that deliberative democracy privileges. Here, the link to deliberative democracy

386 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2800).
387 Norris 2014, 527.
388 BGH [Federal Court of Justice] 30 October 2012, VI ZR 4/12, GRUR 94, 2013 (96); OLG Düsseldorf [Düsseldorf Regional Court] 7 November 2019, 16 U 161/18, BeckRS 30090, 2019; BGH [Federal Court of Justice] 18 December 2018, VI ZR 439/17, MMR 824, 2019 (825).

becomes crucial once again. The democratic journalism theory with its focus on the deliberative model of democracy might lend support to the privileging of journalists and the media over activists.

6.3.4 Deliberative vs. Participatory Democracy and Ethics of Journalism

Above we have seen that the German Courts' usage of the 'public watchdog' is linked to three functions of the media, one of which is the contribution to the formation of public opinion. We have also seen that this function, as well as the details of the other functions (extending accountability to private actors, disseminating information that is not linked to politicians and elections) go beyond what a procedural or representative model of democracy demand from the media. It was argued that this difference is indicative of the participatory and/or the deliberative model of democracy. In fact, a closer look at the distinction between the two may provide an explanation for why the media, unlike activists, are privileged as 'public watchdogs' in existing judicial reasoning. This Section will argue that animal activists who assume a watchdog function can invoke participatory democracy in order to gain privileges, while, at the same time, the deliberative model sets high ethical requirements for journalists that animal activists are unlikely to meet.

Stephen Ward contrasts deliberative democracy with participatory democracy, and considers the implications for journalism under both. Ward employes the notion of participatory democracy as advanced in the 1970s by Carole Pateman, among others.[389] According to this theory, inequalities based on sex, race and class, among others, hinder the freedom and equality of citizens.[390] To reduce these barriers to participation, both society and the state must be democratized by making institutions, such as parliaments or political parties, more accountable.[391] In addition, Ward invokes David Held, who argues that resources should be redistributed

389 Pateman, Carole, Participation and Democratic Theory (Cambridge: Cambridge University Press 1970).
390 Ward 2011, 106.
391 Ibid.; Pateman 1970.

to facilitate the participation of marginalized groups, and for an 'open information system to ensure informed decisions.'[392]

These arguments for participatory democracy give rise to relevant implications for democratic journalism theory. First and foremost, the 'open information system' requires journalism to provide a variety of communicative channels for the public which are accessible to all. This can be realized through the internet which reduces barriers to the public sphere. Online, citizens not only consume news, they can also actively shape public discourse.[393] The result can be called 'grassroots journalism.'[394]

This line of argument can be invoked by animal activists who create footage and publish it online. As has been explored in Chapter 5, animal activists and their associations tend to be marginalized in political discourse. Most significantly their priority on animal protection, over both economic interests and self-interests of consumers, makes it difficult for their views to be placed on the political agenda. The ability to publish footage online, such as on their own websites or social media platforms, increases their independence from other media outlets who may choose not to engage with this content for fear that it would offend their readers, viewers, and advertisers. Further, activists can choose the language with which they present their views: they may choose a more confrontative language than the detached, rational communication that is characteristic of balanced news reporting. In short, participatory democracy endorses citizens acting as providers rather than only as consumers of reporting, and the underlying rationale for that would apply equally to animal activists.

However, the idea of grassroot journalism points to a question that looms large: what amounts to journalism? Many activities, such as engaging in political discussions, taking part in campaigns and commenting on newspaper articles online, can constitute political participation, but whether they constitute (citizen) journalism is up for debate.

Participatory democracy and its requirements for journalists can be contrasted against what deliberative democracy requires of those actors.[395] It is important to recall that deliberative democracy implies a specific kind

392 Held, David, Models of Democracy (Cambridge: Polity Press, 3rd ed., 2008), 4; Ward 2011, 107.
393 Ward 2011, 107.
394 Ibid.; citing Gillmor, Dan, We the Media: Grassroots Journalism for the People, by the People (Sebastopol, CA: O'Reilly Media 2004).
395 Ward 2011, 109.

of participation: reflective, respectful, and rational. If furthering the goals of deliberative democracy is considered the purpose of the media, then journalists, and the media more generally, are under an ethical duty to 'create deliberative spaces in the public sphere' and encourage deliberation among people who hold opposing views.[396] The spaces created by the media should encourage the kind of conversation that deliberative democracy requires, namely rational, reflective, and respectful exchange.[397] In other words, pursuant to this view, facilitating participation is a necessary but not sufficient criterion for the media to contribute to democracy.

Chapter 5 explained that animal activists will, in practice, often fail to adhere to the standard forms, or, as I put it in Chapter 5, the 'rules' of deliberative democracy. This finding has important implications for the topic at hand. If deliberative democracy is informing legal reasoning, this explains why the media are, in some cases, privileged over activists when it comes to the dissemination of undercover footage. Unlike activists, the media are expected to be less biased, more objective, and more deliberative in their communication. While participatory democracy provides room for activists acting as journalists, and benefitting from the same privileges, the deliberative model can be employed to deny this extension of the 'public watchdog.'

However, the above argument only follows if one invokes the traditional model of deliberative democracy. It seems that many authors considered above, in particular Strömbäck, have in mind the traditional notion of deliberative democracy primarily. As explained in Chapter 5, this version of deliberative democracy can be criticized on the ground that it over-relies on forms of communication perceived as detached and rational. It risks marginalizing political minority groups who may not comply with the rational and detached tone that deliberative democracy demands.

But more importantly, the distinction between deliberative and non-deliberative engagement cannot always be drawn along formal lines. The privilege that professional journalists receive is grounded in the assumption that they are more objective, impartial and deliberative, providing a strong case for privileging them, as opposed to activists, when it comes to the dissemination of undercover footage. But in some cases, established media outlets also fail to comply with the deliberative ideal. While they could still be considered public watchdogs, the same does not hold for activists. This

396 Ibid., 110.
397 Ibid.

conclusion appears questionable, as it could allow to disadvantage activists compared to, for example, online tabloids, based on formal distinctions rather than contribution to public debate.

6.4 Conclusion and Agenda for Further Research

In the jurisprudence of German Courts, the notion of the 'public watchdog' describes a functional/teleological concept: anyone who fulfills the functions described above – (1) the revelation of public grievances; (2) ensuring the flow of information; and (3) contributing to the public formation of opinion – can be considered a 'public watchdog.' Therefore, animal activists and activist organizations could be considered 'public watchdogs.' The extension of the conception is recognized in the jurisprudence of the ECtHR but not in the jurisprudence of German Courts.

The privileges of a 'public watchdog' should not be conferred based on a strict distinction between journalists and activists, but based on whether they comply with certain legal, ethical, and democratic standards. This argument was made based on both the legal analysis of the jurisprudence of the ECtHR and the normative reconstruction that has been conducted through the lens of democratic journalism theory. In short, this Section argued that when it comes to assigning 'public watchdog' protections, the question should not be *who* disseminates undercover footage, but rather *how?*

Making a categorical distinction between the rights of the press and those of activists and their associations, would deviate from the jurisprudence of the ECtHR. In particular, activist associations cannot be denied the role of 'public watchdogs' as a matter of principle. However, the making of a distinction is warranted within the required balancing test, which is based on the criterion of adherence to the criminal law and widely accepted ethical standards for NGOs and journalists. If animal activists were to comply with these standards, there would exist no grounds for the denial of the robust protection of their right to freedom of expression, as comparable to that of the press; neither on the European level nor, in light of the principle of interpretation in accordance with international law, at the domestic level. What matters is not whether someone is formally classified as an activist or as a journalist, but instead whether she complies with the accepted ethical standards. While it may be difficult for animal activists to achieve these ethical standards if they insist on the use of undercover footage as

an advocacy strategy and as long as obtaining such footage interferes with criminal law (see Chapter 9). Compliance with criminal law and widely accepted ethical standards for NGOs is to be assessed on a case-by-case basis. Regardless, the functional nature of the concept of 'public watchdog' does not allow one to draw the line between the media and activists based only on set of formal criteria.

Against this backdrop, the maintenance of a distinction between activists and the media requires some justification derived from democratic theory. Deliberative democracy may indeed provide such a ground on which the privileges of 'public watchdogs' can be limited to professional journalists and the media. Through the lens of 'democratic journalism theory,' it was illustrated that journalists and the media, as opposed to activists, are expected to maintain a rational and detached perspective on issues such as the wellbeing of animals, and thus contribute to the formation of public opinion to a greater extent than can activists. Activists and journalists must, thus, work together, as was the case in the organic chicken case. While activists obtained the footage, presumably by illegal means, their working together with a public broadcasting company provided for the lawful publication of the footage.

Future research could critically challenge this line of argument based on new approaches to deliberative democracy and on the sociology of media. It seems questionable whether a line between activists and the media can still be drawn in today's media landscape, and whether this line follows a deliberative/non-deliberative divide. Such argumentation invites (empirical) questions regarding the communication strategies of animal activists. At the same time, the blurring of the line between activism and journalism should pose a question directly addressed at (animal) activists: how will they use their increasing freedom ethically, and in particular, to further democracy? As with increased influence through participation, animal activists, like other 'citizen journalists,' are under an increased ethical duty to confront questions of democracy.[398]

The question of activists' increased ethical obligations highlights another starting point for future research, namely, the normative *evaluation* of the ongoing development in the media landscape (as opposed to the normative *reconstruction* attempted here). From the standpoint of deliberative democracy, there are legitimate concerns pertaining to activists assuming the role

398 Ibid., 111.

of journalists, especially online.[399] A recent example is the rise of conspiracy theories during the COVID-19 pandemic which gained traction in the online sphere. Ward cautioned that the support for online citizen journalism runs the danger of supporting a libertarian view which considers ethical standards irrelevant to the democratic function of the media.[400] Normatively, deliberative democracy, with its higher requirements for the ethics of journalism, seems more appealing than a model centering participation only. Less prone to collapse into libertarianism, deliberative democracy provides better safeguards against such developments; albeit at the price of disfavoring activists who disseminate factually correct information.

399 See also ibid., 107.
400 Ibid., 108.

Part III: The Creation of Undercover Footage as Democratic Civil Disobedience

Previous Chapters have shown that the law can accommodate for the dissemination of undercover footage, and that the extent to which it does so can be explained and evaluated through the lens of deliberative democracy. But what about the creation of undercover footage and acts that both clearly cross the boundaries of the law and are non-deliberative in nature? All too often, activists argue that it is necessary to enter facilities without knowledge and consent of those in charge. Activists may argue that trespass is necessary to create footage in order for that footage to be disseminated, to educate the public and to contribute to deliberation.

These arguments may earn activists some points in the eyes of deliberative democrats, and even in civil Court, in so far as the *dissemination* of footage is concerned. And yet, the issue of the illegal *creation* of the same footage looms large. The unlawful obtaining of footage is a factor militating against dissemination of undercover footage when present in a legal case. Similarly, deliberative democracy cannot easily condone trespass as it is at odds with civility and mutual respect. In short, a contribution to public deliberation cannot easily gloss over the often illegal and non-deliberative acts involved in obtaining undercover footage.

Nevertheless, both political theory and law may provide some resources to vindicate activists who trespass to create undercover footage. According to political theorists, animal activists may benefit from the moral pedigree of civil disobedience.[1] Activists might even go unpunished in a legal trial:

1 O'Sullivan, Siobhan/ McCausland, Clare/ Brenton, Scott, Animal Activists, Civil Disobedience and Global Responses to Transnational Injustice, Res Publica 23 (2017), 261–280; McCausland, Clare/ O'Sullivan, Siobhan/ Scott Brenton, Trespass, Animals and Democratic Engagement, Res Publica 19 (2013), 205–221; Milligan, Tony, Animal Rescue as Civil Disobedience, Res Publica 23 (2017), 281–298.

Courts in Germany have recently issued progressive decisions considering trespass on agricultural facilities to be justified[2] as a necessity.[3]

The matter of trespass for the purpose of creating undercover footage has recently featured in legal policy debates. The coalition government formed in 2018 expressed its intention to take legislative measures to counter 'stable break-ins.'[4] Moreover, the issue featured prominently in a recent tax law debate: can an association that endorses breaches of the law, such as trespass, claim to be of benefit to the public, thus benefiting from a reduction in taxation? Animal activist organizations were used as an example in this debate.[5]

Some preliminary remarks are due in introducing the next Chapters. First, this part of the dissertation is concerned with, and only with, the creation of footage from animal facilities by means of trespass, understood as entering a property without consent and typically without knowledge of those in charge. As I will show below, it is undisputed that, under German law, those acts fulfill the elements of criminal trespass contained in § 123 of the Criminal Code [Hausfriedensbruch].[6] However, the acts described above are commonly discussed under the term 'Stalleinbrüche,' which translates to 'stable break-ins.' The term is misleading, for 'break-in'

2 In civil law systems, a justification describes a defense that renders an act lawful, although the elements of an offense were fulfilled. It is distinct from so-called excuses, which submit that someone committed an unlawful act but did so without guilt.

3 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018.

4 'We want to effectively penalize break-ins in animal stables as criminal offence' ['Wir wollen Einbrüche in Tierställe als Straftatbestand effektiv ahnden']. Koalitionsvertrag zwischen CDU, CSU und SPD, Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt für unser Land, 19th Legislative Period, 2018, 86, available at: https://www.bundesregierung.de/resource/blob/974430/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1 (last accessed 10 February 2022).

5 Deutscher Bundestag Finanzausschuss, Protocol no. 19/31 protocol of the debate on criminal acts and charity status, 13 February 2019, available at: https://www.bundestag.de/resource/blob/628100/da0782f3616ce7c7a0dff733ce7a3e32/Protokoll-data.pdf (last accessed 21 February 2022); see also Deutscher Bundestag, wissenschaftliche Dienste, Gemeinnützigkeit am Beispiel von Tierrechtsorganisationen, 13 July 2019, WD 4 – 3000 – 079/19, available at: https://www.bundestag.de/resource/blob/653348/f793d1771ef7226cd590a47fda94d30a/WD-4-079-19-pdf-data.pdf (last accessed 21 February 2022).

6 If the act involves damage to property, the elements of § 303 of the Criminal Code (criminal damage [Sachbeschädigung]) are fulfilled in addition. Further, § 17 of the Animal Protection Act [Tierschutzgesetz] may be triggered, if the act causes harm to animals.

draws a parallel to burglary rather than trespass: burglary being an offence against property, while trespass is an offence against public order.[7] The term 'stable break-in' thus indicates a higher level of criminal conduct and, as a result, the term will not be used here. Instead, I will refer to these acts as trespass to create footage.

Second, the following Chapters do not cover situations in which animals are removed from the facilities (animal rescue).[8] This issue differs from the case of undercover footage morally, politically, and legally, and should not be discussed under the headline of civil disobedience.[9] In short, while undercover footage aims at inspiring change downstream, the aim of animal rescue is to instantly effect a change.[10]

Further, the following does not cover cases in which footage is being created by other means than entering the facility without the consent of those in charge (e.g., by obtaining employment at a facility and secretly creating footage). It seems doubtful whether civil disobedience would be a suitable framework to discuss these scenarios. Further, under German law, these scenarios are governed by different legal provisions.[11]

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7 Trespass, enshrined in § 123 of the Criminal Code [Hausfriedensbruch] is listed under the heading 'Offences against public order' [Straftaten gegen die öffentliche Ordnung] while burglary is a case of § 243 of the Criminal Code, aggravated theft [Besonders schwerer Fall des Diebstahls] and listed under the heading 'Theft and misappropriation' [Diebstahl und Unterschlagung].

8 On animal rescue as civil disobedience see Milligan, Tony, Civil Disobedience: Protest, Justification, and the Law (New York: Bloomsbury Academic 2013), 117–126; Milligan 2017. The position that animal rescue can also be a form of civil disobedience is not being supported in this dissertation.

9 Daniel Weltman explains why animal rescue cannot be described as civil disobedience. See Weltman, Daniel, Covert Animal Rescue: Civil Disobedience or Subrevolution?, Environmental Ethics, published online December 2021.

10 Weltman 2021, 7.

11 Most significantly, § 23 of the Act for the Protection of Business Secrets [Gesetz zum Schutz von Geschäftsgeheimnissen] is affected in these cases. Further, § 203 of the Criminal Code (violation of private secrets [Verletzung von Privatgeheimnissen]), § 353b of the Criminal Code (breach of official secrecy and special obligation of secret [Verletzung des Dienstgeheimnisses und einer besonderen Geheimhaltungspflicht]) and § 201 of the Criminal Code (violation of privacy of spoken word [Verletzung der Vertraulichkeit des gesprochenen Wortes]) would have to be discussed in this context. While the criminal law dimension of these acts under German law will not be discussed in detail in this dissertation, the civil law dimension is discussed in Chapters 5 and 6 under the applicable and in practice highly relevant civil law provisions, *inter alia* the civil injunction of §§ 283 (1), 1004 (1) sentence 2 of the Civil Code.

Third, although focused on animal activists, the following Chapters contribute to a currently emerging debate on possible legal justifications for other types of activists who operate at the boundaries of the law in protesting on 'green' causes such as climate and environmental protection.[12] Courts around the world must now grapple with the question of how to approach these activists. For example, in January 2020 a Swiss Court acquitted activists who were charged with trespassing when they entered a bank and protested for more climate protection in the financial sector;[13] they were however convicted by a higher Court a few months later.[14] These decisions, like others revolving around the same topic, received widespread public attention.[15] The example of animal activists and the creation of undercover footage may inform this broader debate.

7. Beyond Deliberation? Trespass as Civil Disobedience

In this Chapter, I trace deliberative democracy in legal and other normative assessments of the creation of undercover footage. I do so through the notion of civil disobedience.

12 For an overview of recent examples see Klein, Francesca Mascha, Die Rechtfertigung von Straftaten angesichts der Klimakrise, Verfassungsblog, 4 March 2022, available at: https://verfassungsblog.de/die-rechtfertigung-von-straftaten-angesichts-der-klimakrise/ (last accessed 6 March 2022).

13 Tribunal de Police de l'arrondissement de Lausanne [Lausanne District Court] 13 January 2020, available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_NA_judgment.pdf (last accessed 6 March 2022).

14 Cour D'Appel Penale [Court of Appeals] 22 September 2020, available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200922_NA_judgment.pdf (last accessed 6 March 2022).

15 For media coverage of the first decision see Pfaff, Isabel, Rechtsbruch für den Klimaschutz, Süddeutsche Zeitung, 16 January 2020, available at: https://www.sueddeutsche.de/wirtschaft/klimaschutz-proteste-1.4758035 (last accessed 22 October 2020); Reichen, Philippe, Tränen bei den Klima-Aktivisten, Raunen im Gerichtssaal, Tagesanzeiger, 13 January 2020, available at: https://www.tagesanzeiger.ch/schweiz/standard/traenen-bei-den-klimaaktivisten-raunen-im-gerichtssaal/story/10342973 (last accessed 22 October 2020); for media coverage of the second decision see SRF (online), Klima-Aktivisten nach Aktion in Lausanner CS-Filiale verurteilt, 24 September 2020, available at: https://www.srf.ch/news/schweiz/freispruch-widerrufen-klima-aktivisten-nach-aktion-in-lausanner-cs-filiale-verurteilt (last accessed 22 October 2020).

Can trespass to create footage be conceptualized as civil disobedience and can it be morally justified as such? Which role does democracy play in the definition and justification of civil disobedience? In answering these questions, this Chapter first sketches out a definition of civil disobedience and defends its relevance in a distinctively legal context, identifying the defining elements of civil disobedience and applying them to the case of trespass to create footage. It is concluded that the moral justification of these acts hinges on the approach of civil disobedience one subscribes to. Multiple streams of theory argue that civil disobedience can be morally justified, but not all of them can vindicate animal activists. For example, pursuant to so-called liberal approaches, actions on behalf of animals can only be vindicated if animals are owed justice. I focus instead on so-called democratic approaches to civil disobedience. One that provides promise for animal activists is the deliberative account of civil disobedience as developed by William Smith.[16] The deliberative account makes the moral status of civil disobedience contingent upon democratic deficits and blockages in the deliberative process.[17] If aimed at remedying these shortcomings, the creation of undercover footage may be both vindicated as civil disobedience *and* reconciled with deliberative democracy.

The reader may find that democracy plays a subsidiary role in this Chapter. In fact, it does not appear in the definition of civil disobedience at all. And yet, this Chapter will show that both opponents and proponents of moral and legal defenses of civil disobedience draw on democracy in their arguments. Civil disobedience features more prominently than deliberative democracy in the following. I use the notion of civil disobedience with caution: my use of the notion is not intended to express admiration or to imply a moral status on animal activists. Rather, it is used in an analytic sense and functions, first and foremost, to better understand the practice of, and legal responses to, trespassing to create footage. Accordingly, this Chapter distinguishes between: (a) whether certain acts of trespass fall under the definition of civil disobedience; (b) whether such acts of civil

16 Smith, William, Civil Disobedience and Deliberative Democracy (Abingdon: Routledge 2013).

17 Ibid.

disobedience *can be* morally and/or legally justified; and finally (c) whether a concrete act of civil disobedience *is* morally and/or legally justified.[18]

7.1 Why Civil Disobedience Matters

Two preliminary questions must be settled upfront: first, what is civil disobedience; and second, why is relevant to a *legal* study on animal activism and trespass? Civil disobedience already plays a role in the legal debate, although in a superficial and elusive way. But what is it? Following the work of John Rawls, civil disobedience is commonly defined as 'a public, non-violent conscientious yet political act contrary to law usually done with the aim of bringing about a change in law or policies of the government.'[19] Although this definition is not undisputed, it will serve as a starting point for the analysis here. The suffragette movement, the resistance to the British rule in India, the United States civil rights movement, and the resistance against apartheid in South Africa are often referred to historic examples of civil disobedience.[20] More controversial examples include protests against military action; in the United States against the Vietnam war beginning in the 1960s; and in Germany as against the stationing of US missiles occurring mostly in the late 1970s and 1980s.[21] The label of civil disobedience has sometimes also been claimed by opponents of abortion.[22] Some forms of environmental and climate action may also be considered civil disobedience.

18 Other legal scholars writing about civil disobedience have structured their contributions in similar ways. See e.g., Prittwitz, Cornelius, Sitzblockaden – ziviler Ungehorsam und strafbare Nötigung?, JA 87 (1987), 17–28.

19 Rawls, John, A Theory of Justice (Cambridge: Harvard University Press, original ed. 1971, reprint 2005), 364.

20 For an overview on civil disobedience see For an overview of the disputes on this issue see Delmas, Candice/ Brownlee, Kimberley, Civil Disobedience, in: The Stanford Encyclopedia of Philosophy (Winter 2021 Edition), Edward N. Zalta (ed.), available at: https://plato.stanford.edu/archives/win2021/entries/civil-disobedience/ (last accessed 18 April 2022). In this dissertation, I will occasionally also refer to a previous version of this encyclopedia entry to highlight recent developments in the debate: Brownlee, Kimberley, Civil Disobedience, in: Edward N. Zalta (ed.), The Stanford Encyclopedia of Philosophy (Fall 2017 edition), available at: https://plato.stanford.edu/archives/fall2017/entries/civil-disobedience/ (last accessed 18 April 2022).

21 Markovits, Daniel, Democratic Disobedience, The Yale Law Journal 114 (2005), 1897–1952, 1901.

22 Ibid., 1937 ft. 87 on the legal and democratic questions that arise with regard to anti-abortion activism as civil disobedience.

Political scientists have also applied civil disobedience to animal activism and trespass specifically.[23] For example, Clare McClausland et. al. addressed the matter of undercover footage and argue that trespass on private property for public policy formation can be justified as civil disobedience.[24] In any case, the notion of civil disobedience is a powerful political label and strategically desirable for protest movements. As a result, the notion has been applied inconsistently in both public and academic discourse. Nevertheless, some conceptual distinctions can be made between different approaches to civil disobedience. This Section limits its analysis to those approaches considered fruitful for the discourse on animal activism, namely the liberal and democratic approaches to civil disobedience.

This leads to the next question: why is civil disobedience, a non-legal notion, relevant to the legal debate? Civil disobedience matters to legal discourse, although it is not part of the criminal law. In the 1980s, for example, legal scholars in Germany employed the concept to evaluate protests of the 'peace movement' ['Friedensbewegung'].[25] As such, it already plays a role in legal discourse.

The starting point for the analysis here is not that civil disobedience *should* be applied to animal activism, but rather, as mentioned above, the finding that it already plays a role. For example, civil disobedience is mentioned in one of the few existing Court decisions regarding trespass to create footage.[26] Further, it features in the legal literature on the subject.[27]

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23 See e.g., Garner, Robert, Animal Ethics (Cambridge: Polity Press 2005) 157 f., 161; McCausland, Clare/ O'Sullivan, Siobhan/ Brenton, Scott, Trespass, Animals and Democratic Engagement, Res Publica 19 (2013), 205–221.

24 McCausland/ O'Sullivan/ Brenton 2013. This literature is informative for the Chapter at hand. However, the findings of these scholars stem from the Australian animal rights movement and cannot be applied indiscriminately to the German or US-American context.

25 See e.g., Lenckner, Theodor, Strafrecht und ziviler Ungehorsam – OLG Stuttgart, NStZ 1987, 121, JuS (1988), 349–355; Roxin, Claus, Strafrechtliche Bemerkungen zum zivilen Ungehorsam, in: Peter-Alexis Albrecht, Alexander Ehlers, Franziska Lamott, Christian Pfeiffer, Hans-Dieter Schwind, Michael Walter (eds.), Festschrift für Horst Schüler-Springorum zum 65. Geburtstag (Köln: Carl Heymanns Verlag 1993), 441–457, 141; Prittwitz 1987.

26 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS 2017, 132799.

27 Stucki, Saskia, In Defence of Green Civil Disobedience: Judicial Courage in the Face of Climate Crisis and State Inaction, Verfassungsblog, 30 October 2020, available at: https://verfassungsblog.de/in-defence-of-green-civil-disobedience/ (last accessed 21 February 2022).

Courts' superficial engagement with civil disobedience is particularly unfortunate, given that civil disobedience may provide a valuable resource to discuss the normative implications of the acts in question. The notion of civil disobedience may help to explain and evaluate legal responses to animal activism.[28]

As stated above, there are ongoing doctrinal-legal debates as well as legal policy debates on the topic of trespass to create footage of animal facilities.[29] On both the judicial and the legislative level, the legal debate currently lacks systematic and comprehensive analytical arguments. Despite persisting indeterminacies, civil disobedience as an analytical tool can remedy this situation. This is why I de-emphasize in this analysis the *prescriptive, normative* dimension of civil disobedience, and instead emphasize its *analytical* dimension. When used in this sense, civil disobedience is highly relevant to those mentioned legal debates on trespass to create footage.

Civil disobedience can also provide guidance as to the conditions under which certain breaches of the law are morally justified, thus allowing one to inform legal policy and questions of sentencing. However, the need for modesty in shaping ones expectations of what can be gained from civil disobedience was emphasized by John Rawls:

> 'Precise principles that straight way decide actual cases are clearly out of the question. Instead, a useful theory defines a perspective within which the problem of civil disobedience can be approached; it identifies the relevant considerations and helps us to assign them their correct weights in the more important instances. If a theory about these matters appears to us, on reflection, to have cleared our vision and to have made our considered judgments more coherent, then it has been worthwhile.'[30]

7.2 Considering Trespass as Civil Disobedience

Now that it is clear what civil disobedience is, and why it is relevant to legal questions, this Section will examine whether, and under what conditions, trespassing on animal facilities may qualify as civil disobedience. To this

28 See also Chapter 2.

29 See also Müller, Henning Ernst, Strafrechtsreform der GroKo auf Abwegen: "Stalleinbruch" als Sondertatbestand?, beck online, 6 March, 2018, available at: https://community.beck.de/2018/03/06/strafrechtsreform-der-groko-auf-abwegen-stalleinbruch-als-sondertatbestand (last accessed 4 September 2020).

30 Rawls 1971 (reprint 2005), 364.

end, this Section will identify the defining features of civil disobedience and test their applicability to animal activists who trespass.

As mentioned earlier, Rawls defined civil disobedience as 'a public, non-violent conscientious yet political act contrary to law usually done with the aim of bringing about a change in law or policies of the government.'[31] Rawls' theory of civil disobedience is designed for a democratic and 'nearly just society,' in which those acting in civil disobedience address the majority in order to make them aware that, in the opinion of the activists, the principles of justice are disrespected by a certain policy or law.[32] These features distinguish civil disobedience from both 'ordinary offences' and from other forms of protest.

Rawls' definition is increasingly understood as representative of a traditional, liberal understanding of civil disobedience, and it is now being challenged by the so-called republican or democratic approaches.[33] This Chapter follows the language used in existing literature and thus refers to 'liberal' approaches in the tradition of Rawls, as well as 'democratic' approaches.[34] Proponents of these latter approaches tend to employ broader definitions. Robin Celikates, for example, proposes a minimalist definition of civil disobedience 'as an intentionally unlawful and principled collective act of protest […] with which citizens […] pursue the political aim of changing specific laws, policies or institutions.'[35] Celikates argues that the remaining features of Rawls definition, such as non-violence, conscientiousness, and appealing to the majority's sense of justice, give rise to substantial normative issues that are better dealt with during the consideration of justification, and not when considering the definition of an act of civil disobedience.[36]

In a nutshell, liberal approaches consider it the role of civil disobedience to realize justice, whereby justice is usually understood, in a Rawlsian sense, as encompassing the fundamental rights of free and equal citizens.[37] Demo-

31 Ibid.
32 Ibid., 363.
33 See e.g., Markovits 2005; Celikates, Robin, Democratizing Civil Disobedience, Philosophy and Social Criticism 24 (2016), 982–994; Celikates, Robin, Rethinking Civil Disobedience as a Practice of Contestation – Beyond the Liberal Paradigm, Constellations 23:1 (2016), 37–45.
34 See e.g., Smith 2013, 8.
35 Celikates, Rethinking Civil Disobedience, 2016, 39.
36 Ibid.
37 Smith 2013, 8.

cratic approaches, on the other hand, emphasize democracy as a framework with procedures that enable citizens to exercise collective governance.[38] I will come back to the distinction between liberal and democratic approaches later. However, for now, this Chapter will follow the liberal approach. It should also be mentioned that the definition in the following does not speak to the justifiability of civil disobedience; this issue will be considered subsequently. With this in mind, we can now take a closer look the features of civil disobedience and test their applicability to animal activists' trespassing on animal facilities for the purpose of creating undercover footage for public dissemination.

Traditionally, characteristic features of civil disobedience are considered to be conscientiousness, communication, publicity, non-violence, acceptance of legal consequences, and fidelity to the law.[39] First, civil disobedience must be *conscientious*, which is understood to mean principled, deliberate and based on serious convictions.[40] Is this feature shared by animal activists who trespass on animal facilities to create footage? At a minimum, it seems reasonable to assume that these acts are based on a moral conviction that intensive animal farming for human consumption is morally wrong. Activists may also believe that they act in the interests of society, if they consider that consumers should be made aware of the origins of food. Thus, as a rule, one can say that animal activist who trespass to create footage act conscientiously.[41]

The second feature of civil disobedience is *publicity*. According to Rawls, civil disobedience can never be covert or secretive.[42] It is essential that civil disobedience is conduced publicly, and may even involve prior notice to the authorities.[43] However, contrary to this view, it can be argued that sometimes covertness is essential to acts of civil disobedience.[44] Kimberly Brownlee names covert animal rescue as an example of this category.[45] In

38 Ibid.
39 See e.g., Delmas/ Brownlee 2021.
40 Ibid.
41 Celikates voices doubts in this regard and suggests a category of 'advocatory civil disobedience' Celikates, Rethinking Civil Disobedience, 2016, 38. However, other authors do not make this distinction and consider the conscientiousness criterion to be fulfilled in the case of animal activism. McCausland/ O'Sullivan/ Brenton 2013.
42 Rawls 1971 (reprint 2005), 366.
43 Ibid.
44 For an overview of the disputes on this issue see Delmas/ Brownlee 2021.
45 Brownlee 2017.

this case, she argues, prior warning to the authorities would prevent the communicative purpose of the act.[46] The same applies, even more so in fact, to trespassing to create footage: while the initial act needs to be covered to be successful, covertness serves a communicative purpose through the subsequent dissemination of footage.[47] Although covertness may sometimes be necessary, some suggest that the publicity requirement of civil disobedience can be met by claiming responsibility after the act.[48] The paradigmatic case of subsequent publicity is that of the activists themselves calling the police and admitting to trespass. Having said this, as regards civil disobedience, any effort made to stay anonymous, even after the act (e.g., wearing masks), clearly conflicts with the publicity requirement.

The third feature is *communication*. Those acting in civil disobedience would typically seek to communicate their disagreement with a law or policy and, at the same time, instigate a change of law or policy. This feature is closely related to the notion that those acting in civil disobedience seek to convince others and contribute to the formation of opinion.[49]

At first sight, this feature is clearly shared by animal activists, for the dissemination of footage has a communicative aspect. However, there are two problems in this regard. The first relates to the distinction between the private sector on the one hand, and policy or law on the other. If animal activists use the footage for a campaign against a specific company or farming collective, it is questionable whether they communicate a disagreement with the lenient animal protection law that allows for such conditions, or whether they are communicating a disagreement with the decisions of the animal facility operator as a private actor. Joseph Raz argued that actions taken to communicate disagreement with the decisions of private actors do not qualify as civil disobedience.[50] This would be problematic in animal law, where industry standards and the law are intertwined. Pursuant to Raz' view, communicating disagreement with the decision of an animal facility operator, for example the decision to provide animals with only the very

46 Note that in the current version of the above encyclopedia entry, covert animal rescue is considered uncivil: Delmas/ Brownlee 2021.

47 Ladwig, Bernd, Politische Philosophie der Tierrechte, (Berlin: Suhrkamp 2020), 398; McCausland/ O'Sullivan/ Brenton 2013, 210. With further references on the compatibility of secrecy and civil disobedience.

48 See Delmas/ Brownlee 2021 with further references.

49 See also Ladwig 2020, 392.

50 Raz, Joseph, The Authority of Law: Essays on Law and Morality (New York: Oxford University Press 1979), 264.

minimum of space legally required, would not qualify as civil disobedience. This seems very restrictive considering that a disagreement with the decision of a private actor who is acting within the law is simultaneously a disagreement with the law that sets those low minimum standards.

German animal law follows a multilayered approach whereby, rather than the ambitious wording of the Animal Protection Act, the Farm Animal Protection Regulation [Tierschutz-Nutztierhaltungsverordnung] is decisive. Further, as we have seen in Chapter 6 in the legal analysis of the decision of the lower Court in the organic chicken case, the industry norm plays a significant role, too. In this system, the lines between industry standards, policy and law are blurred. In light of this, the exclusion of any communication of disagreement with industry standards or decisions of private actors from the classification of civil disobedience as a default appears to be arbitrary. It is, however, appropriate to apply stricter scrutiny when footage is primarily used to communicate disagreement with the conduct of a specific private actor.

The second problem with communication as it relates to the case at hand is the meaning of 'policy.' What if animal activists seek footage to prove that an actor does not comply with the law, and that an enforcement gap exists? It seems questionable whether a failure of the authorities to remedy animal welfare violations can be considered policy. On the other hand, it would be counterintuitive to exclude the case of activists who seek to prove non-compliance with existing law from the moral justification provided by the concept of civil disobedience. After all, activists who focus on the enforcement gap display increased fidelity to the legal order (see below), which makes their case for civil disobedience stronger. In addition, in most scenarios, the aim to reveal an enforcement gap seems sufficiently policy-related: In the Naumburg Regional Court[51] case, which will be discussed in Chapter 8, the defense presented by the activists was, in part, based on the claim that the authorities knew of the unlawful conditions in an animal facility, and yet did not take action. If authorities chose not to initiate appropriate proceedings in response to unlawful conditions, and if this choice can be illustrated across a long period of time, this is in effect a policy, as opposed to a mere oversight.

51 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018.

Possibly the best-known feature of civil disobedience is that of *non-violence, or peacefulness*. Some authors question both what this feature entails and whether it is necessary.[52] They do so, *inter alia*, based on controversies – both in law and in philosophy – about the definition of violence.[53] Reciting all relevant positions on this issue would go beyond the scope of this Chapter, since they are of limited importance for the case of animal activists. It is, however, important to be aware of how the notion of violence can be legally redefined in counterintuitive ways.

In the wake of the peace movement ['Friedensbewegung'] in the 1960s, the FCJ considered protesters who sat down on train tracks to be deploying violence ['Gewalt'] in the sense of § 240 of the Criminal Code (coercion ['Nötigung']).[54] The traditional definition of violence in coercion cases required the influencing of another person though the use of physical (bodily) force, in order to redress resistance that was either actually given, or expected with certainty ['die unter Anwendung von physischer (körperlicher) Kraft erfolgende Einwirkung auf einen anderen zur Beseitigung eines tatsächlich geleisteten oder bestimmt erwarteten Widerstandes'].[55] In both the aforementioned and similar decisions, the German Courts substantially lowered the requirements for physical force, extending the definition to include sitting blockades and other means of protest deployed by the 'peace movement.' This development was halted in 1995, when the FCC found that the extensive interpretation of 'violence' as including situations where the accused was merely physically present and where the force was merely psychological, did not satisfy the principle of legal certainty [Bestimmtheitsgebot] enshrined in Article 130 (2) of the Basic Law.[56] That case also concerned a sitting blockade this time occurring in front of an ammunition depot of the German military.[57] Legal scholars now consider

52 See e.g., Celikates, Rethinking Civil Disobedience, 2016, 41 f.

53 Another common challenge to the non-violence feature that non-violent acts can lead to greater harm than violent acts. Raz made the example of possible effects of a strike by ambulance drivers Raz, Joseph, The Authority of Law: Essays on Law and Morality (New York: Oxford University Press 1979), 267.

54 BGH [Federal Court of Justice] 8 August 1969, 2 StR 171/69, NJW 1770, 1969 (often referred to as 'Läpple-Urteil').

55 See e.g., Heger, Martin, § 240 Nötigung, in: Karl Lackner, Christian Kühl (eds.), Strafgesetzbuch Kommentar (München: C.H. Beck 29th ed., 2018), para. 5.

56 BVerfG [Federal Constitutional Court] 10 January1995, 1 BvR 718/89, 719/89, 722/89, 723/89, NJW 1141, 1995 (1142).

57 Ibid., 1141.

the cases to which the broader definition of violence was applied until 1995 to have been acts of civil disobedience.[58]

Nevertheless, one should distinguish between legal definitions of violence and the non-violence feature of civil disobedience. Even within German criminal law, there is no uniform definition of violence.[59] § 113 of the Criminal Code (Resistance to enforcement officers ['Widerstand gegen Vollstreckungsbeamte']) relies on a notion of violence different from that of § 240 of the Criminal Code.[60] But then again, scholars and Courts also disagree on the notion of violence in the context of § 113 of the Criminal Code. In a case that could also be discussed in the context of civil disobedience – protesters chaining themselves to trees on the issue of the building of a new train station ('Stuttgart 21') – the Stuttgart Regional Court relied on a broad notion of violence reminiscent of § 240 of the Criminal Code in upholding the conviction of activists under a different provision, § 113 of the Criminal Code.[61]

Further, none of the criminal law definitions of violence are identical to the constitutional law definition of non-peacefulness ['Unfriedlichkeit'].[62] In constitutional law, peacefulness is a relevant criterion for the right to assembly enshrined in Article 8 of the Basic Law. In this context, the FCJ considers an assembly to be non-peaceful 'if acts of some danger, such as aggressive riots against persons or things or other acts of violence occur' ['wenn Handlungen von einiger Gefährlichkeit wie etwa aggressive Ausschreitungen gegen Personen oder Sachen oder sonstige Gewalttätigkeiten stattfinden'].[63]

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58 See e.g., Magnus, Dorothea, Der Gewaltbegriff der Nötigung (§ 240 StGB) im Lichte der neusten BVerfG-Rechtsprechung, NStZ (2012), 538–543, 539.

59 See Eser, Albin, § 113 Widerstand gegen Vollstreckungsbeamte, in: Adolf Schönke, Horst Schröder (founders), Albin Eser (ed.), Strafgesetzbuch (München: C.H. Beck Verlag 30st ed., 2019), para. 42.

60 Eser 2019, para. 42; Bosch, Nikolaus, § 113 Widerstand gegen Vollstreckungsbeamte, in: Volker Erb, Jürgen Schäfer (eds.), Münchner Kommentar zum Strafgesetzbuch (München: C.H. Beck 4th ed., 2021), para. 18.

61 OLG Stuttgart [Stuttgart Regional Court], 30 July 2015, 2 Ss 9/15. For a broad interpretation see also BVerfG [Federal Constitutional Court], 23 August 2005, 2 BvR 1066/05, NJW 136, 2006. Critical of both decisions Bosch 2021, para. 20.

62 See also BVerfG [Federal Constitutional Court] 11 November 1986, 1 BvR 713/83 u. a., NJW 43, 1987 (47) ['Der verfassungsrechtliche Begriff der Unfriedlichkeit kann aber nicht mit dem von der Rechtsprechung entwickelten weiten Gewaltbegriff des Strafrechts gleichgesetzt werden'].

63 BVerfG [Federal Constitutional Court] 24 October 2001, 1 BvR 1190/90 u. a., NJW 1031, 2002 (1033).

Civil disobedience does, and should, have a definition of non-violence that is distinct from the law.[64] The legal theorist Ralf Dreier supported this view, and submitted that violence in the context of civil disobedience should include violence against persons and destruction of property and expressly left open the question of whether that definition should include the destruction of things the value of which is relatively low in relation to the aim pursued.[65] In philosophy and political science literature on civil disobedience, minor damage to property, such as broken locks, are usually not considered to constitute violence or non-peacefulness.[66] Tony Milligan defends the destruction of property as civil disobedience in some cases, based on the notions of civility and respect.[67] It is possible to disrespect someone as owner of an animal facility, without disrespecting her as a person.[68] As a result, entering animal facilities in order to create footage should not be categorically excluded from civil disobedience based on this feature,[69] though it remains contingent and close scrutiny is warranted.

Some scholars argue that those acting in disobedience must be *willing to accept legal consequences*, including punishment.[70] Later I will argue – against the view of the German Federal Constitutional Court – that this requirement does not mean that those engaging in civil disobedience cannot defend themselves against criminal charges in a court of law.[71]

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64 See also Schüler-Springorum, Horst, Strafrechtliche Aspekte zivilen Ungehorsams, in: Peter Glotz (ed.), Ziviler Ungehorsam im Rechtsstaat, (Frankfurt a.M.: Suhrkamp 1983), 76–98, 83.

65 Dreier, Ralf, Widerstandsrecht und ziviler Ungehorsam im Rechtsstaat, in: Peter Glotz (ed.), Ziviler Ungehorsam im Rechtsstaat (Frankfurt a.M.: Suhrkamp 1983), 54–75, 62 f.

66 McCausland et al. consider trespass to be of a non-violent nature McCausland/ O'Sullivan/ Brenton 2013, 207.

67 Milligan, Tony, Civil Disobedience: Protest, Justification, and the Law (New York: Bloomsbury Academic 2013), 117–126.

68 Ibid., 17 f.

69 Which does not imply that it is justified – see below.

70 See e.g., Cohen, Marshall, Civil Disobedience in a Constitutional Democracy, The Massachusetts Law Review 10:2 (1969), 211–226, 214. For a compelling argument against the willingness to accept punishment criterion see Arendt, Hannah, Crises of the Republic (New York: Harcourt Brace Jovanovich, Inc. 1969), 67: 'It is most unfortunate that, in the eyes of many, a "self-sacrificial element" is best proof of […] "the disobedient's seriousness and his fidelity to the law", for single-minded fanaticism is usually the hallmark of the crackpot and, in any case, makes impossible a rational discussion of the issues at stake.'

71 For this view see Dreier 1983, 61 f. The German Constitutional Court stated the opposite view in 1986, when deciding about a legal justification of a sitting blockade;

The above is closely linked to the final feature of civil disobedience, which is *fidelity to the law*. This does not require fidelity to the specific law that the activists seek to change, but to the rule of law, and especially the constitution.

Bernd Ladwig points out that this requirement conflicts with the self-perception of activists and historic examples of civil disobedience.[72] Ladwig argued that Mahatma Gandhi sought to end colonial rule in India and thus did not endorse the constitutional order.[73] Martin Luther King invoked the United States Constitution, but at the same time he did so with the qualifier that the way it was understood and applied – discriminating against African Americans – was far from 'nearly just.'[74] In light of this example, Ladwig suggests a distinction between the written constitution and the way it is applied, and takes this difference into account the case of animal activism.[75]

The pitfall of the fidelity to the law requirement, as well as of the idea of a lived or applied constitution, is that it makes the case for civil disobedience highly dependent on positive law and constitutional interpretation. In some jurisdictions, where the constitution reflects a commitment to the wellbeing of animals and where human interests are not interpreted as trumping animal welfare concerns, an argument along those lines can be made. In any case, the question of to what extent an account of civil disobedience should hinge on (constitutional) law, might be underestimated in the literature.

To concretize the fidelity to the law requirement, I suggest limiting the involvement of the law itself by instead focusing on the attitude of activists towards the law. Importantly, what should matter is less the 'self-perception' of activists, and more the attitude that manifests in the alleged act of civil disobedience. In the case of trespass to create undercover footage, a strong argument can be made in favor of fidelity to the law. Publicity and non-violence can be indicative of fidelity to the legal order. In the words of Rawls: '[t]he law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act, by the willingness to accept the legal consequences of one's conduct.'[76] Similarly, if animal activists create footage of animal welfare law violations and submit it to the authorities,

BVerfG [Federal Constitutional Court] 11 November 1986, 1 BvR 713/83, NJW 43, 1987 (48). See Chapter 9 for further details.

72 Ladwig 2020, 390 ff.; see also Celikates, Democratizing Civil Disobedience, 2016, 984.

73 Ladwig 2020, 390.

74 Ibid., 391.

75 Ibid., 391 f.

76 Rawls 1971 (reprint 2005), 366.

they indicate respect for, and belief in, the ability and willingness of official authorities to enforce the law. The issue can also be looked at by means of comparison; namely between activists who remove individual animals from facilities ('animal rescue'); and the activist who create footage. The activists who create footage show fidelity to democracy and the legislative process as they seek legal change through these channels.

In sum, one can say that trespassing to create undercover footage can be discussed under the headline of civil disobedience. However, it is important to keep in mind the limited scope of this finding: not every individual case would meet the features above. More importantly, the moral justification and legal relevance of these acts remain separate matters, which I am going to explore in the following.

7.3 Justifying Civil Disobedience for Animals Morally

As we have seen above, many features of civil disobedience are contested, as is the moral justification of civil disobedience.[77] Indeed, the question of justification is typically where the conflict between the different approaches to civil disobedience is most salient, and where the specific problems of animal activism as civil disobedience rise to the surface. The question of justification is crucial: not only do those performing civil disobedience breach the law, they also fail to comply with decisions made by a democratic authority and they impose costs on others. In the case at hand, for example, they impose costs on the operators of animal facilities.[78] Against this backdrop, the question of justification is pertinent, not only legally, but morally.

The main issue with civil disobedience on behalf of animals lies in the expectation that those performing civil disobedience *appeal to a sense of justice shared with the majority of a given society*. McClausand et. al. identify this feature as problematic for animal activism, since the sense of justice held by animal activists is not shared by the majority.[79] This feature of Rawls' account of what constitutes civil disobedience is also widely criticized by other authors. Peter Singer argues that the limitation

77 There is no uniform template as to if and where a line is to be drawn between the defining features and the moral justification of civil disobedience.
78 Smith 2013, 3.
79 McCausland/ O'Sullivan/ Brenton 2013, 208.

of civil disobedience to shared principles of justice is unreasonable: '[w]hy could one not be justified in disobeying in order to ask the majority to alter or extend the shared conception of justice?'[80] Consequently, it is not surprising that here the Rawlsian approaches, those that I call extended liberal approaches, and the democratic approaches disagree on the case of animal activists.

7.3.1 Extending the Rawlsian-Liberal Approach

In the strictly Rawlsian sense, only acts regarding matters of justice can be justifiable as civil disobedience. Trespass to create footage from animal facilities cannot be justifiable as civil disobedience, for in Rawls' view, the wellbeing of animals is not a matter of justice:

> 'Certainly it is wrong to be cruel to animals and the destruction of a whole species can be a great evil. The capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly imposes duties of compassion and humanity in their case. I shall not attempt to explain these considered beliefs. They are outside the scope of the theory of justice, and it does not seem possible to extend the contract doctrine so as to include them in a natural way.'[81]

As a result, civil disobedience is only permissible to protest a violation of policies or laws that infringe upon the rights of humans. Thus, the Rawlsian approach does not accommodate for actions taken against, for example, economic inequality or the wellbeing of animals.[82]

Now, there are at least two ways in which this view can be challenged. One pertains to Rawls' concept of justice, and the other on the 'matter of justice' requirement and consequently – as indicated above – Rawls' entire approach to civil disobedience. For example, proponents of the latter view, relating to a 'matter of justice,' would typically stress issues of democracy over those of justice.

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80 Singer, Peter, Disobedience as a plea for reconsideration, in: Hugo A. Bedau (ed.), Civil disobedience in focus (London: Routledge 1991), 122–129, 125.

81 Rawls 1971 (reprint 2005), 512.

82 See also Delmas/ Brownlee 2021. Specifically for environmental issues see also von Essen, Erica, Environmental disobedience and the dialogic dimension of dissent, Democratization 24:2 (2017), 305–324.

While Rawls' notion of justice and his definition of civil disobedience exclude animals, other approaches to civil disobedience that are rooted in the liberal tradition may be more promising. As public opinion continues to shift further towards an increased concern for the wellbeing of animals, it could be argued that animal activists appeal to certain normative demands of society. Society does not have to recognize animal *rights* – rather, a consensus that animal suffering in the food industry should be reduced could suffice. In an official statement, the German Ethics Council cited a representative study showing that 94 % of the population subscribe to the view that, if we are using animals, we should enable them to have a good life.[83] In so far as this element is concerned, animal activists do appeal to a sense of right and wrong that is shared by the majority of society. Although few may frame this as a matter of justice, there seems to be a shared moral sense in society that animal activists can appeal to.

A comprehensive, and distinctively liberal, approach to civil disobedience that extends to animals is yet to be developed. Resources for such an 'extended' liberal approach may be found in the works of scholars who argue that Rawlsian theory provides room for animals. Kimberly Smith, for example, argues that social contract theory can include animals.[84] Similarly, Mark Rowlands argues that Rawls' theory can be read in a way that includes animals in the realm of justice, namely by 'thickening' the veil of ignorance to hide species membership.[85] However, attempts to include animals in a Rawlsian theory of justice have also been subject to criticism.[86] As a response, instead of thickening the veil of ignorance, it might be possible to include animals in Rawls' theory indirectly, as many humans deeply care about animals. In any case, an extended liberal approach to civil disobedience based on the Rawlsian definition of civil disobedience must grapple

83 Deutscher Ethikrat, Tierwohlachtung – Zum verantwortlichen Umgang mit Nutztieren, Stellungnahme, 16 June 2020, available at: https://www.ethikrat.org/publikationen/publikationsdetail/?tx_wwt3shop_detail%5Bproduct%5D=140&tx_wwt3shop_detail%5Baction%5D=index&tx_wwt3shop_detail%5Bcontroller%5D=Products&cHash=7ed5e4c787e389129366a34deaa86416 (last accessed 22 February 2022) 6.

84 Smith, Kimberly K., Animals and the Social Contract: A Reply to Nussbaum, Environmental Ethics 30:2 (2008), 195–207.

85 Rowlands, Mark, Contractarianism and Animal Rights, Journal of Applied Ethics 14 (1997), 235–247; Rowlands, Mark, Animal Rights: Moral Theory and Practice (New York: Palgrave Macmillan 2009), 118.

86 See Garner, Robert, Rawls, Animals and Justice: New Literature, Same Responses, Res Publica 18 (2012), 159–172, 169; Svolba, David, Is there a Rawlsian Argument for Animal Rights?, Ethical Theory and Moral Practice 19 (2016), 973–984.

with the contractarianism and constructivism that are prevalent both in Rawls' theory, and in liberal theory generally.

Theories of animal rights, such as, for example, Tom Regan's[87] or Alasdair Cochrane's,[88] may provide alternative starting points for an approach to civil disobedience that is more promising for animals. Having said that, an extended liberal approach to civil disobedience will always be at risk of overbroad application. Some may argue that a broader definition of civil disobedience would be appropriate, but at the risk of the term losing its normative force. In the words of Daniel Weltmann, a critic of the application of the term civil disobedience to animal activists: if all forms of protest and resistance are referred to as civil disobedience, the term is no longer 'seen to merit the respect that civil disobedience is currently afforded.'[89]

In conclusion, reconciling the 'matter of justice' requirement in civil disobedience with animal rights requires further study in the field of moral and political philosophy. A moral justification of civil disobedience on behalf of animals and pursuant to an extended liberal approach remains contingent upon these issues. In the following, I will refer to approaches to civil disobedience that could be derived from liberal animal rights positions as 'extended liberal approaches' and contrast them against the so-called 'democratic approaches.'

7.3.2 Democratic Approaches

There is another way to challenge Rawls' narrow view of civil disobedience and his 'matter of justice' requirement. That approach has to do with democracy. In a nutshell, one can say that the first challenge to the Rawlsian liberal approach presented above was *substantive* in that it challenged the exclusion of animals from the scope of justice. The democratic approaches to civil disobedience presented in the following instead challenge the Rawlsian approach on *procedural* grounds.

87 Regan, Tom, The Case for Animal Rights (Berkley: University of California Press 2004).

88 Cochrane, Alasdair, Animal Rights Without Liberation (New York: Columbia University Press 2012).

89 Weltman, Daniel, Covert Animal Rescue: Civil Disobedience or Subrevolution?, Environmental Ethics, published online December 2021, 5 (in online publication).

Democratic approaches submit that civil disobedience is a form of political participation and can be an appropriate response in cases of democratic deficits or shortcomings in law and policy making.[90] Advocates of the so-called democratic approaches often argue that liberal accounts in general, and the Rawlsian account in particular, are too narrow because they make it difficult, if not impossible, to justify civil disobedience on behalf of the environment, animals, or other causes that are not clearly linked to the rights of citizens.[91]

In turn, defenders of liberal approaches argue that democratic approaches allow civil disobedience for too many causes. Ironically, democratic approaches are vulnerable to the accusation of being undemocratic because of their justification of civil disobedience in cases where the democratic majority's decisions should be accepted.[92] The following normative reconstruction of recent cases in Chapter 8 will provide a closer look at these arguments.

Democratic approaches to civil disobedience are advanced by Daniel Markovits,[93] Robin Celikates,[94] and William Smith.[95] Some elements of these approaches were present in the discourse surrounding civil disobedience much earlier, tracing back to the works of Hannah Arendt.[96] This Section will take a closer look at Markovits' and Smith's accounts of civil disobedience and apply each to the case of animal activists. The crucial question is: can civil disobedience on behalf of animals be morally justified pursuant to these accounts?

90 Smith 2013, 8.
91 Ibid.
92 Ibid., 9.
93 Markovits 2005.
94 Celikates, Democratizing Civil Disobedience, 2016; Celikates, Rethinking Civil Disobedience, 2016.
95 Smith 2013, although Smith's account also contains elements of liberal approaches.
96 Although Arendt's approach shows elements of both liberal and democratic approaches: 'Civil disobedience arises when a significant number of citizens have become convinced either than the normal channels of change no longer function, and grievances will not be heard or acted upon, or that, on the contrary, the government is about to change and has embarked upon and persists in modes of action whose legality and constitutionality are open to grave doubt.' Arendt 1969, 74.

7.3.2.1 Daniel Markovits: Democratic Disobedience

Markovits argues that the liberal approach to civil disobedience is ill-equipped to capture political protests such as, for example, the opposition to nuclear missiles that was prevalent in Europe in the 80s.[97] He re-conceptualizes civil disobedience as democratic disobedience. Thus, rather than defending civil disobedience against allegations of being anti-democratic, he argues from within democratic theory, saying that civil disobedience can function to remedy democratic deficits in law and policy.[98]

There are multiple ways in which a policy or law can lack democratic authority; for instance, in cases where the preference of citizens has significantly changed over time, such that they would no longer approve of a dated law or policy which was enacted in a different political environment.[99] However, not all cases will be legitimate under democratic civil disobedience. It is important to note that the threshold for justified democratic civil disobedience according to Markovits is quite high. It requires that there is an actual democratic deficit, rather than just a 'political defeat.'[100] Significantly, the finding that a majority of the society opposes a certain policy is not sufficient to prove a democratic deficit. Instead, a democratic deficit exists in the case of a 'failure of democratic engagement in the process that produced this outcome.'[101] Typically there is room for democratic disobedience:

> 'when the internal institutions or democratic policies combine to keep a policy option that commands significant support among the citizens of the political agenda entirely – when no major political party adopts the policy the mainstream press ignores it, and this state of affairs does not respond to the legal forms of protest.'[102]

Democratic disobedience does not seek to impose a particular policy, it instead seeks to initiate a process of reengagement with an issue the consideration of which suffers a democratic deficit.[103] In reality, activists will likely seek change above democratic debate. However, what is crucial is

97 Markovits 2005, 1901.
98 Ibid., 1902.
99 Ibid., 1933.
100 Ibid., 1938.
101 Ibid.
102 Ibid., 1938 f.
103 Ibid., 1939 f.

that they may never coerce the outcome of a democratic process.[104] They may only use coercive methods to secure a 'sovereign reengagement' with a certain issue; they may seek to create room for political discourse.[105] Thus, democratic disobedience does not seek to 'force a sovereign to *change course,*' but it seeks to 'force the sovereign to *reconsider.*'[106]

Markovits submitted that civil disobedience can be justified as an objection to the way laws and policies are made. Now, what does that mean for animal activists? Trespassing to create footage of animal facilities *can* be morally justified pursuant to democratic approaches to civil disobedience. Whether it *is* morally justified – not only in a specific scenario, but also, more broadly speaking, in a given jurisdiction at a given point in time – depends on empirical factors. It depends on whether Markovits' threshold for justification of democratic disobedience is met: with regard to factory farming, is there an epistemic gap preventing citizens from making informed decisions? How grave does this epistemic gap have to be, to justify civil disobedience? And, how many films of how many different facilities are needed to close the epistemic gap? What if the majority of society prefers not to know about the details of animal farming? Is this relevant? And, considering the increasing public awareness of animal issues, including in the media, can it still be argued that these issues are not represented? These questions must inform any justification based on Markovits' democratic approach to civil disobedience.

At this point in time, in Germany for example, the requirements are not met – or, rather, are no longer met. Animal welfare is on the agenda of most political parties, and it receives broad societal support. As already mentioned above, a representative study showed that 94 % of the population subscribe to the view that, if we are using animals, we should enable them to have a good life.[107] The media report on animal issues, and the topic is clearly a matter of public discourse. The problem is rather that these commitments and declared preferences do not translate into policy and law. This problem is not reflected in Markovits' account. The republican-democratic approach to civil disobedience does not sufficiently accommodate for features of democracy beyond voting.[108]

104 Ibid., 1941.
105 Ibid.
106 Ibid., 1942.
107 Deutscher Ethikrat 2020, 6.
108 For an overview of other shortcomings of this approach see Smith 2013, 62 f.

7.3.2.2 William Smith: The Deliberative Account

William Smith addresses the problem described immediately above in his formulation of a deliberative, rather than republican democratic, approach to civil disobedience.[109] Smith's account of civil disobedience combines elements of both liberal and democratic approaches. This Section will focus on the more democratic elements of Smith's ideas, as these elements draw on deliberative democracy.[110]

According to Smith, civil disobedience is a breach of law 'within the limits of deliberative respect.'[111] Smith submits that civil disobedience can promote, and even contribute to, deliberation.[112] Emphasizing the communicative feature of civil disobedience (communicating vertically between citizen and state, and horizontally amongst members of civil society) regarding a law or policy that should be reconsidered, he argues that it 'can be framed as a contribution to a process of public deliberation, or can be a non-deliberative act designed to stimulate a deliberative process.'[113] This point is crucial for animal activists and their collection of undercover footage: as Smith challenges the view that civil disobedience is always at odds with deliberative democracy.[114]

According to Smith, civil disobedience can, under certain conditions, be compatible with deliberative democracy. This requires *inter alia*: that the act is 'broadly non-coercive;' that activists make sure to coordinate with other groups who protest in order to maintain social stability; and that activist engage in lawful means before resorting to civil disobedience.[115]

Smith also narrows down the situations in which civil disobedience may be justified. The first is the 'commission or toleration of serious injustices by the democratic majority, such as failure to achieve social inclusion for all citizens,'[116] which broadly resembles liberal approaches to civil disobedience discussed above. The second is the 'failure of government to debate or enact important policy options, where the discussion or enactment of those

109 Smith 2013, 2.
110 See Chapter 3.
111 Smith 2013, 32.
112 Ibid., 12.
113 Ibid., 32.
114 Ibid., 60.
115 Ibid., 9.
116 Ibid.

options is obstructed by the phenomenon of deliberative inertia.'[117] Civil disobedience can function as a means by which to contest 'discursive blockages that inhibit the proper functioning of the *public sphere* in a deliberative democracy' (emphasis in original).[118]

Thus, Smith, like Markovits, allows for the possibility that civil disobedience may be justified to remedy shortcomings in the democratic process. And yet, Smith's theory is very different from the one advanced by Markovits as it is based on a distinctively deliberative understanding of democracy.

The phenomenon of deliberative inertia, as Smith uses the term, arises due to the central role of discourses in shaping democratic decision-making.[119] Discourses are here understood as frameworks which enable individuals to understand given problems.[120] As such, they can assist political deliberation by guiding citizens in identifying problems and suggesting ways to solve them.[121] However, a given discourse can become so prevalent that it privileges some agendas over others and marginalizes alternatives.[122] In this case, deliberative inertia can inhibit important functions of deliberation in the public sphere.[123] It can reduce the likelihood of alternative perspectives make it to the center of the deliberative process.[124] When it comes to decision-making, alternative perspectives may either be 'kept off the deliberative agenda or not treated as plausible approaches to public policy.'[125] If that happens, civil disobedience may be justified to promote important and urgent discourses which were prevented from influencing the political debate, and consequently political decisions, due to deliberative inertia.[126]

Smith's approach is better equipped to capture animal activists' ambivalent relationship to democracy. In the deliberative process on animal law, 'welfarism' could be said to be a hegemonic discourse. The core assumption of welfarist discourse on animal law is the moral permissibility of using animals for human ends. Within this discourse, the view that trivial human

117 Ibid.
118 Ibid., 60.
119 Ibid., 68.
120 Ibid.
121 Ibid.
122 Ibid.
123 Ibid.
124 Ibid.
125 Ibid., 69.
126 Ibid., 70.

interests and economic considerations can trump animal welfare is prominent. Alternative discourses, such as animal rights, which would imply policies restricting the use of animals, are thus becoming marginalized.

Further, Smith argued that deliberative inertia can cause a gap between public awareness on the one hand, and law and policy on the other.[127] This occurs when the dominant discourses have established barriers that prevent public awareness from being translated into effective law and policy.[128] Smith used the example of green politics to explain this point, and it may similarly apply to animal issues. As I mentioned earlier, the shortcomings of intensive farming are a salient topic in the media, and political parties across the board declare their commitment to enhancing animal welfare. However, entrenched discourses prioritizing tradition and economic considerations over the wellbeing of animals, prevent stricter animal welfare laws from being enacted.

In both of the above examples, Markovits' approach would not justify civil disobedience, because animal issues are not kept off the political agenda entirely. Smith, on the other hand, understands civil disobedience in a way that allows one to address the gap between awareness and lip service on the one side, and enacted policies and laws on the other. To be clear, both Markovits' and Smiths' approach to civil disobedience can, in theory, morally justify trespassing on animal facilities to create footage; but Smiths' approach is better suited to address the specific problems of the democratic process with regard to animal law.

Of course, the deliberative account is not without its critics. Erica von Essen raises a number of challenges against the application of the deliberative account to 'environmental disobedience.'[129] Amongst other issues, von Essen raised a 'slippery slope' problem: if even coercive and clandestine acts of activism are endorsed by Smith's deliberative account, is it still delib-

127 Ibid., 69.

128 Ibid., 70.

129 von Essen 2017. It should be noted that von Essen includes acts such as eco sabotage or arson in her analysis of environmental disobedience, although she notes that some of the examples discussed are 'poor candidates for deliberative disobedience' (p. 310). In my interpretation, neither the defining criteria of civil disobedience nor Smith's deliberative account would allow to consider these acts morally justified as civil disobedience. Nevertheless, the questions raised by Essen speak to the essential dilemma of legitimizing the clandestine and lawbreaking elements of the creation of undercover footage as compatible with deliberative democracy.

erative?[130] Or does it rather fall into a tradition of pluralistic agonism?[131] I discuss agonism, contrasting it against deliberative democracy, in Chapter 10. In short, agonism provides an alternative model to deliberative democracy which is criticized for its presumption that finding consensus through rational deliberation is a possible and appropriate solution for political conflicts.[132] Agonists are skeptical of the possibility of democratic consensus; they embrace conflict as both inevitable and positive.

I consider the risk of a slippery slope towards agonism marginal in the case of undercover footage. The goal of publicizing undercover footage shows a strong commitment to participation in the deliberative process, challenging of dominant discourses, and finding a new consensus. The aim of activists who create such footage is expressly more than a statement of dissent – they actively seek to persuade others to alter their views. Further, acknowledging that activists contribute to, or even promote, deliberation downstream does not require defining their clandestine acts of trespass as deliberative in nature. Rather, their relationship with deliberative democracy can and must remain ambivalent; otherwise attempting to justify them as disobedience rather than regular democratic practice would be superfluous.

7.4 Summary and Conclusion

This Chapter turned from the dissemination of undercover footage to its creation. While law and deliberative democracy can allow for the dissemination of undercover footage, its creation is clearly non-deliberative in nature and crosses the boundaries of the law. As such, this Chapter argued that trespass to create undercover footage from animal facilities can be conceptualized as civil disobedience. Further, it showed that, whether these acts can be morally justified is contingent upon extended liberal and democratic approaches to civil disobedience, as well as empirical factors. An extended liberal approach to civil disobedience requires considering animals to be within the moral community in the sense that they are owed a form of justice.

130 von Essen 2017, 315.
131 Ibid.
132 Mouffe, Chantal, Democratic Politics and Conflict: An Agonistic Approach, Política Común 9 (2016) not paginated. See Chapter 10 for further references.

Democratic approaches to civil disobedience are better equipped to address animal activists' ambivalent relationship with democratic processes that crystalizes in the creation of undercover footage. Smith's deliberative approach to civil disobedience is particularly promising for animal activists, as it highlights the phenomenon of deliberative inertia[133] which provides a compelling explanation for the current state of animal law and policy. It reflects the features of democratic discourse on animal welfare that activists may struggle with, and explains the reasons why they resort to the creation of undercover footage. In short, the creation of undercover footage for public dissemination can counter deliberative inertia, thus leveling the ground between the prevailing existing discourses on animal issues (e.g., using animals for trivial human interests) and policy options that would meaningfully increase the wellbeing of animals or limit their use. Acknowledging that undercover footage can contribute to deliberation does not imply that it is deliberative in nature. Rather, it nested in an inherently tense space between fidelity to the law, democratic institutions, and practices on the one hand; and illegal, coercive forms of dissent on the other.

8. Recent Trespass Cases: Civil Disobedience for Animals on Trial?

Political theorists are not alone in grappling with the conduct of activists who trespass to create footage. These above debates may also be reflected in the courtroom when animal activists stand trial for criminal trespass. This Chapter will analyze two recent cases against animal activists, and normatively reconstruct the Courts' reasoning through the lens of civil disobedience with a special focus on its (deliberative) democratic dimensions. The two cases discussed resulted in different outcomes: in the first case (the Heilbronn case) the animal activists were convicted for trespass (§ 123 of the Criminal Code),[134] while in the other case (the Naumburg case) the Courts considered the act of trespass justified based on *inter alia* necessity (§ 34 of the Criminal Code).[135] Reconstructing the cases through the lens of civil disobedience functions to explain and to evaluate the reasoning of the Courts. Most importantly, the normative reconstruction sheds light on

133 Smith 2013, 9.

134 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017.

135 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018.

underexplored aspects of the decisions, both lending further support for the arguments made by the Courts and giving rise to criticism.

In 2017, the Heilbronn District Court denied the possibility of letting animal activists go unpunished for trespass.[136] The Court argued that intensive animal farming was socially accepted, and that trespass to create footage was but an attempt by a minority to impose their political aim on the majority.[137] The deliberative approach to civil disobedience developed by William Smith[138] points out the weaknesses of this line of argument. The Court made this finding based on the existence of certain practices, not only appealing to their legality, but also to their democratic legitimacy. The Court invoked democracy, but failed to engage with the shortcomings of public discourse and political decision-making on the topic of animal issues which were elaborated in Chapter 5.

In a different case, the Magdeburg District Court and the Naumburg Regional Court considered trespass to create undercover footage justified as defense of others and necessity, respectively.[139] In this case, activists created footage of unlawful conditions in an animal facility in order to urge authorities to enforce applicable animal welfare law. The Magdeburg Court's 'defense of others' justification may find support in extended liberal approaches to civil disobedience, as it implies that animals are at least bearers of 'welfare rights.'[140] The Naumburg Court's necessity justification, which is legally the most convincing, hinges on animal welfare as legally protected interest of society as a whole. If existing animal welfare law is considered to reflect a democratic minimum consensus on animal welfare, this line of argument can find support in democratic approaches to civil disobedience.

The insights from the political theory literature explored in Chapter 7 provide useful resources to normatively reconstruct the cases at hand. However, it should be said upfront that the cases discussed here cannot be considered to constitute civil disobedience for reasons I will explain below.

136 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 126).

137 Ibid.

138 Smith, William, Civil Disobedience and Deliberative Democracy (Abingdon: Routledge 2013).

139 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065); LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018 (173).

140 I borrow the term 'welfare rights' from Stucki, Saskia, Towards a Theory of Legal Animal Rights, Oxford Journal of Legal Studies 40:3 (2020), 533–560.

As mentioned in Chapter 7, the mere *possibility* that trespass to create footage can be justified as civil disobedience, does not imply that it always is. What is more relevant here are salient arguments in the debate around civil disobedience in political theory.

8.1 Heilbronn District Court: Civil Disobedience as a Threat to Democracy

The 2017 Heilbronn District Court case concerned animal activists who had trespassed on a turkey farm to create footage, and were convicted.[141] A legal analysis and normative reconstruction of the trespassing charges highlights how questions of civil disobedience and animal activists' ambivalent relationship to democracy can surface in legal reasoning.

8.1.1 Legal Analysis

8.1.1.1 Background and Facts

The trespass in question occurred on a turkey fattening facility [Putenmastanlage][142] where birds of the breed 'bigsix' were kept.[143] These birds are bred to become very heavy, resulting in some being unable to stand.[144] The birds' beaks are shortened to counter the problems of feather-pecking and cannibalism. Many lack parts of their plumage, or have deformed legs.[145] These conditions are not unique to the facility in question, but rather result from intensive farming and the characteristics of the breed 'bigsix.'[146]

The three defendants agreed to enter the facility to create footage.[147] Two of the defendants entered through an unlocked door and filmed inside while the third kept watch outside.[148] The defendants had decided to undertake the filming as trashcans with dead birds lead them to believe that the

141 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017.
142 Ibid., para. 16.
143 Ibid.
144 Ibid., para. 17.
145 Ibid.
146 Ibid., paras. 18 f.
147 Ibid., para. 20.
148 Ibid., paras. 25 f.

conditions in the facility were particularly poor.[149] The defendants wore protective clothing while trespassing,[150] and one of them additionally wore a ski mask to prevent his identification.[151]

The defendants believed that intensive farming always results in animal suffering, and that, in light of Article 20a of the Basic Law, it was justified to enter the facilities to create footage.[152] At the same time, they considered their actions to fall in a legal 'gray area,' and were aware that law enforcement would not consider them justified.[153] The defendants thought it was futile to inform the veterinary inspection offices ['Veterinärämter'] instead of trespassing, or to ask permission for the filming, believing that this would only lead to a cover up of the conditions.[154] The defendants believed that the farming practices would change only if the conditions of factory farming and the associated suffering of animals were made public on TV.[155] Further, the defendants were hoping to put public pressure on veterinary inspection offices to take action against factory farming.[156]

The owner of the facility became aware of unusual movements in the facility, and surprised the defendants.[157] During a physical fight between the facility operator and one of the defendants, the defendant used a chemical spray and followed the facility operator into his private home.[158] These events will not be analyzed as they relate to charges other than trespass. However, it must be noted that the wearing of a ski mask, the entering of a private home, the violence against humans and, in particular, the use of a weapon in the form of the chemical spray, rule out the possibility of characterizing this act as one of civil disobedience.

149 Ibid., para. 23. The Court indicates that the defendants welcomed the bad conditions in the particular facility, as it was their goal to create a daunting impression ['was ihnen – um einen besonders abschreckenden Eindruck zu vermitteln [...] – gerade recht war'].
150 Ibid., para. 24.
151 Ibid.
152 Ibid., para. 106.
153 Ibid., paras. 52, 55.
154 Ibid., para. 106.
155 Ibid.
156 Ibid., para. 21.
157 Ibid., paras. 27, 80. The accuser and the defendants gave different accounts the development of the event from this point on, and the Court found the account of the accuser to be more consistent.
158 Ibid., paras. 32–43.

8.1.1.2 Procedural History

On 21 April 2016, the Schwäbisch Hall Magistrate Court found two of the three defendants guilty of trespass, and one defendant guilty of aiding and abetting trespass.[159] For the events following the trespass, one of the defendants was additionally convicted for the infliction of dangerous bodily harm (§ 224 (1) No. 2 of the Criminal Code [gefährliche Körperverletzung]) and coercion (§ 240 of the Criminal Code [Nötigung]).[160] Both the prosecution and the defense appealed the decision.[161] During the appeal, the charges of aiding and abetting were terminated pursuant to § 153a (2) of the Criminal Procedure Code.[162] The prosecution's appeal regarding one of the two remaining defendants was successful on the point of sentencing; the Heilbronn District Court sentenced him to seven months and two weeks probation.[163] The Stuttgart Regional Court upheld the decision. The defense has announced its intention to issue a constitutional complaint against the decision [Verfassungsbeschwerde] before the Federal Constitutional Court, and potentially the European Court of Human Rights.[164]

8.1.1.3 No Self Defense/ Defense of Others Justification

It is undisputed that the defendants trespassed in the sense of § 123 of the Criminal Code. However, the crucial question before the Heilbronn District Court was whether that trespass was legally justified. Amongst other justifications which will be discussed in Chapter 9, the Court considered defense of others and necessity as possible justifications.

The Court denied a justification based on self-defense/defense of others, arguing that the there was no unlawful attack against oneself or another as required by § 32 of the Criminal Code.[165] The Court noted that § 32

159 Ibid., para. 1.
160 Ibid., para. 159.
161 Ibid., paras. 4, 6.
162 Ibid., para, 7.
163 Ibid., tenor.
164 Albert Schweizer Stiftung, Tierschutzer zieht vor das Verfassungsgericht, press release of 11 October 2018, available at: https://albert-schweitzer-stiftung.de/aktuell/tierschuetzer-zieht-vor-das-verfassungsgericht (last accessed 19 October 2020).
165 For the official translations see Federal Ministry of Justice, German Criminal Code, available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0141 (last accessed 30 October 2020).

of the Criminal Code does not confer a right to defend the state's implementation of animal protection in Article 20a of the Basic Law.[166] Central to the Court's assessment was the threat this would pose to democracy: '[e]ven the slightest consideration regarding what would happen if everyone attempted to enforce their political views through criminal offences shows that then, within the shortest amount of time, anarchy instead of democracy would rule in Germany' ['Schon die kleinste Überlegung dahingehend, was passierte, wenn jeder seine politische Ansicht versuchte durch Straftaten durchzusetzen, zeigt, dass dann in kürzester Zeit nicht mehr eine Demokratie, sondern eine Anarchie in Deutschland herrschte'].[167]

The reasoning of the Court went as follows: it is generally accepted that animal factory farming is not species-appropriate ['artgerecht'] and results in pain to animals.[168] § 1 sentence 1 of the Animal Protection Act indicates that the purpose of the Act is ethical animal protection; a harmonization of ethically motivated animal protection and human interests.[169] The notion of a 'reasonable cause' [vernünftiger Grund'] is central for this purpose.[170] As a rule, it serves as the balancing tool between human interests and animal protection pursuant to the principle of proportionality.[171] The legislative history, according to the Court, indicates that intensive farming was deemed necessary for the food industry.[172] From that it followed, according to the Court, that the problems of intensive farming are *known* to society, the legislator, and veterinary inspection offices.[173] Further, in the conflict between animal protection and sufficient meat production it is up to the State to make the rules pursuant to which intensive animal farming is to be conducted[174] and, accordingly restrictions of animal protection are being accepted.[175]

166 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 116).
167 Ibid., para. 117.
168 Ibid., para. 109.
169 Ibid., para. 110.
170 Ibid., paras. 110 f.
171 Ibid., para. 111.
172 Ibid. The Court cites OVG Münster [Münster Reginal Administrative Court] 20 May 2016, 20 A 530/15 BeckRS, 46151, 2016 (para. 39).
173 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 112).
174 Ibid.
175 Ibid.

Veterinary inspection offices are not attempting to put an end to the conditions in intensive animal farming, because intensive farming is allowed despite its resulting in non-species-appropriate conditions, such as feather-pecking and deformations.[176] These conditions are considered 'socially acceptable' ['sozial-adäquat'] and, as such, veterinary inspection offices cannot intervene against these inevitable consequences of intensive animal farming, for intensive farming and its consequences occur with 'reasonable cause' and, thus, in accordance with the Animal Protection Act.[177] As such, intensive animal farming is not prohibited.[178]

In other words, the Court concluded from the societal acceptance of not species appropriate farming, that it is legal. Hans-Peter Vierhaus and Julian Arnold describe this line of argument as 'contra legem:' § 2 No. 1 of the Animal Protection Act requires animals to be kept in species appropriate conditions.[179] The Heilbronn Court finds that animals are kept in not species-appropriate conditions. However, it fails to conclude that this constitutes a breach of § 2 No. 1 of the Animal Protection Act, and instead, without a legal basis, concludes that the practices are legal.[180] As a result, the Court did not consider the defendants' actions justified as defense of others pursuant to § 32 of the Criminal Code.

8.1.1.4 No Necessity Justification

The Court found that the requirements of necessity, enshrined in § 34 of the Criminal Code, were not met because the defendants did not act to avert an imminent danger.[181] § 34 of the Criminal Code reads:

> 'A person who, faced with an imminent danger to life, limb, freedom, honour, property or another legal interest which cannot otherwise be averted, commits an act to avert the danger from himself or another, does not act unlawfully, if, upon weighing the conflicting interests, in

176 Ibid., para. 113.
177 Ibid.
178 Ibid., para. 114.
179 Vierhaus, Hans-Peter/ Arnold, Julian, Zur Rechtfertigung des Eindringens in Massentierhaltungsanlagen, NuR 41 (2019), 73–77, 75 f.
180 Ibid.
181 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 125).

> particular the affected legal interests and the degree of the danger facing them, the protected interest substantially outweighs the one interfered with. This shall apply only if and to the extent that the act committed is an adequate means to avert the danger.'[182]

The Court did not answer the question whether animal protection as enshrined in Article 20a Basic Law is 'another legal interest' in the sense of § 34 of the Criminal Code, for it is up to the State to achieve the state objective.[183] Further, the Court noted that the defendants' aim was not to avert danger from individual animals; rather, they hoped to change the consumers' thinking and inspire changes in intensive farming.[184]

The defendants submitted that they believed the trespassing was necessary to achieve their political aims in the sense that they did not see another way to shake society and politics awake.[185] The Court found that the defendants failed to show why they believed that another film was necessary to pursue the aim of changing consumers' attitudes about intensive farming: while footage may impact the publics' attitude to consuming cheap meat, the Court found that enough footage already existed.[186] Furthermore, the Court argued that footage could be obtained legally with the consent of facility operators.[187] Another illegally obtained film was not necessary to educate consumers about the topic. Consequently, even if one accepted that there was an imminent danger, the defendants failed to show that the danger could not be averted by legal means.[188] Finally, the Court again stressed the consideration made with regard to § 32 of the Criminal Code, namely, that it is alien to the democratic system to allow a minority to change the opinion of the majority through criminal acts.[189]

182 For the official translations see Federal Ministry of Justice, German Criminal Code, available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0141 (last accessed 30 October 2020).
183 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 123).
184 Ibid., para. 124.
185 Ibid., para. 126.
186 Ibid., para. 128.
187 Ibid., para. 129.
188 Ibid., para. 130.
189 Ibid., para. 131.

8.1.1.5 The Court's Reasoning Comprised

The final paragraphs in the Court's decision sum up its reasoning: intensive animal farming is considered 'socially acceptable' to provide large amounts of affordable meat.[190] According to the Court, this situation is comparable to private transport: driving harms a number of people thus it limiting even the highest legal interest (the right to life and bodily integrity), yet it is accepted because this is the preference of the majority.[191] Trespass to create footage is a politically motivated criminal offence against a decision of the majority that came about in accordance with the constitution; and the majority decision is to accept intensive animal farming, including its impact on the wellbeing of animals.[192] A majority decision has to be accepted, or a democracy cannot function: 'the legal order cannot declare lawful a behavior without self-surrender of democracy and legal peace, which attempts to circumvent the majority rule' ['Deshalb kann die Rechtsordnung nicht ohne Selbstaufgabe der Demokratie und des Rechtsfriedens ein Verhalten für rechtmäßig erklären, dass diese Mehrheitsregel zu umgehen versucht'].[193] According to the Court, the act of trespassing could not be justified, including under the aspect of civil disobedience: the Court notes that there is a consensus that civil disobedience does not justify criminal behavior.[194]

8.1.2 Normative Reconstruction

In the above decision, the Heilbronn District Court denied a justification of the act of trespass, clearly stating that considering the acts as civil disobedience would not change the outcome of the case. However, the significance of the Heilbronn decision for the topic at hand does not arise from this superficial mentioning of civil disobedience. Neither does it arise from the act of trespass being morally justified as civil disobedience: the elements of covertness and violence militate against this conclusion. Rather, the core aspects of the Heilbronn Court's reasoning echo the most critical questions in the characterization of animal activism as morally justified

190 Ibid., para. 138.
191 Ibid.
192 Ibid., para. 140.
193 Ibid.
194 Ibid., para. 137.

civil disobedience: the Court reasons that animal protection is a political issue on which animal activists' view departs from the that of the majority, and that acts of trespass undertaken in an attempt to impose the activist's minority view on the majority poses a danger to the rule of law and to democracy. This reasoning echoes the main argument made against democratic approaches to civil disobedience in political theory: if civil disobedience against 'ordinary' political issues is endorsed, it is a danger to the rule of law and to democracy.

It should be noted that the Court's appraisal of animal welfare as simply a political aim, insufficient to trigger § 34 of the Criminal Code,[195] understates the status of animal welfare as a state objective, a value of constitutional rank. Since animal protection is a state objective, it is (in principle) sufficient to trigger § 34 of the Criminal Code. The Heilbronn Court denied this by saying that the relevant provision, Article 20a of the Basic Law is addressed to the state only.[196] This interpretation of the law can be challenged, as the decision of the Nauburg Regional Court, discussed below, shows.

However, in the following, I will accept the Court's premise that animal welfare is but apolitical aim, and critically examine its further argument through the lens of democratic approaches to civil disobedience. Is society really sufficiently informed about factory farming? And does this imply that existing animal welfare law and its enforcement have democratic support?

8.1.2.1 The Epistemic Gap and Related Empirical Matters

The Court's overarching normative claim is that trespass poses a danger to democracy, since it equates to imposing the political view of a minority onto the majority; the majority's view being expressed in existing animal welfare law and practice. This normative claim seems to rest on two empirical assumptions. The Court assumes that (1) society is already informed about the conditions under which animals in intensive farming live and die, and (2) that society nevertheless endorses intensive animal farming for the purpose of affordable animal-based food production.

The first empirical point relates to the epistemic gap on animal welfare and cannot be comprehensively assessed here. In Chapter 7, in discussing

195 Ibid., para. 130.
196 Ibid., para. 123.

democratic approaches to civil disobedience, I noted that more empirical research is needed on the epistemic gap. Contrary to the reasoning of the Court, some activists will say that, in order to show that objectionable practices are not isolated incidents or the wrongdoing of single employees but rather widespread and systematic, recent footage from different facilities is needed. However, for the purpose of this dissertation, I suggest assuming that the Court's assessment is correct in concluding that there is no need for more footage to inform society. After all, countless documentaries and other material on the conditions in factory farms exist already.[197] More footage is, therefore, not necessary to inform society and there exists no epistemic gap on intensive animal farming.

What does this entail for a moral justification of trespass to create footage? If society is already informed about intensive animal farming, a moral justification pursuant to Markovits' approach to civil disobedience would be difficult to sustain. As I argued in Chapter 7, a justification pursuant to this account would require that animal issues are not on the democratic agenda.[198] Yet, a justification pursuant to Smith's deliberative account remains possible. As I showed in Chapter 7, rather than demanding that there be an epistemic gap, Smith makes room for civil disobedience if the preferences of society do not translate into law and policy. This shows that Smith's approach to civil disobedience speaks to the challenges faced by animal activists.

The second assumption of the Court is that society, the legislator, and veterinary inspection offices endorse factory farming as socially adequate, despite its shortcomings. The Court seems to base this assumption on the argument that, if this were different in that society did not endorse factory farming, things would change. This claim is not convincing. The majority of people in Germany seem to reject intensive animal farming when they subscribe to the view that, if animals are used for food, they should be given a decent life.[199]

Animal welfare law, and its enforcement, allow for the continuation of practices that society finds objectionable. But, rather than concluding that

197 In fact, one of the defendants in the case at hand had apparently published several such films in the past. LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 127).

198 Markovits, Daniel, Democratic Disobedience, The Yale Law Journal 114 (2005), 1897–1952, 1939 f.

199 Deutscher Ethikrat 2020, 6.

there must be serious flaws in how the majority's view on animal welfare is translated into law, the Court explains that this apparent tension is not unique to the topic of animal welfare. In arguing that society accepts intensive animal farming as a 'socially acceptable,' the Court compares intensive farming to traffic and traffic accidents: by allowing for traffic, we too accept negative consequences, namely limitations of the right to life and bodily integrity. The Court here implies that the issues of transportation and animal welfare are comparable regarding the democratic decision-making process that governs them. This comparison is interesting, but it seems that it cannot capture the distinguishing features of decision-making processes on animal protection. Animals' interests are not balanced in the same way as human interests. For animals, there is no benefit in intensive farming. Further, a difference exists in that animals are not being represented in the legislative debate.[200]

8.1.2.2 The Democratic Legitimacy of Animal Welfare Law and its Enforcement

Now that I have critically assessed the empirical points – the epistemic gap and democratic support for intensive farming – I turn to the overarching normative claim they support, namely, that animal welfare law and its enforcement enjoy democratic legitimacy. The Court implied that, when activists protest against the current state of animal law with illegal means, they try to overrule a democratic decision and impose their minority view on the majority. This echoes a common objection against democratic approaches to civil disobedience. Democratic disobedience allows one to disobey majority decisions on the basis that the ways in which diverse opinions of citizens are translated into law has shortcomings which, in some cases, may be addressed through civil disobedience. Critics would argue that this poses a risk to democracy as the majority decision should be respected. Further, drawing on the traditional Rawlsian approach to civil disobedience, they may argue that civil disobedience can be appropriate

200 On political representation of animals in politics see e.g., Ahlhaus, Svenja, Tiere im Parlament? Für ein neues Verständnis politischer Repräsentation, Mittelweg 36 5 (2014), 1–12. On animals in deliberative democracy specifically see Meijer, Eva, When Animals Speak. Toward an Interspecies Democracy (New York: New York University Press 2019), 216 ff.

where matters of justice are concerned, but not in other areas of politics and law, such as animal protection.

There are two different ways to respond to this criticism. The first is based on extended liberal approaches to civil disobedience. In Chapter 7 I argued that extended liberal approaches must be based on a theory of animal rights. Proponents of extended liberal approaches will respond to the Court's reasoning by saying that animal welfare is not just an unrealized political aim; rather, it is a matter of justice for animals and poses moral rights. As a matter of political theory or ethics, this argument may have merit. However, as of yet, it is ill equipped to convince lawyers or legal scholars, given that moral animal rights are not recognized as legal rights. In cases where even the 'simple' legal rights[201] conferred to animals via animal protection law are clearly violated, there may be some room for this line of argument, which will be addressed below in the context of the Magdeburg decision. In the case at hand, this reasoning is fruitless, given that the Court did not find a violation of animal welfare law (although this is disputable, too). Instead, one would have to go further and target the interpretation of Article 20a of the Basic Law or the Animal Protection Act, in particular the notion of 'reasonable cause' to reach the conclusion that higher animal welfare norms are being violated. But even then, the extended liberal view leads to a somewhat absurd argument; on the one hand arguing that animals are within the scope of justice and on the other hand wrestling with interpretations of the Animal Protection Act that allows large-scale farming of animals for human consumption and, as such, remains incompatible with most animal rights positions. Against this backdrop, the extended liberal approach does not promise to convince in a legal debate.

A second – and more convincing – way to respond to the democratic legitimacy argument of the Court would be based on democratic approaches to civil disobedience. Earlier I mentioned that a moral justification pursuant to Markovits' account is unlikely since, as the Court pointed out, footage already exists, and the topic is not kept off the political agenda entirely. One could argue that animal rights, as opposed to welfare, are kept off the political agenda. However, Markovits demands that the view on the behalf of which civil obedience occurs 'commands significant support

201 I borrow this term from Saskia Stucki who explains that even if 'simple' animal rights can be derived from animal welfare law, they fall short of the strong legal protection that would correspond to animals' moral rights. Stucki 2020, 551.

among the citizenry,'[202] which is not the case for more radical animal rights approaches. Therefore, we must turn to Smith and 'deliberative inertia' as justification for civil disobedience.

In his book *Civil Disobedience and Deliberative Democracy*, William Smith argues that civil disobedience can be compatible with deliberative democracy under certain conditions.[203] Besides matters of justice, civil disobedience may be used to 'protest against failure of government to debate or enact important policy options, where the discussion or enactment of those options is obstructed by the *phenomenon of deliberative inertia*' (emphasis added).[204] Smith's deliberative account is well suited to point out some possible criticism of the decision at hand. The defendants did not attempt to release the turkeys, thus they did not engage in direct action. Instead, they chose the more democratic and deliberative route, creating footage to make the majority reconsider. If Smith's formulation is taken as a threshold, the question is whether, with regard to animal welfare, there is a failure of government to discuss or enact certain policy options because of deliberative inertia.

A definite statement on this issue would require further empirical research. However, there are good reasons to argue that, when it comes to intensive farming and related practices, these conditions are met. For example, the animals kept in the facility at hand were of the breed 'bigsix.' It is well known that these animals are designed to be particularly profitable, which has negative effects on their health. Nevertheless, this breed is used widely. According to Naturland e.V., an international association for organic agriculture, even organic producers use the breed due to 'lack of alternatives.'[205] Policy options, such as prohibiting the breeding farmed animals in a way that is detrimental to their health, are not being seriously considered, because the discourse on animal welfare is dominated by the goal of continuing the production of large amounts of affordable meat. Thus, deliberative inertia prevents the consideration of further policy options. The Court did not take this perspective into account in its reasoning. It invoked instead a very 'thin' notion of democratic decisions and legitimacy.

202 Markovits 2005, 1939.
203 Smith 2013.
204 Smith 2013, 9.
205 Naturland, Kundeninfo Naturland Puten, 17 February 2014, available at: https://www.naturland.de/images/Verbraucher/tierwohl/pdf/2014_KI-Puten.pdf (last accessed 15 January 2022).

To sum up, one can say that the Court denied the possibility of letting animal activists go unpunished, arguing that intensive animal farming was socially accepted and that trespass to create footage posed a danger to democracy.[206] In short, it argued that trespass is but a means by which the minority can impose their 'political aim' on the majority.[207] This argument is familiar from Chapter 7; it can be employed by critics of democratic approaches to civil disobedience. A strictly Rawlsian account of civil disobedience can support this reasoning of the Court. However, the deliberative account[208] points out its weaknesses: The Court concluded from the existence of certain practices, both the legality and the democratic legitimacy of those practices. It invoked a 'thin' notion of democracy, failing to engage with the shortcomings of public discourse and political decision-making on animal issues where the stated preferences of the public do not always translate into policy and law. In so doing, the Court underestimated the effect of deliberative inertia that may prevent alternative policy options from being considered.

8.2 Magdeburg District Court and Naumburg Regional Court: Legally Justified Civil Disobedience?

In this criminal case, the Naumburg Regional Court reached a very different finding than that of the case above; holding that the wellbeing of animals constituted a legally protected good ['Rechtsgut'] a threat to which could trigger a legal necessity justification for trespass.[209] Previously, the Magdeburg District Court had considered the act of trespass justified based on both self-defense/ defense of others (§ 32 of the Criminal Code), and necessity (§ 34 of the Criminal Code). This Section will analyze the decisions and reconstruct them through the lens of civil disobedience. I suggest looking at the Magdeburg District Court decision as an attempt to apply an 'extended liberal approach' to civil disobedience for animals, while the Naumburg District Court decision includes elements of democratic approaches to civil disobedience.

206 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 126).
207 Ibid.
208 Smith 2013.
209 OLG Naumburg [Regional Court Naumburg] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2064).

8.2.1 Legal Analysis

8.2.1.1 Background and Facts

The accused were affiliated with an animal advocacy organization. For a number of years, they had reported violations of the Animal Protection Act to law enforcement.[210] However, they noticed that law enforcement did not take their reports seriously, unless they were supported by evidence.[211]

In 2013, an unknown third party informed the accused of violations of the Farm Animal Welfare Regulation [Tierschutz-Nutztierhaltungsverordnung] in a pig breeding facility.[212] Motivated by their compassion for animals, and knowing that the authorities would disregard a report without evidence, the animal activists entered the premises at night in June 2013.[213] They wore protective clothing and took other sanitary measures to protect the health of the pigs.[214] In the facility, they observed a number of violations of the Farm Animal Welfare Regulation, which they documented on film.[215] At that time, 62,000 animals were kept on the premises, and it was impossible for the activists to document all violations in just one night.[216] They returned on another night under observance of the same safety measures.[217]

A few month later, in November 2013, the defendants filed a criminal report with the Public Prosecutor's Office in Magdeburg.[218] They also informed the public, the state's Ministry of Agriculture and Environment, and another regional authority ['Landesverwaltungsamt'].[219] As a consequence, the regional authority conducted an unannounced check of the facility, which revealed several breaches of the applicable animal welfare law.[220] To give just a few examples, crates were of insufficient width,[221] cracks in the floor were too wide,[222] and some areas of the facility were

210 Ibid.
211 Ibid.
212 Ibid.
213 Ibid.
214 Ibid.
215 Ibid.
216 Ibid.
217 Ibid.
218 Ibid.
219 Ibid.
220 Ibid.
221 Violation of § 24 (2) Farm Animal Welfare Regulation [TierSchNutztV].
222 Violation of § 22 (3) Farm Animal Welfare Regulation [TierSchNutztV].

overcrowded and equipped with an insufficient number of troughs.[223] An expert described some of these conditions as causing 'significant suffering' ['erhebliches Leiden'] in the sense of § 17 No. 2 lit. b of the Animal Protection Act.[224] In the investigations that followed, it turned out that the county's veterinary inspection office had already been aware of the conditions and had not taken action.[225]

8.2.1.2 Applicable Law

The Naumburg Regional Court's decision, as well as the decisions of the lower Courts, revolved around § 123 of the Criminal Code (trespass), and possible justifications for the commission of trespass pursuant to § 32 of the Criminal Code (self-defense/defense of others), and § 34 of the Criminal Code (necessity).

8.2.1.3 Reasoning of the Courts

The Magdeburg District Court tentatively assessed the question of whether animals, like humans, are 'another' in the sense of § 32 of the Criminal Code (self-defense/defense of others).[226] The Naumburg Regional Court upheld the decision of the lower Courts to acquit the accused, despite a noteworthy shift in the reasoning, denying their justification pursuant to § 32 of the Criminal Code but relying on § 34 of the Criminal Code (necessity) instead. This Section discusses both decisions as well as the criticism of them, in order to contrast their varying approaches to the relevant legal questions of the case.

223 Violation of § 29 (2) and (3) Farm Animal Welfare Regulation [TierSchNutztV], respectively.

224 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2064).

225 Ibid.

226 LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018 (173).

8.2.1.3.1 Defense of Others Justification

§ 32 (2) of the Criminal Code defines self-defense/defense of others as 'any defensive action that is necessary to avert an imminent unlawful attack on oneself or another.' Thus, the first essential question the Courts answered was whether animals could be considered 'another' in the sense that provision. The Magdeburg District Court answered this in the positive.[227] In addition, the Magdeburg Court endorsed a view according to which § 1 of the Animal Protection Act also protected human feelings towards animals, which could then also trigger § 32 of the Criminal Code.[228] The first approach is remarkable in its essence, as it implicitly recognizes animals as holders of individual rights. However, the Magdeburg District Court did not provide a comprehensive reasoning for this approach, it referred only to the animal protection state objective enshrined in Article 20a of the Basic Law, and § 1 of the Animal Protection Act.

The Naumburg Regional Court did not apply § 32 of the Criminal Code (self-defense/defense of others). The Court argued that the measures taken by the activists were unlikely to terminate the threat to the animal's wellbeing: considering the short lifespan of animals in the factory farm system, they would be dead by the time law enforcement could take action based on the criminal report.[229] This reasoning is curious as the institutionalization of animal suffering in factory farms, and the resulting short lifespan, becomes the obstacle to improving the living conditions of animals.

8.2.1.3.2 Necessity Justification

The Magdeburg Court and the Naumburg Court both considered the acts of trespass to be justified pursuant to § 34 of the Criminal Code. The main legal question the Courts had to answer in applying this provision was whether the wellbeing of animals is 'another legal interest' in the sense of § 34 of the Criminal Code. Again, the Magdeburg Court answered this question in the positive. It recognized the 'right of the animals to a keeping according to the requirements of the Animal Protection Act and the

227 Ibid.
228 Ibid.
229 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2066).

Farm Animal Protection Regulation' ['das Recht der Tiere auf eine Haltung nach den Vorgaben des Tierschutzgesetzes und der Tierschutz-Nutztierhaltungsverordnung'],[230] and defined this right as a legal interest sufficient to trigger § 34 of the Criminal Code.[231] The Naumburg Court also applied § 34 of the Criminal Code but based that decision on a different reasoning: the Court considered animal welfare to be a 'legal interest of society as a whole' ['Rechtsgut der Allgemeinheit'].[232]

Furthermore, both Courts agreed that the violation of applicable animal welfare laws constituted an imminent danger, albeit, as the Naumburg Regional Court pointed out, one that persisted over a longer period of time ['Dauergefahr'].[233] They also agreed that this danger called for immediate action, and that documenting the conditions was the least intrusive remedy available.[234]

A final point worth mentioning is the Naumburg Regional Court's response to the Public Prosecutor's submission stating that § 34 of the Criminal Code was not applicable in the case at hand, since the owner of the animal facility did not consent to the intervention of the activists.[235] In pointing out that the consent of the animal owner was irrelevant, the Court drew a powerful comparison to a dog about to suffocate in an overheated car as a result of the owner refusing to open the car.[236] If the reasoning of the Public Prosecutor was applied consistently, it would not be justified to destroy the window of the car in order to save the dog.[237]

230 Quote from the context of § 34 of the Criminal Code, but also applicable to § 32 of the Criminal Code, LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018 (173).

231 LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018 (173).

232 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065).

233 LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018 (174); OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065).

234 Ibid.

235 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065).

236 Ibid.

237 Ibid.

8.2.2 Normative Reconstruction

The Naumburg Regional Court decision has received widespread attention, both in the public and in academic discourse. In particular, Hans-Peter Vierhaus and Julian Arnold deliver a legal analysis supporting the finding of the Naumburg Court in stating that animal welfare can trigger § 34 of the Criminal Code.[238] They show that, under certain narrowly defined circumstances – most notably the unlawful omission of actions by the responsible authorities, the law allows citizens to protect the legal interests of society as a whole, including the wellbeing of animals.[239]

8.2.2.1 A Blueprint for Civil Disobedience?

In discussing the Heilbronn case above, I noted that the activists' conduct in this case did not qualify as civil disobedience due to the use of violence. In the Naumburg case, the threshold of civil disobedience may also not be met. For the purpose of the normative reconstruction this is hardly relevant as exploring the arguments of the Courts through the lens of civil disobedience does not require drawing conclusions as to whether acts in question actually constitute civil obedience. Nevertheless, asking whether civil disobedience was present in the case at hand may illuminate some further challenges to civil disobedience in the context of animal law.

First, it is up for debate whether the activists in this case fulfilled the requirement of publicity.[240] After all, months passed before the activists filed a criminal report. However, the Courts found that the long timespan between filming and reporting was necessary for the activist to process the material and to draft the criminal report.

Second, civil disobedience could be precluded because the activists did not communicate disagreement with a certain law. If anything, they communicated disagreement with the lacking enforcement of existing animal protection law. But the notion of civil disobedience is not limited to com-

238 Vierhaus/ Arnold 2019.

239 Ibid.

240 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065); LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018 (173). This point is of vital importance, as it stands in square contrast to so-called 'rapid reporting' statutes in the United States, which will be discussed in Chapter 10.

municating disagreement with law, it can also be invoked to communicate disagreement with a certain policy, like that of the enforcement gap in animal protection law.

With regard to farmed animals, there exists a significant enforcement gap in Germany.[241] Not only did responsible authorities on the ground fail to take action like in the case at hand, but they fail to do so systematically as illustrated by, for example, legal scholar Jens Bülte.[242] A recent example is the legislator's approach to sow stalls ['Kastenhaltung von Schweinen']. In 2016 the Federal Administrative Court found that, in the common form of sow stalls, sows are not kept in accordance with § 24 (4) No. 2 of the Farm Animal Protection Regulation, which provides that sows must be kept in a manner that allows them to stand, lay down, and stretch their limbs at any time.[243] In 2020, the legislator finally passed a bill addressing this issue and phasing out the long term keeping of sows in sow stalls.[244] However, for some of the required changes the bill allows for transition periods of up to 15 years;[245] disregarding that – as the Federal Administrative Court held – existing industry practices with regard to sow stalls are not permissible under the Farm Animal Protection Regulation. In a nutshell, the legislator is hesitant to take measures against common practices in the industry, despite Courts finding them to be already in violation of existing law.[246] Considering the systemic nature of the underlying conditions, there is a strong argument that the non-enforcement in this case is a policy choice, rather than a mere oversight, and thus a potential target for civil disobedience.

As a rule, legal remedies should be available for enforcement related action. If enforcement policies are unlawful, remedies can be sought, most commonly in administrative Courts. In such a case, there would be little room for civil disobedience. However, animal law is exceptional in this

241 See Bülte, Jens, Zur faktischen Straflosigkeit institutionalisierter Agrarkriminalität, GA 165:1 (2018), 35–56.

242 Ibid.

243 BVerwG [Federal Administrative Court] 8 November 2016, 3 B 11/16, NJW 404, 2017.

244 Decision of the Federal Council [Bundesrat], Siebte Verordnung zur Änderung der Tierschutz-Nutztierhaltungsverordnung, 3 July 2020, Drucksache 302/20, Grunddrucksache 587/19, 11, available at: https://www.bundesrat.de/SharedDocs/drucksachen/2020/0301-0400/302-20(B).pdf?__blob=publicationFile&v=1 (last accessed 23 February 2022).

245 Ibid.

246 See also Bülte 2018, 45 on the example of laying hens.

regard. Not only do animals lack legal standing, but it is also difficult for humans to take legal actions regarding enforcement gaps in animal law. The Naumburg Court took the authorities' failure to follow up on criminal reports without evidence seriously.[247] However, this failure of law enforcement is not a stand-alone issue. What is more important is the lack of legal mechanisms in place to address the enforcement gap in administrative Courts. On a federal level, as well as in many states in Germany, animal protection associations do not have the right to sue in these matters ['Verbandsklagerecht']. Consequently, and as the Court emphasized, activists filing complaints, or otherwise calling upon the authorities, are unlikely to be successful.[248]

All in all, the status of enforcement-related action as civil disobedience remains ambivalent. Those who target the enforcement gap of animal law, rather than animal law as such, indicate a higher fidelity to the legal order. This, combined with the systemic enforcement gap in animal law, militates against excluding enforcement related action from the notion of civil disobedience. What remains is a puzzle of academic interest: while activists target the policy of non-enforcement, they also play by the rules of this policy by providing authorities with unmistakable evidence of unlawful conditions before they can be expected to act. Activists who create footage to prompt law enforcement to act are doing precisely what the policy requires.

With this in mind, the next Section will explain and evaluate the decisions of both the Magdeburg District Court and the Naumburg Regional through the lens of civil disobedience.

8.2.2.2 Magdeburg District Court and the Extended Liberal Approach

The Magdeburg District Court's reasoning can serve as an example of an 'extended liberal' approach to civil disobedience. It shows how extended liberal approaches, which require considering animals as rights-bearers, can be reflected in legal reasoning.

In considering the acts of trespass justified pursuant to both § 32 of the Criminal Code (self-defense/defense of others), and § 34 of the Criminal

247 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065).

248 Ibid.

Code (necessity), the Court primarily based both its justifications on the rights of animals. Not only did it consider animals, like humans, to be 'another' in the sense of § 32 of the Criminal Code, but it also considered the 'right of the animals to a keeping according to the requirements of the Animal Protection Act and the Farm Animal Welfare Regulation'[249] to be a legal interest sufficient to trigger § 34 of the Criminal Code.[250] This implies – as critics of the decision have noted – that animals have legal rights.[251]

The Court appears to have in mind animal rights that are derived from animal welfare law. Saskia Stucki proposes referring to this notion of animal rights as 'animal welfare rights' or 'simple' rights.'[252] These 'animal welfare rights' do not correspond to the common understanding of rights as being strong protections of moral animal rights.[253] Nevertheless, the Magdeburg Court centers the individual animal's, rather than society's, interests. This approach – albeit likely unintentionally – relates to what I have above characterized as an extension of the liberal conception of civil disobedience. Although it limits the consideration of animal wellbeing to the level of protection that is granted by the law, it looks at this protection as existing for the good of the individual animal.

The Magdeburg District Court was criticized for this decision not only in the literature,[254] but implicitly also by the higher Court. The Magdeburg Court's decision can be perceived as more radical than the higher Court's decision as it considered animals to be 'another' in the sense of § 32 of the Criminal Code.[255] However, from the perspective of democratic theory, the Magdeburg Court's approach is more modest than that of the higher Court. In the decision of the Magdeburg Court, the interest that triggers the justification is an *individual interest*, albeit one of animals. Elevating an interest of society as a whole to an interest triggering § 34 of the Criminal Code arguably has a higher potential of endangering the state's monopoly

249 Quote from the context of § 34 Criminal Code, but also applicable to § 32 Criminal Code, LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018 (173).
250 LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018 (173).
251 Scheuerl, Walter/ Glock, Stefan, Hausfriedensbruch in Ställen wird nicht durch Tierschutzziele gerechtfertigt, NStZ (2018), 448–451, 449.
252 Stucki 2020, 551.
253 Ibid.
254 Scheuerl/ Glock 2018, 449.
255 Ibid.

on the use of force. This threat to the state's monopoly on the use of force is the central point of criticism against both decisions.[256]

What is lacking is a more thorough reasoning is for the Court to find that animals are 'another' in the sense of § 32 of the Criminal Code. In that way, the decision too replicates problems that I identified in Chapter 7 with regard to the extended liberal approaches. That is, they are in need of a normative basis. If defense of others is to serve as a justification for trespass to create footage from animal facilities, this point needs to be clarified.

8.2.2.3 Naumburg Regional Court and the Democratic Approaches

The Naumburg Regional Court considered animal protection to be a legal interest of society as a whole, expressed in the state objective enshrined in Article 20a of the Basic Law, and thus sufficient to trigger § 34 of the Criminal Code (necessity).[257] Saskia Stucki argues that the decision can be considered an instance of 'judicial courage' in defense of 'green' civil disobedience.[258]

Unlike the lower Court, the Naumburg Regional Court did not base its justification on individual interests, but on interests of society as a whole. Unlike in the case before the Heilbronn District Court, the case at hand does not raise questions regarding legitimacy, neither of the law nor of activism, as the conditions in the pigsty were found by the Court to be unlawful. In other words, the conditions clearly contradicted the law, which is the result of democratic procedures. Therefore, the arguments advanced by proponents of democratic approaches to civil disobedience can lend support to the reasoning of the Naumburg Court.

From the perspective of democratic theory and civil disobedience, the Naumburg decision is further reaching than that of the lower Court: the Naumburg Court considered animal welfare as an interest of society sufficient to trigger the necessity justification. However, the Court did not rely

256 Ibid., 450 f.

257 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065).

258 Stucki, Saskia, In Defence of Green Civil Disobedience: Judicial Courage in the Face of Climate Crisis and State Inaction, Verfassungsblog, 30 October 2020, available at: https://verfassungsblog.de/in-defence-of-green-civil-disobedience/ (last accessed 23 February 2022).

on the interest of individuals. Against this backdrop, it cannot be supported by the liberal approaches.

An essential step in the application of the necessity justification of § 34 of the Criminal Code is the balancing of interests. In the case at hand, the Court emphasized that those in charge of the animal facility were in breach of animal protection law, and thus they were responsible for the danger to animal welfare.[259] Those responsible for a danger to a protected legal interest have to accept limitations of their own rights to a greater extent than others.[260] Now turning to democratic disobedience, one could say that, rather than the activists, those responsible for the facility had deemed themselves higher authorities than the democratic legislator by breaching the law.

The footage was primarily meant to serve as evidence in a criminal report, because the primary goal of the activists was not reform but enforcement. The enforcement of these standards is, in this case, the enforcement of a democratic minimal consensus regarding animal protection. As opposed to arguing that the majority endorses higher animal protection standards than the law delivers, or that they would but for deliberative inertia,[261] the finding that existing law was violated does not require a questioning of the democratic legitimacy of animal protection law.

The necessity justification, which is legally the most convincing, hinged on animal welfare as legally protected interest of society as a whole.[262] If animal welfare law is considered as democratic minimum consensus on animal welfare, this line of argument can find support in democratic approaches to civil disobedience.

8.3 Conclusion

This Chapter analyzed and normatively reconstructed recent decisions of German Courts relating to trespass to create footage through the lens of civil disobedience. It employed civil disobedience, and the arguments made by

259 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2066).
260 Ibid.
261 Smith 2013.
262 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018.

proponents of liberal and democratic approaches, to explain and evaluate legal reasoning.

The Heilbronn District Court decision denying the possibility of letting animal activists go unpunished can be criticized for engaging with democracy superficially. In short, the Court argued that trespass is but a means by which the minority can impose their political aim on the majority, who considers intensive animal farming acceptable and legal.[263] The deliberative account points out what is problematic about this reasoning: the democratic decisions on animal issues may be impacted by deliberative inertia and hegemonic discourses.[264] Courts should not conclude that practices in animal industries are legal and enjoy democratic legitimacy, just because they commonly exist.

The reasoning of the Magdeburg District Court, letting activists go unpunished, faces other challenges. The Court employed a defense of others justification, which finds support in extended liberal approaches to civil disobedience, as it implies that animals are 'others' in the sense of the Criminal Code; they are bearers of animal welfare rights.[265] Unfortunately, the Court did not further substantiate this ambitious argument.

Finally, the Naumburg Regional Court's reasoning in this case highlights the legal potential of enforcement related civil disobedience.[266] The Court's necessity justification, which is legally convincing, hinged on animal welfare as legally protected interest of society as a whole.[267] If animal welfare law is considered as democratic minimum consensus on animal welfare, this line of argument can find support in democratic approaches to civil disobedience. The downside of this argument is that it rests on conditions in a facility being considered illegal.

Importantly, the above decisions do not necessarily contradict each other, as the favorable decisions hinged upon the illegality of the conditions found in the facility and the reluctance of the authorities to enforce the law.

A remarkable level of legal uncertainty remains for activists. Due to the multiple layers of animal law, from the abstract commitment of Article 20a

263 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 126).

264 Smith 2013.

265 LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018.

266 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018.

267 Ibid.

of the Basic Law, to the concrete Farm Animal Protection Regulation and its enforcement, the legality of conditions found in factory farming is not a clear-cut criterion. Again, activists' rights depend on animal law: only if the conditions to be revealed through footage are considered unlawful, a case can be made for activists' behavior being legally justified as necessity. Against this backdrop, the legality of the creation of undercover footage deserves further attention. The next Chapter will discuss which other options exist to allow animal activists who trespass to create footage go unpunished. In so doing, the Chapter draws on existing literature and jurisprudence on civil disobedience.

9. Civil Disobedience and the Law

Chapter 7 showed that trespass to create undercover footage can be discussed under the headline of civil disobedience, and that it can be morally justified as such, though dependent on which theory one subscribes to, as well as on empirical factors. Further, Chapter 8 analyzed and normatively reconstructed recent decisions of German Courts, offering a more in-depth analysis of the Courts' arguments. Considering the nascent state of the jurisprudence on civil disobedience in the context of animal activists, and the probability that similar cases will arise in the future, it is worth taking a closer look at other legal resources which may allow animal activists who create undercover footage go unpunished.

Although civil disobedience is not a legal concept, it sometimes features in legal scholarship where the key questions arise: is there a legal justification, excuse, or other legal construct that allows one to let acts of civil disobedience go unpunished; and can some of the criteria for a moral justification of civil disobedience be advanced in a criminal trial? To answer these questions, this Chapter draws on the works of legal scholars in the 1980s in the context of the 'peace movement' in Germany,[268] and on the literature from political theory discussed in Chapter 7. It further draws

268 Dreier, Ralf, Widerstandsrecht und ziviler Ungehorsam im Rechtsstaat, in: Peter Glotz (ed.), Ziviler Ungehorsam im Rechtsstaat (Frankfurt a.M.: Suhrkamp, 1983), 54–75; Roxin, Claus, Strafrechtliche Bemerkungen zum zivilen Ungehorsam, in: Peter-Alexis Albrecht, Alexander Ehlers, Franziska Lamott, Christian Pfeiffer, Hans-Dieter Schwind, Michael Walter (eds.), Festschrift für Horst Schüler-Springorum zum 65. Geburtstag (Köln: Carl Heymanns Verlag 1993), 441–457; Schüler-Springorum, Horst, Strafrechtliche Aspekte zivilen Ungehorsams, in: Peter Glotz (ed.), Ziviler Ungehorsam im Rechtsstaat (Frankfurt a.M.: Suhrkamp, 1983), 76–98. On

comparisons with other jurisdictions, in particular the United States, which makes the insights of this Chapter interesting beyond the German context.

The Chapter begins by explaining how German Courts have approached civil disobedience in the past. It illustrates that the highest German Courts have always employed a democratic, rather than Rawlsian, notion of civil disobedience and that they have never considered it to impact legal decisions. Next, Section 2 critically examines the view as held by the FCC and voiced in the literature according to which civil disobedience can never be legally justified. Following these general questions, Section 3 turns to the topic of animal activists who trespass to create footage, specifically. Civil disobedience cannot erase trespass on the level of the elements of the offence. However, as shown in Section 4, legal defenses from constitutional law (in particular freedom of expression, Article 5 (1) of the Basic Law) and from criminal law (in particular necessity § 34 of the Criminal Code) have been discussed in the context of civil disobedience. In Sections 5 to 8, I consider other avenues allowing for animal activists to go unpunished: from excuses over an error of law (§ 17 of the Criminal Code); to prosecutorial discretion and sentencing. Finally, Section 9 discusses how the matter of civil disobedience has been approached by Courts in the United States, and whether invoking civil disobedience could be beneficial for animal activists in that context.

Chapter 9 concludes that justifications from constitutional law, in particular the right to freedom of expression enshrined in Article 5 (1) of the Basic Law and animal welfare enshrined in Article 20a of the Basic Law, may resonate with those voices in the literature who emphasize the communicative value of civil disobedience. However, justifications from constitutional law are doctrinally unsound. Justifications from the criminal code, in particular necessity in § 34 of the Criminal Code, provide more promise. It further zeroes in on the error of law argument, given the ongoing debate in legal scholarship that is causing uncertainty for activists. Finally, Chapter 9 suggest that matters of civil disobedience can be considered both at the sentencing stage, and when exercising prosecutorial discretion, given that the rationales for punishment are rarely applicable in cases of civil disobedience which results in there being a minimal public interest in prosecution. Some further considerations will be discussed regarding the

civil disobedience and German criminal law generally see Kröpil, Karl, Ziviler Ungehorsam und strafrechtliches Unrecht, JR (2011), 283–287.

differences between the United States and the German legal system on the matter of civil disobedience.

9.1 Civil Disobedience and German Courts

Most of the literature and jurisprudence on civil disobedience and German law focuses on coercion (§ 240 of the Criminal Code) and is closely linked to the specific societal and political climate at the time of the peace movement.[269] This is important to bear in mind for the following Sections.

In 1986, the FCC – citing to a publication by the protestant church[270] – stated:

> 'Civil or civic disobedience is – as opposed to the right to resistance against an unjust system[271] – understood as a resistance of the citizen vis-à-vis singular weighty governmental decisions, in order to face a decision considered as fatal and ethically illegitimate through demonstrative, symbolic protest up to spectacular rule-breaking.'
>
> ['Unter zivilem oder bürgerlichem Ungehorsam wird – im Unterschied zum Widerstandsrecht gegenüber einem Unrechtssystem – ein Widerstehen des Bürgers gegenüber einzelnen gewichtigen staatlichen Entscheidungen verstanden, um einer für verhängnisvoll und ethisch illegitim gehaltenen Entscheidung durch demonstrativen, zeichenhaften Protest bis zu aufsehenerregenden Regelverletzungen zu begegnen.'][272]

269 For a comprehensive account on civil disobedience, the peace movement, and the law see Quint, Peter E., Civil Disobedience and the German Courts (New York: Routledge-Cavendish 2008).

270 Kirchenamt im Auftrag der evangelischen Kirche, Evangelische Kirche und freiheitliche Demokratie: Der Staat und das Grundgesetz als Angebot und Aufgabe, Denkschrift der Evangelischen Kirche in Deutschland (Gütersloh: Verlagshaus Mohn 1990, 4th edition), available at: https://www.ekd.de/ekd_de/ds_doc/evangelische_kirche_und_freiheitliche_demokratie_1985.pdf (last accessed 23 February 2022).

271 The 'right to resist against an unjust system' ['Widerstandsrecht'] is a constitutional right protected in Article 20 (4) Basic Law, which reads: 'All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available.'

272 BVerfG [Federal Constitutional Court] 11 November 1986, 1 BvR 713/83, NJW 43, 1987 (47).

Referring to literature and research in the field of peace and conflict studies, the Court stated that acts of civil disobedience must be triggered by issues of significant public importance, especially the prevention of grave dangers to the public.[273] Civil disobedience must be aimed at impacting the process of public formation of opinion, it must be without risk to others, peaceful, public, and proportionate in time and place.[274]

This definition differs from that of Rawls' account of civil disobedience in significant ways.[275] There exist some similarities in the descriptive elements of civil disobedience, but few regarding the purpose of the acts in question. The FCC case concerned a sitting blockade as part of a protest against military armament – a constellation that cannot be morally justifiable under Rawls' account of civil disobedience because it did not concern issues of justice in the strictly Rawlsian sense. The FCC did not consider the acts legally justified either, but it did so for reasons other than a failure to meet Rawls' criteria for justification. Tentatively, to use the terms introduced in Chapter 7, one could say that German Courts have always had a democratic rather than liberal conception of civil disobedience. Civil disobedience was discussed with reference to cases that did not match the Rawlsian definition. Daniel Markovits shows that, similar to the protests against the Vietnam War in the United States, protests against nuclear missiles in Europe can hardly be subsumed under the liberal approach.[276] Markovits supports this claim *inter alia* by saying that the political decisions involved were within the democratic authority of governments.[277] German Courts did not consider civil disobedience to be legally permissible in the context of the 'peace movement;' yet this is the context in which their jurisprudence developed.

The Courts have two paramount objections to the use of civil disobedience leading to impunity. One is that, in a democracy, a minority cannot be allowed to force the majority to change their politics. We saw this argument applied in the reasoning of the Heilbronn District Court in one of the cases analyzed in detail in Chapter 8. The second paramount objection is that it is part of the definition of civil disobedience that those employing it

273 Ibid.
274 Ibid.
275 For the contrary opinion see Kröpil 2011. Kröpil considers the definition similar to that of Rawls.
276 Markovits, Daniel, Democratic Disobedience, The Yale Law Journal 114 (2005), 1897–1952, 1901.
277 Markovits 2005, 1901.

must accept punishment. This argument will be addressed in the following Section.

9.2 Legally Justified Civil Disobedience – A Contradiction?

At first glance, the search for a legal defense of civil disobedience seems doomed to failure. After all, civil disobedience by definition requires a breach of the law. Hannah Arendt argued that, although civil disobedience is compatible with the 'spirit' of the (in this case US) law, it could not be legally justified since the law cannot justify its own violation, even if the purpose of the violation is to prevent the violation of another law.[278]

Similar views are echoed in legal reasoning. The German Federal Constitutional Court – followed by other Courts and authors – pointed towards this tension when it stated that civil disobedience cannot be invoked as a justification, for it requires by its definition a symbolic breach of the law and an acceptance of the risk of punishment.[279]

However, the inherent tension within the notion of legally justified civil disobedience should not be overstated for it can be resolved. There is a distinction to be made between the prevalent interpretation of the law by the Courts, and the law as such. An activist may believe she has breached the law, in the sense that she knows that the Courts will consider her action illegal. At the same time, she may also have a different interpretation of the law in question, thus maintaining that that if the law was applied correctly, her actions would be justified. In the words of Ronald Dworkin: '[s]ometimes, even after a contrary Supreme Court decision, an individual may still reasonably believe that the law is on his side; such cases are rare, but they are most likely in disputes over constitutional law when civil disobedience is involved.'[280]

278 Arendt, Hannah, Crises of the Republic (New York: Harcourt Brace Jovanovich, Inc. 1969), 99.

279 BVerfG [Federal Constitutional Court] 11 November 1986, 1 BvR 713/83, NJW 43, 1987 (48). See also LG Dortmund [Dortmund District Court], 14 October 1997, Ns 70 Js 90/96, NStZ-RR 139, 1998 (141); Perron, Walter, § 34 Rechtfertigender Notstand, in: Adolf Schönke, Horst Schröder (founders), Albin Eser (ed.), Strafgesetzbuch (München: C.H. Beck Verlag 30st ed., 2019), para. 41a.

280 Dworkin, Ronald, On Not Prosecuting Civil Disobedience, The New York Review of Books, 6 July 1968, available at: https://erikafontanez.files.wordpress.com/2015/08/on-not-prosecuting-civil-disobedience-b-dworkin-the-new-york-review-of-books.pdf (last accessed 23 February 2022).

In the cases of animal activists in Germany, such a disagreement could revolve around Article 20a of the Basic Law (the state objective on animal protection) and to what extent that provision can trigger justifications such as that of § 34 of the Criminal Code (necessity). More precisely, there is disagreement about the weight that *is* and *should* be assigned to animal protection in the balancing of interests that provisions such as § 34 of the Criminal Code require.

Unlike the FCC,[281] some legal scholars draw a distinction between the breach of a legal norm and illegality in the context of civil disobedience. Ralf Dreier argued that it would be misguided to define civil disobedience by saying that it is not justifiable.[282] Instead of requiring illegality as defining feature of civil disobedience, he required meeting 'the elements of a prohibitive norm' ['Tatbestant einer Verbotsnorm'].[283] Similarly, Claus Roxin – against the backdrop of the FCC decision mentioned above – emphasized the possibility of an act of civil disobedience fulfilling elements of a crime and still being justified.[284] This distinction, mentioned by Dreier and Roxin, is well established in criminal law theory. As such, civil disobedience and legal defenses are not mutually exclusive, at least not by their definition.

9.3 Civil Disobedience and the Elements of a Crime

Civil disobedience has no impact on the question of whether the elements of a crime ['Tatbestand'] are fulfilled in a given case. The only cases in which this could be discussed are those where the criminal law provision in question provides room for interpretation in accordance with the constitution ['verfassungskonforme Auslegung']. For example, when determining whether a given statement is 'insulting' in the sense of § 185 of the Criminal Code (insult ['Beleidigung']), Article 5 (1) of the Basic Law (freedom of expression) demands that the statement in question be interpreted in a way favorable to the accused.[285]

281 BVerfG [Federal Constitutional Court] 11 November 1986, 1 BvR 713/83, NJW 43, 1987 (48).
282 Dreier 1983, 61.
283 Ibid., 60.
284 Roxin 1993, 443.
285 BVerfG [Federal Constitutional Court] 10 October 1995, 1 BvR 1476/91, 1 BvR 1980/91, 1 BvR 102/92, 1 BvR 221/92, NJW 3303, 1995 (3309). The statement at issue in this case was 'soldiers are murderers' ['Soldaten sind Mörder'].

The elements of § 123 of the Criminal Code (trespass ['Hausfriedensbruch']) do not leave room for reinterpretation in light of Article 5 of the Basic Law, or any other constitutional norms. As such, only one, rarely supported, view could provide resources for a different conclusion: according to Rolf Dietrich Herzberg, there is an element of insult ['Beleidigungsmoment'] inherent in trespass.[286] This resonates with a view in political theory according to which significance attaches to civility and respect.[287] However, the view according to which insult matters to trespass is far removed from the text of § 123 of the Criminal Code and consequently not relevant for a legal assessment.

9.4 Legal Justifications for Civil Disobedience

Civil disobedience can influence legal decisions to a larger extent on the level of justification. In civil law systems, a justification describes a defense that renders an act lawful, although the elements of an offense were fulfilled. It is distinct from so-called excuses, which submit that someone committed an unlawful act but did so without guilt. According to Dreier, one of the few proponents of a legal justification for civil disobedience, there exist three options of justification in cases of civil disobedience: the first one arising from a non-codified right to resistance, the second arising from fundamental rights, and the third arising from justifications in the criminal and in the civil code.[288] This distinction can help to categorize justifications which will be done in the following, though possible justifications and matters that are not relevant to animal activism will not be covered.[289]

286 Herzberg, Rolf Dietrich, *Eigenhändige Delikte*, ZStW 82:4 (1970), 896–947, 928.

287 For civility and respect in possible cases of civil disobedience for animals see Milligan, Tony, Civil Disobedience: Protest, Justification, and the Law (New York: Bloomsbury Academic 2013), 17 f.

288 Dreier 1983, 59.

289 There is a comprehensive body of literature on cases of civil disobedience and the 'unlawfulness' requirement in coercion, § 240 Criminal Code. See e.g., Kröpil 2011, 285 f. with further references. This issue is specific to German criminal law and not relevant to animal activism and trespass.

9.4.1 Justifications from Constitutional Law

The first constitutional law provision that should be mentioned is Article 20 (4) of the Basic Law, which codifies the right to resistance ['Widerstandsrecht']. It confers 'the right to resist any person seeking to abolish this constitutional order if no other remedy is available.' There is a broad consensus that the right to resistance enshrined in Article 20 (4) of the Basic Law does not extend to civil disobedience.[290] Legal scholar Christoph Degenhart sums up the distinction: the right to resistance is aimed at maintaining the existing legal order, it is 'legality-related,' while those acting in civil disobedience want legitimacy to trump legality.[291] The right to resistance can be triggered only if the constitutional order itself is under threat, it cannot be triggered by decisions made from within that order.[292] Therefore, the right to resistance enshrined in Article 20 (4) of the Basic Law cannot be advanced for a legal justification of trespassing to create footage from animal facilities. Further, Article 20 (4) of the Basic Law is final; it does not leave room for a non-positivized right to resistance arising from natural law theories or an extralegal state of emergency, for example.[293]

Dreier focused on the second option listed above, namely a justification of civil disobedience grounded in basic rights. He argued that the realm protected by basic rights ['Schutzbereich'] must be broadly construed so that acts of civil disobedience are not *per se* excluded from constitutional protection as afforded by the right to freedom of expression, enshrined in Article 5 (1) of the Basic Law.[294] Dreier argued that other norms, such as

290 Degenhart, Christoph, Staatsrecht I. Staatsorganisationsrecht (Heidelberg: C.F. Müller 35th ed., 2019), 174 f.; Kröpil 2011, 284 f. Before the codification of the right to resistance in Article 20 (4) Basic Law the distinction between the right to resistance and civil disobedience was not as clear in German legal theory. For an informative account of the evolution from one right to resistance to differentiation see Dreier 1983, 54.

291 Degenhart 2019, 174 f.

292 Ibid.

293 Grzeszick, Bernd, Art. 20 (4) GG Widerstandsrecht, in: Theodor Maunz, Günter Dürig (founders), Roman Herzog, Rupert Scholz, Matthias Herdegen, Hans H. Klein (eds.), Grundgesetz (München: C.H. Beck, last updated November 2021), para. 24.

294 Dreier 1983, 64 f. Similar considerations have been made regarding the right to freedom of conscience in Germany enshrined in Article 4 (1) of the Basic Law. For a critical discussion of freedom of conscience and criminal law (in the Swiss context) see Mona, Martino, Der Gewissenstäter im Strafrecht, in: Peter Kunz, Jonas Weber, Andreas Lienhard, Iole Fargnoli, Jolanta Kren Jostkiewicz (eds.), Berner Gedanken

those in the Criminal Code, may limit freedom of expression, but must be interpreted in a way that takes freedom of expression into account: the value protected by the basic right to freedom of expression and the value protected by the other norm in question must be balanced against each other on a case-by-case basis.[295] The prohibitive norm in question must step back behind the right to freedom of expression if the act of civil disobedience is committed in protest against a 'grave wrong' ['schwerwiegendes Unrecht'] and if it the act is proportional.[296] Dreier stated that, besides basic rights, state objectives provide the relevant yardstick of what can be considered as a grave wrong.[297] This is interesting, given that, although it was not at the time, the protection of animals has been enshrined in Article 20a of the Basic Law as a state objective since 2000. As such, Dreier's account would hold promise for animal activists.

However, Dreier's account cannot be reconciled with established jurisprudence. Article 5 (2) of the Basic Law provides that freedom of expression and the freedom of the press are limited by 'provisions of general laws,' such as § 123 of the Criminal Code (trespass).[298] Further, the FCJ held in the so-called Walraff-Springer decision, that the unlawful creation of footage is not covered by Article 5 (1) of the Basic Law, freedom of expression.[299] This rules out a justification of trespass arising from constitutional law.

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zum Recht. Festgabe der Rechtswissenschaftlichen Fakultät der Universität Bern für den Schweizerischen Juristentag 2014 (Bern: Schultheiss Verlag 2014), 471–495, 484 f.

295 Dreier 1983, 65.

296 Ibid., 66 f.

297 Ibid., 67.

298 For a detailed explanation of which las qualify as 'general laws' in English see Payandeh, Mehradad, The Limits of Freedom of Expression in the Wunsiedel Decision of the German Federal Constitutional Court, German Law Journal 11:8 (2010), 929–942, 932 f. The prohibition of trespass in § 123 of the Criminal Code undisputedly qualifies as 'general law,' for it does not prohibit a specific opinion. It protects the right to authority over one's premises ['Hausrecht'] which is worth protecting as such. According to the 'Wechselwirkungslehre' laws that limit the right to freedom of expression have to be interpreted in a way that again takes into account the basic right. But as explained above, § 123 of the Criminal Code does not leave room for an alternative interpretation more accommodating for freedom of expression.

299 BVerfG [Federal Constitutional Court] 25 January 1984, 1 BvR 272/81, NJW 1741, 1984 (1743).

9.4.2 Justifications from Criminal Law

Contemporary cases on animal and environmental civil disobedience in Germany and Switzerland hinge on criminal law justifications. In Chapter 8, I introduced 'defense of others' in the context of the Magdeburg decision.[300] Defense of others, enshrined in § 32 of the Criminal Code in German law, is not suitable to address civil disobedience. It describes situations in which a defensive action is necessary to avert a present unlawful attack on oneself or another. Against this backdrop, it is surprising that the Court applied it to the creation of undercover footage. Even if animals were considered 'another' in the sense of § 32 of the Criminal Code, the lengthy process from the creation of footage to law enforcement action, or even to social and legal change, is not capable of averting danger from individual animals presently in danger. If anything, the rationale behind this justification could be advanced for so-called animal rescue, rather than the case of undercover footage. In the following, I will examine the necessity justification in more detail, before briefly introducing the justification of safeguarding legitimate interests.

9.4.2.1 Necessity

Necessity is enshrined in § 34 of the Criminal Code in German law and was considered to justify trespassing in an animal facility in the Naumburg decision, as discussed in Chapter 8.[301] Further, the necessity justification will likely become salient in the discourse currently emerging around climate protest.

In the 1980s – during the prime of civil disobedience in European legal theory – Horst Schüler-Springorum advocated for a justification based on necessity using § 34 of the Criminal Code.[302] The provision reads:

> 'A person who, faced with an imminent danger to life, limb, freedom, honour, property or another legal interest which cannot otherwise be

300 LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018.

301 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018; LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018.

302 Schüler-Springorum 1983, 87 f.

> averted, commits an act to avert the danger from himself or another, does not act unlawfully, if, upon weighing the conflicting interests, in particular the affected legal interests and the degree of the danger facing them, the protected interest substantially outweighs the one interfered with. This shall apply only if and to the extent that the act committed is an adequate means to avert the danger.'[303]

§ 34 of the Criminal Code requires, first and foremost, a state of necessity, which is granted if a legal interest is in imminent danger and cannot be averted otherwise. The list of legal interests provided in § 34 of the Criminal Code is not exhaustive. The protected interests – according to the majority of authors – include legal interests of society as a whole.[304] Since its codification as a state objective in Article 20a of the Basic Law, there remains no doubt that animal protection qualifies as an interest of society as a whole.[305]

A legal interest is in a state of danger if, given the risk factors that are under consideration, there is a certain degree of likelihood that harm will occur.[306] In the case of animal activists and undercover footage, the requirement of imminent danger can be fulfilled if violations of animal welfare law are documented. However, this argument is more difficult to make when animals are kept and treated in accordance with the minimum standards set by animal welfare law. In this case one could only argue that the provisions of animal welfare law are so low that they, in effect, still pose a danger to animal welfare in the sense of Article 20a of the Basic Law.

The danger posed is imminent if it can imminently turn into harm.[307] This is also considered to be the case if a continuous danger ['Dauergefahr']

303 For the official translations see Federal Ministry of Justice, German Criminal Code, available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0141 (last accessed 30 October 2020).

304 Erb, Volker, § 34 Rechtfertigender Notstand, in: Volker Erb, Jürgen Schäfer (eds.), Münchner Kommentar zum Strafgesetzbuch (München: C.H. Beck Verlag 4th ed., 2020), para. 72; Perron 2019, para. 10 (for the inclusion of legal interests of society as a whole but against the inclusion of acts of civil disobedience); OLG München [Munich Regional Court] 10 March 1972, 2 Ws 40/72, NJW 2275, 1972 (2276) public health [Volksgesundheit]; OLG Düsseldorf [Düsseldorf Regional Court] 25 October 2005, VIII ZR 392/03, NJW 243, 2006 (244) safety of air traffic.

305 Explicitly including animal protection as legal interest of society as a whole: Erb 2020, para. 72.

306 Ibid., para. 74.

307 Perron 2019, para. 17.

exists.[308] Consequently, the state of necessity is not precluded by the fact that animals have been kept in inhumane conditions for a long period of time.

§ 34 of the Criminal Code further requires that there exists no possibility to avert the danger by a means other than the action taken; that the protected interest weights heavier than the violated one; and that the act committed is an adequate means to avert the danger. The first criterion is understood to require that the act committed was apt to avert the danger and that, out of the alternatives available, it was the most moderate or least intrusive one.[309] It can be argued that trespassing and creating footage is a less intrusive alternative compared to so-called animal rescue, for instance. However, the question remains whether the creation and dissemination of footage is apt to avert the danger of a breach of animal welfare. It can certainly not avert the danger for the individual animals filmed. However, acts of civil disobedience, including those for animal protection, can perhaps limit the danger in the future, or at least prevent an increase of danger.[310] Schüler-Springorum pointed out that this kind of answer to the legal criterion of averting danger mirrors the idea that civil disobedience does not seek to rescue or change, but rather to raise awareness and contribute to the formation of opinion.[311] Yet, even if one accepts this line of reasoning, the question is whether the same could not be achieved by other means, in particular, legal protest without undercover footage, or reporting to law enforcement. This constitutes an important objection to applying the necessity justification to animal activists.

The next step in the assessment of the objective elements of § 34 of the Criminal Code requires a balancing of the interests at stake. The balancing of interests is at the heart of necessity. Interests must be balanced both in the abstract and in the concrete, whereby the priorities set by the democratic legislator in the legal order are decisive for the abstract level of balancing.[312] Here, the state objective on animal protection in Article 20a of the Basic Law may be invoked in favor of the activists. However, it remains a legal interest of society as a whole, which speaks in favor of

308 Ibid.
309 Erb 2020, para. 104.
310 This point was also raised by Schüler-Springorum in the context of the peace movement. Schüler-Springorum 1983, 88 f.
311 Ibid., 89.
312 Erb 2020, paras. 130 f.

leaving its enforcement to state authorities.[313] On a more positive note, it may be considered that trespassing on the premises of animal facility operators interferes not with the rights of, as Schüler-Springorum put it, 'innocent third parties,' but rather the rights of those who are responsible for the animal welfare conditions in the facility.[314]

In a nutshell, one can say that a justification of civil disobedience pursuant to § 34 of the Criminal Code depends on several considerations which must be addressed on a case-by-case basis. As animal protection is a state objective, and as most authors accept that legal interests of society as a whole can trigger § 34 of the Criminal Code, there is no doctrinal obstacle preventing the application of § 34 of the Criminal Code to animal activism *per se*. In practice, however, the requirement that less intrusive and legal means have been exhausted, poses a challenge to the necessity justification for animal activists. It can always be argued that further lawful protest would have been feasible. Climate activists face similar challenges. Both would benefit from a broader application of the necessity defense with adjusted standards regarding the legal measures that must be exhausted before resorting to civil disobedience.

9.4.2.2 Safeguarding Legitimate Interests

The rationale behind safeguarding legitimate interests may be better equipped to accommodating for civil disobedience than is the justifications discussed above. This justification is frequently mentioned in the context of civil disobedience, although in Germany, it has so far played a subsidiary role.[315] The provision on safeguarding legitimate interests, § 193 of the Criminal Code, was employed in analogous application as a legal justification by the District Court in a case regarding pacifist activists who entered a deserted United States military area in Germany, spraying buildings with pacifist messages, planting trees and flowers and letting sheep roam around

313 Ibid., para. 182.

314 In the contect of the peace movement, Schüler-Springorum noted that acts of civil disobedience were often committed at the cost of others, who were not the addressees of the acts.

315 For a more detailed analysis of § 193 Criminal Code in the context of civil disobedience see Lenckner, Theodor, Strafrecht und ziviler Ungehorsam – OLG Stuttgart, NStZ 1987, 121, JuS (1988), 349–355, 353; LG Dortmund [Dortmund District Court], 14 October 1997, Ns 70 Js 90/96, NStZ-RR 139, 1998 (141).

the grounds.[316] In 1987 the Stuttgart Regional Court overturned the favorable decision of the District Court.[317] The position of § 193 of the Criminal Code as placed behind defamatory offences enshrined in §§ 185 et seq. of the Criminal Code, makes clear that the legislator intended the justification to be available for those offences only, which is the prevalent view in jurisprudence and legal literature.[318]

Only few authors argue that § 193 of the Criminal Code could be applied to other offences relating to § 193 of the Criminal Code in that they create cultural value, for example.[319] Against this backdrop, one could argue that § 193 of the Criminal Code is triggered in the case of undercover footage which falls in the vicinity of protected speech, and thus the rationale behind § 193 of the Criminal Code. Having said this, these considerations are vague and thus are insufficient to overcome the clear decision of the legislator to apply the provision only to defamatory offences.[320]

In other jurisdictions, safeguarding legitimate interests may be more relevant in the context of civil disobedience. In Switzerland, safeguarding legitimate interests is accepted as not-positivized justification both by Courts and by legal scholars. It requires that an act is both a necessary and adequate means for the achievement of a legitimate aim, and that the interests which the offender seeks to protect outweigh the other interests at stake.[321] This justification is currently discussed in the cases of whistleblowers,[322] which is comparable to that of undercover footage in terms of the aspects

316 For more details on this unpublished decision see Lenckner, 1988.

317 OLG Stuttgart [Stuttgart Regional Court] 5 December 1986, 1 Ss 551/86, NStZ 121, 1987 (122).

318 See e.g., Regge, Phillip/ Pegel, Christian, § 193 Wahrnehmung berechtigter Interessen, in: Volker Erb, Jürgen Schäfer (eds.), Münchner Kommentar zum Strafgesetzbuch (München: C.H. Beck Verlag, 4th ed., 2021), para. 8, with further references.

319 Noll, Peter, Tatbestand und Rechtswidrigkeit: Die Wertabwägung als Prinzip der Rechtfertigung, ZStW 77:1 (1965), 1–36, 32.

320 Regge/Pegel 2021, para. 8.

321 Schweizerisches Bundesgericht [Swiss Federal Court] 1 May 2001 – 6S.49/2000/bue, available at: https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F01-05-2001-6S-49-2000&lang=de&type=show_document&zoom=YES& (last accessed 23 February 2022). ['Der übergesetzliche Rechtfertigungsgrund der Wahrung berechtigter Interessen setzt voraus, dass die Tat ein zur Erreichung des berechtigten Ziels notwendiges und angemessenes Mittel ist, sie insoweit den einzig möglichen Weg darstellt und offenkundig weniger schwer wiegt als die Interessen, welche der Täter zu wahren sucht.']

322 Konopatsch, Cathrine, Whistleblowing in der Schweiz – Mitteilung an die Presse als ultima ratio, NZWiSt (2012), 217–223.

relevant for this justification. However, again, problems arise regarding subsidiarity: a defense based on safeguarding legitimate interests is likely to fail if defendants have not exhausted legal means of protest.

9.4.2.3 Summary: Legal Justifications for Civil Disobedience

The justifications discussed above all suffer similar shortcomings. As a rule, defendants will likely fail to show that they exhausted all legal means to protest and achieve their goals. However, animal activists may constitute the exception to this rule. The enforcement gap in animal law is well known, and as discussed in Chapter 8, other means, such as the of filing criminal reports without footage, tend to be unsuccessful. As such, a necessity justification provides promise for animal activists in some cases.

And yet, despite the possibility of applying necessity in some cases, it remains questionable whether necessity is the best suited mechanism to expressing and addressing the challenge that animal activists pose to the legal order. At least one compelling argument against necessity, which has received little attention in the relevant literature so far, deserves consideration here. Consider that a legal justification of trespass precludes those in charge of an animal facility from exercising self-defense against the trespassers.[323] A self-defense justification of § 32 of the Criminal Code requires the existence of an 'unlawful attack.' If trespassing on animal facilities is justified, it is no longer an unlawful act in the sense of § 32 of the Criminal Code. As a result, those in charge of an animal facility would be very limited in what they can do to counter trespass. This shows that the necessity justification would have far-reaching logical consequences, which would be rather extraordinary and should at least give reason to carefully consider other, less far-reaching, concepts to let activists go unpunished.

323 Scheuerl, Walter/ Glock, Stefan, Hausfriedensbruch in Ställen wird nicht durch Tierschutzziele gerechtfertigt, NStZ (2018), 448–451, 451. The authors claim that even a livestock farmer who perfect animal husbandry practices would have to tolerate trespass is not in line with the Naumburg decision. Roxin mentioned the issue in the context of sitting-blockades, noting that if they were to be considered justified the police would be legally prevented from removing the protesters from the site: Roxin 1993, 448.

9.5 Legal Excuses for Civil Disobedience

The above problem, arising from necessity and other justifications, would not arise if trespass to create footage was excused rather than justified. Excuses are concerned with the guilt of the offender, not with the lawfulness of her behavior. This corresponds to the defining features of civil disobedience, in particular the conscientious motivation of those acting in civil disobedience. However, there is no excuse in German law that could be applied to trespass on animal facilities. Due to its title, the necessity as excuse under § 35 of the Criminal Code [Entschuldigender Notstand] may come to mind.[324] The rationale behind necessity as excuse resonates with civil disobedience, as it aims to mitigate conflicts between the law and the understandable reasons for acting against it.[325] An activist engaging in civil disobedience may experience a conflict between the law, and the integrity of her conscience, which is a legal interest protected by the constitution.[326] In the Swiss context, Martino Mona shows that necessity as excuse, enshrined in Article 18 of the Swiss Criminal Code, could operate as a resource for offenders motivated by their conscience, including animal activists.[327]

The same does not apply in Germany. § 35 of the German Criminal Code requires one to act to avert danger to life, limb, or liberty from oneself, a relative, or another person to whom one is close. In other words, the provision is limited both as regards the protected legal interests, and the possible beneficiaries. The finding of the Magdeburg Court that animals are 'another' in the sense of § 32 of the Criminal Code[328] does not make a difference in this regard, since § 35 of the Criminal Code additionally requires a close personal relationship between the individual who is acting and the individual under threat.

Another legal excuse, this one not written in the Criminal Code, is that of extralegal necessity [übergesetzlicher entschuldigender Notstand]. However, the validity of this excuse is highly disputed, and it has only

324 Alternatively, 'Entschuldigender Notstand' may be translated as 'necessety as defense.' However, in the present context this translation could be ambiguous.
325 Mona 2014, 491.
326 Ibid., 491 f.
327 Ibid., 492.
328 Or to return to the philosophical literature on civil disobedience, the extended liberal view according to which animals are included in the scope of justice.

been discussed in scenarios similar to the so-called trolley problem where human lives are at stake.[329]

9.6 Legally Relevant Errors: Putative State of Necessity and Error of Law

Neither is the so-called 'Erlaubnistatbestandsirrtum,' a category of putative state of necessity, applicable. It describes a scenario in which an accused imagines objective circumstances which would – if they were existent – justify her actions.[330] For this consideration to be applicable, activists would have to be under the mistaken impression that a specific animal abuse is occurring within a facility. Importantly, the error would have to be on the *factual*, not on the *legal* level: they would have to be mistaken about a *specific* violation of animal welfare law taking place in the facility – not about whether a certain practice constitutes a violation of animal welfare law.[331] In practice, especially under the standards set by the Naumburg Court,[332] such a scenario is hardly conceivable. Activists will rarely have a precise image of the conditions inside an animal facility in mind before entering. The Naumburg Court made clear that general suspicion of breaches of animal welfare laws are not sufficient. Therefore, further elaborations on the legal assessment of this scenario is superfluous.

Instead, the error of law, enshrined in § 17 of the Criminal Code [Verbotsirrtum] may become relevant. § 17 reads:

> 'If, at the time of the commission of the offence, the offender lacks the awareness of acting unlawfully, then the offender is deemed to have

329 Müssig, Bernd, § 35 Entschuldigender Notstand, in: Volker Erb, Jürgen Schäfer (eds.), Münchner Kommentar zum Strafgesetzbuch (München: C.H. Beck Verlag 4th ed., 2020), para. 89 f.

330 A common text-book example could go as follows: during a carnival street festival, someone wearing a bank robber costume enters a bank. A bank employee sees the person in bank robber costume and mistakenly believes that she intends to rob the bank. Considering herself and the bank under threat, the bank employee hurts the alleged bank robber.

331 If they erred about the legality of existing conditions, this would again be in the realm of a mistake of law in the sense of § 17 of the Criminal Code, although it would ultimately likely not qualify as such, because in order to meet the criteria of the Naumburg Court, they would also need a denial of the authorities to provide remedies.

332 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018.

acted without guilt if the mistake was unavoidable. If the mistake was avoidable, the penalty may be mitigated pursuant to section 49 (1).'

In the case of trespass to create footage, the applicability of § 17 sentence 1 of the Criminal Code is conceivably applicable in the case where an activist mistakenly believes in the broad applicability of an existing legal justification, such as necessity (§ 34 of the Criminal Code), or the a justifying nature of Article 5 (1) of the Basic Law, and its applicability in the case of investigative journalism.[333] Put simply, the offender would have to believe that trespass on animal facilities was *legally* justified. This scenario is conceivable, especially since the Naumburg decision discussed in Chapter 7: if activists overestimate the extent to which the necessity justification applies, and, for example, assume that they do not need evidence of a breach of animal welfare law, but that a suspicion of any unethical condition would suffice, then § 17 sentence 1 of the Criminal Code would be relevant.

For an unavoidable error of law, there is a high threshold to pass: an error of law is avoidable if, when using her best judgement, the accused would have had to develop doubts regarding the legality of her plan, and thus reconsider it or obtain legal advice.[334] Considering the sensational way in which the Naumburg decision was communicated, lay persons could be led to believe that trespassing on animal facilities to create footage was commonly justified.[335] On the other hand, anyone plotting to follow suit and enter animal facilities to create footage could be expected to inform herself further about the legal situation. As a result, she would become aware of the more nuanced nature of the Naumburg decision, and develop, at the very least, doubts that would warrant seeking legal advice. Only if a lawyer then gave a wrong legal opinion, saying that trespassing to create footage was always, or in an imagined scenario different from that of the

333 This form of the mistake of law is commonly called 'indirect mistake of law' ['indirekter Verborsirrtum'].

334 Joecks, Wolfgang/ Kulhanek, Tobias, § 17 Verbotsirrtum, in: Volker Erb, Jürgen Schäfer (eds.), Münchner Kommentar zum Strafgesetzbuch (München: C.H. Beck Verlag, 4th ed 2020), para. 39.

335 See e.g., Redaktion Fleischwirtschaft.de, Stalleindinglinge bleiben straffrei, 2 März 2018, available at: https://www.fleischwirtschaft.de/wirtschaft/nachrichten/OLG-bestaetigt-Urteil-Stalleindringlinge-bleiben-straffrei-36276?crefresh=1 (last accessed 23 February 2022); Deter, Alfons, Freibrief für Stalleindringlinge? Für Rukwied ein Skandal, top agrar online 23 February 2018, available at: https://www.topagrar.com/management-und-politik/news/freibrief-fuer-stalleinbrueche-fuer-rukwied-ein-skandal-9545680.html (last accessed 23 February 2022).

Naumburg decision, justified, would an excuse pursuant to § 17 sentence 1 of the Criminal Code be possible.

Interestingly, despite the high threshold for an unavoidable error of law, § 17 of the Criminal Code has already been discussed in animal cruelty cases: in the past, Courts and public prosecutors have allowed those in charge of animals, and who disobeyed animal protection law, to go unpunished based on this norm.[336] As the legality of given conditions in an animal facility also is a decisive criterion in deciding whether trespass to create footage was justified, § 17 of the Criminal Code could become relevant in this context.

In conclusion, the current legal and political frameworks governing trespass on animal facilities to create footage, resonate with an error of law in two ways. First, the legal situation is to some extent unclear. What is required for a legal situation to be so unclear as to meet the threshold for § 17 of the Criminal Code is not entirely established.[337] Second, the question of whether the error can be avoided is based on the best judgement of the accused, which encompasses a moral judgement.[338] This causes problems in situations where the relationship between moral beliefs – not only of the individual but also of society as a whole – and the law is a central part of the dispute, as it tends to be in cases against animal activists. In a field where industry practice diverges from the law, legislation is not always able to keep up with jurisprudence, and both the law and practice diverge from what society would ideally prefer. That is, there is room for an error of law. As a rule, the error of law will be avoidable, but this leaves room for a mitigation of the sentence via § 17 sentence 2 of the Criminal Code pursuant to § 49 (1) of the Criminal Code.

336 OLG Frankfurt [Frankfurt Regional Court] 12 April 1979, 4 Ws 22/79, NJW 409, 1980 (the Court discontinued criminal proceedings *inter alia* due to the accused not having been aware that it was illegal to keep chickens in cages); LG Darmstadt [Darmstadt District Court], 4 October 1983, 5 Kls 4 Js 29471/81, NStZ 173, 1984 (174) (in favor of an unavoidable error of law), overturned by OLG Frankfurt [Frankfurt Regional Court], 14 September 1984, 5 Ws 2/84, NStZ 130, 1985; OLG Celle [Celle Regional Court] 10 January 1993, 1 Ss 297/92, NStZ 291, 1993 (292) (regarding enforcement issues and error of law).

337 Joecks/ Kulhanek 2020, para. 42.

338 Sternberg-Lieben, Detlef/ Schuster, Frank Peter, § 17 Verbotsirrtum, in: Adolf Schönke, Horst Schröder (founders), Albin Eser (ed.), Strafgesetzbuch (München: C.H. Beck, 30th ed. 2019), para. 41a.

9.7 Prosecutorial Discretion

Prosecutorial discretion can be employed as a mechanism to allow acts of civil disobedience to go unpunished.[339] In some cases, the question of whether non-prosecution is in the interest of those acting in civil disobedience may arise. Activists may, in fact, consider the courtroom another venue to advocate for change, thus speaking against the choice not to prosecute.

In German criminal law, § 153 of the Criminal Procedure Code allows for non-prosecution of petty offences ['Absehen von der Verfolgung bei Geringfügigkeit'] by the public prosecutor's office if: the offence at stake is a misdemeanor ['Vergehen']; the guilt of the offender is to be considered minor; and there is no public interest in prosecution. Further, § 153a of the Criminal Procedure Code (non-prosecution subject to the imposition of conditions and directions ['Absehen von der Verfolgung unter Auflagen und Weisungen']) allows for the non-prosecution of misdemeanors subject to the imposition of conditions and directions under similar conditions. In both cases, the approval of the Court is needed. Commentators critical of legal defenses for civil disobedience submit that §§ 153 and 153a of the Criminal Procedure Code may be applied in some cases.[340] It is important to note that §§ 153 and 153a of the Criminal Procedure Code do not depend on the approval of the joint plaintiff [Nebenkläger] who would typically be the person in charge of the animal facility that the activists entered.

Empirical research on the exercise of prosecutorial discretion in cases against animal activists is lacking. However, prosecutorial discretion played an important and interesting role in a recent high-profile case against the well-known animal activist Matt Johnson in the United States.[341] Johnson engaged in both the creation of undercover footage and animal rescue.[342] In January 2022, shortly before a hearing on possible news media recording

339 This possibility (albeit regarding a version of § 153 Criminal Procedure Code that has undergone changes) was also mentioned by Schüler-Springorum. Schüler-Springorum 1983, 91.

340 Perron 2019, para. 41a.

341 Bolotnikova, Martina, Animal activist was in Court on criminal charges. Why was the case suddenly dismissed?, The Guardian, 23 January 2022, available at: https://www.theguardian.com/world/2022/jan/22/an-animal-rights-activist-was-in-court-on-criminal-charges-why-was-the-case-suddenly-dismissed (last accessed 23 February 2023).

342 Ibid.

of the trial, the prosecutor filed to dismiss the charges against Johnson 'in the interest of justice.'[343] Johnson was opposed to this, and his legal team even filed an objection to the dismissal.[344] Their goal was to have what they called a 'right to recuse' being heard in Court.[345] This case shows that exercising prosecutorial discretion is not always in the interest of activists claiming civil disobedience, in particular when their goal is to effect legal change.

9.8 Sentencing

Another promising way of recognizing civil disobedience in criminal law is at the sentencing stage.[346] Political theorists and legal scholars alike have pointed out that the rationales behind punishment are rarely applicable in the case of civil disobedience.[347] One of the most prominent legal scholars who advocated this view was Claus Roxin. He argued that special prevention ['Spezialprävention'] does not speak in favor of punishment in cases of civil disobedience.[348] Quite the opposite, special prevention requires one to not treat the offenders in question as criminals, for otherwise there is a danger of radicalizing them.[349] Similarly, general prevention ['Generalprävention'] is better achieved by letting those acting in civil disobedience go unpunished, because this is how peace in society can be reestablished.[350] In the case of civil disobedience, this can be achieved by not punishing the offenders: those engaging in civil disobedience are not against the legal

343 Ibid.
344 Ibid.
345 Ibid.
346 Schüler-Springorum 1983, 92 f.; Mona 2014, 482. While civil disobedience and conscious objection are to be separated conceptually, they have much in common when it comes to the issue of punishment. Arguments made in the context of the 'Gewissenstäter' are informative for civil disobedience, too.
347 See e.g., Bennett, Christopher/ Brownlee, Kimberley, Punishment and Civil Disobedience, in: William E. Scheuerman (ed.), The Cambridge Companion to Civil Disobedience (Cambridge: Cambridge University Press 2021), 280–309, 283 with further references.
348 Roxin 1993, 455. More specifically, Roxin suggested addressing civil disobedience with an exclusion of criminal responsibility ['Ausschluss der strafrechtlichen Verantwortlichkeit'] due to the minimal level of guilt of someone acting in civil disobedience.
349 Roxin 1993, 455 f.
350 Ibid.

system as such, and therefore they should not be excluded from society. Roxin explicitly listed 'ecology' motivated civil disobedience as a possible category for acts to which the approach should be applied.[351]

Few authors dispute the appropriateness of considering civil disobedience at the sentencing stage. However, as Kent Greenawalt pointed out, it may be difficult to judge in which cases leniency is appropriate.[352] He voiced concern about arbitrariness of decisions: whether a certain motivation is worthy of impacting the enforcement of criminal law involves fundamental issues that should be in the hands of a democratic legislator, rather than individual officials.[353] However, in the absence of legislation to that end, the criteria of civil disobedience developed in Chapter 7 may be of help to identify the cases where leniency is appropriate. In Germany, § 46 (2) of the Criminal Code does leaves room for many considerations that are relevant in the context of civil disobedience, in particular, the offender's motives and objectives.

In other jurisdictions, similar provisions exist. In Switzerland, for example, the possibility of privileging civil disobedience at the sentencing stage results from Article 48 (a) (2) of the Criminal Code, according to which '[t]he Court shall reduce the sentence if [...] the offender acted [...] while in serious distress' and Article 48 (c) of the Criminal Code, which requires leniency if 'the offender acted in a state of extreme emotion that was excusable in the circumstances or while under serious psychological stress.'[354] It remains to be seen whether Courts make use of this possibility. Like with prosecutorial discretion, it is unclear to what extent the criteria of civil disobedience are considered at the sentencing stage in practice when cases against animal activists arise.

9.9 Civil Disobedience and the Law in the United States

Many of the above considerations are informative for other jurisdictions, including common law jurisdictions, particularly insofar as prosecutorial

351 Ibid., 456.
352 Greenawalt, Kent, Conflicts of Law and Morality (New York: Oxford University Press 1987), 273.
353 Ibid., 276.
354 Mona 2014, 482; For a translation see Fedlex, the publication platform for federal law, Swiss Criminal Code, available at: https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en (10 April 2021).

discretion and sentencing are concerned. Given the comparative angle of this dissertation, a brief outlook to possible legal approaches to civil disobedience cases in the United States is warranted.

Some features of the common law system may render it a more favorable forum for the discussion of civil disobedience. Above I referred to Kent Greenawalt, who wrote from a common law perspective.[355] Greenawalt pointed out that many legal terms and standards in the common law system, such as, for example, what is 'reasonable,' call for 'moral evaluation' of a given situation, albeit restraint by prior legal decisions.[356] The space that is left for 'moral evaluation' in common law may thus be broader, and therefore more conducive to considerations of civil disobedience than in civil law systems. Further, writing from a German perspective, the ethicist Konrad Ott hypothesized that the jury system could be beneficial for those who invoke civil disobedience[357] as ordinary citizens may be more receptive of these arguments than are judges who have received legal training.[358] In fact, in the United Kingdom, a jury recently acquitted climate activists who damaged property. The jury acquitted the defendants, although they had been instructed by the judge that there was no legal defense available for the defendants.[359]

In the United States, activists successfully invoked the necessity defense in cases of civil disobedience in the past.[360] In *City of Chicago v. Streeter* in 1985 protesters successfully invoked the necessity defense as codified in Illinois law.[361] The protesters were charged with trespass after they entered, and refused to leave, the South African Consulate in Chicago in protest

355 Greenawalt 1987.

356 Ibid., 282.

357 Ott, Konrad, Is Civil Disobedience Appropriate in the Case of Climate Policies?, Ethics in Science and Environmental Politics 11 (2011), 23–26, 26.

358 Ibid.

359 PA Media, Jury acquits Extinction Rebellion protesters despite 'no defense in law', The Guardian, 23 April 2021, available at: https://www.theguardian.com/environment/2021/apr/23/jury-acquits-extinction-rebellion-protesters-despite-no-defence-in-law (last accessed 9 January 2022).

360 For examples and further references see Fallon, Abigail J., Break the Law to Make the Law: The Necessity Defense in Environmental Civil Disobedience Cases and Its Human Rights Implications, Journal of Environmental Law and Litigation 33 (2018), 375–394, 381; Rausch, Joseph, The Necessity Defense and Climate Change: Climate Change Litigant's Guide, Columbia Journal of Environmental Law 44 (2019), 553–602, 570 f.

361 *City of Chicago v. Streeter*, No. 85–108644 (Cook Cty., Ill., May 1985). The decision is not publicly available online. For a summary of the relevant aspects see Wride,

of apartheid.[362] The defense brought in witnesses, including high ranking politicians, who testified to the injustice of apartheid. The protesters were acquitted by the jury.[363] Civil disobedience was also successful in *People v. Gray* in 1991.[364] The defendants in that case were charged with disorderly conduct for blocking Queensboro Bridge in New York when a new line on the bridge was scheduled to open for traffic. As part of the necessity defense, the defendants showed that additional air pollution constituted a harm to people living in New York.[365]

So far, at the time of writing, the necessity defense has not been successfully applied to the creation of undercover footage from animal facilities in the United States. Nevertheless, prominent activists have expressed their intention to pursue this option. In 2021, well-known animal activist Matt Johnson said that he intended to rely on a necessity defense when he was charged *inter alia* with violation of Iowa's ag-gag law. However, the charges against him were dismissed as the affected facility operator refused to testify.[366]

Nevertheless, the use of the necessity defense in the context of animal activism is currently receiving some attention in academic discourse. Legal scholar Hadar Aviram recently shed light on the applicability of the necessity defense in cases of animal rescue.[367] As noted previously, animal rescue and the creation of undercover footage give rise to different issues and thus the legal and moral assessment of these acts is not identical. For example, regarding necessity, it may make a difference that activists remove animals from facilities instantly, without counting on legal change to be brought about later. As such, the potential of transferring findings from animal rescue to the creation of undercover footage is limited.

Brent D., Political Protest and the Illinois Defense of Necessity, University of Chicago Law Review 54 (1987), 1070–1094, 1070.

362 Wride 1987, 1070.

363 Ibid.

364 *People v. Gray*, 150 Misc. 2d 852, 854 (N.Y. Crim. Ct. 1991). The decision is not available online. For a summary of the relevant aspects of the case see Rausch 2019, 570.

365 Rausch 2019, 570.

366 Foley, Ryan J., Charges dropped against activist who exposed Iowa hog death, AP News, 29 January 2021, available at: https://apnews.com/article/pandemics-iowa-city-iowa-trials-subpoenas-50332a3905f4913d108865d27ee5d21d (last accessed 23 February 2022).

367 Aviram, Hadar, Standing Trial for Lily: How Open Rescue Activists Mobilize Their Criminal Prosecutions for Animal Liberation, in: James Gacek, Richard Jochelson (eds.), Green Criminology and the Law (Cham: Palgrave Macmillan 2022), 85–106.

Instead, looking at cases where the necessity defense was invoked in the context of climate or environmental civil disobedience may better shed light on the potential success of this defense in cases arising from trespass to create footage. Doing so quickly highlights problems for those favorable perspectives of civil disobedience arising within common law systems as were noted above. For example, Ott underestimates the role of the judge in a jury trial. A judge may bar the defense team from presenting a necessity defense to a jury.[368] In *United States v. DeChristopher*, the Federal District Court granted the government's pre-trial motion, barring the defendant DeChristopher from using a necessity defense.[369] DeChristopher had protested against the Bureau of Land Management's auctioning of land for drilling by placing bids on land.[370] A jury sentenced DeChristopher to a prison sentence.[371] Against this backdrop, scholars argue that, even being permitted to present a necessity defense to a jury can be considered a success.[372]

Further, judges determine which evidence can be presented to the jury. This point is crucial in cases against animal activists who create undercover footage: showing the created footage to a jury may convince them that there was in fact a state of necessity. In a recent case against another prominent animal activist, Wayne Hsiung, the prosecution excluded evidence regarding the suffering of a goat rescued by Hsiung.[373] For removing the sick goat from the facility, Hsiung was convicted of larceny and breaking and entering.[374]

Additionally, if a judge allows one to present a necessity defense to a jury, the judge may still instruct the jury not to acquit the defendant on

368 Rausch 2019, 568.

369 *United States v. DeChristopher*, 695 F.3d 1082, 1088 (10th Cir. 2012). The case is not available online. For a summary see Climate Change Litigation Database, available at: http://climatecasechart.com/climate-change-litigation/case/united-states-v-dechristopher/ (last accessed 5 January 2022). See also Fallon 2018, 381.

370 Fallon 2018, 381.

371 Ibid., 384.

372 Ibid., 568.

373 Lennard, Natasha, Prosecutors Silence Evidence of Cruel Factory Farm Practices in Animal Rights Cases, The Intercept, 30 January 2022, available at: https://theintercept.com/2022/01/30/animal-rights-activists-dxe-trial-evidence/ (last accessed 3 February 2022).

374 Ibid.

this ground. As such, a jury may convict defendants despite expressing admiration for their cause.[375]

A central point in such cases is the assertion that other legal means are available to the protesters. This is a major obstacle to employing the necessity defense in cases of civil disobedience. In 1991, the Ninth Circuit made clear that it does not allow a necessity defense in cases of indirect civil disobedience where the law violated is not the law that is the one being opposed.[376] This poses a severe obstacle to the application of the necessity defense to climate protest.[377] With regard to the creation of undercover footage, the distinction between direct and indirect civil disobedience is ambivalent. Ironically, it implies better chances for the necessity defense in jurisdictions with ag-gag laws on the books. Ag-gag laws protect the property and privacy (or as activists would likely argue, secrecy) of animal facilities. When animal activists create footage in ag-gag jurisdictions, they break the law they oppose. In other jurisdictions, they break 'neutral' trespass laws, which are not the laws they oppose. Rather, they oppose low animal welfare standards or their lacking enforcement. Thus, creating footage in ag-gag jurisdictions can be framed as direct civil disobedience, for which a necessity justification is not ruled out. In other jurisdictions, the creation of footage can only be conceived of as indirect civil disobedience, for which a necessity justification is not available according to the Ninth Circuit.

9.10 Conclusion

Civil disobedience will likely continue to occupy, not only political theorists, but also legal scholars in the future. Besides animal activists, those who cross the boundaries of the law to protest climate change will press Courts to address matters of civil disobedience. This Chapter illustrated that even the most fundamental question of whether civil disobedience

375 Fallon 2018, 381; Wong, Julia Carrie, Activists lose criminal case on climate change defense – but judge praises effort, The Guardian 15 January 2016, available at: https://www.theguardian.com/environment/2016/jan/15/delta-5-seattle-washington-climate-change-court-defense (last accessed 5 January 2021).

376 *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1991). The case is not publicly available online. See also Fallon 2018, 379; Rausch 2019, 567.

377 Nosek, Grace, The Climate Necessity Defense: Protecting Public Participation in the U.S. Climate Policy Debate in a World of Shrinking Options, Environmental Law 49 (2019), 249–261, 259.

can ever be legally justified is not settled. It argued that the understanding of civil disobedience employed by German Courts is incomplete, to say the least: the argument that civil disobedience *per definition* cannot go unpunished cannot be supported.

Subsequently, this Chapter highlighted possible avenues that those defending civil disobedience on behalf of animals in Court may be able to pursue. Views according to which constitutional law, and in particular the right to freedom of expression (Article 5 (1) of the Basic Law), can be advanced as a justification for civil disobedience conflict with established legal doctrine, and should not be supported. What remains is the option of criminal law justifications, specifically necessity (§ 34 of the Criminal Code). Although a justification may be doctrinally possible in limited cases, it seems questionable whether a justification – declaring an offender's conduct legal rather than excused – is the appropriate answer to civil disobedience.

Instead, the error of law (§ 17 of the Criminal Code), a so far underexplored avenue, may provide some resources. It is certainly not a one-size-fits-all option, but it reflects the disagreement that exists between legal scholars and Courts on the issue, as well as the gray area between legality and legitimacy in which animal activists often operate.

In any case, civil disobedience can be considered when assessing the guilt of an offender, not in form of an excuse, but rather by recognizing the conscientiousness of the act as significant factor in determining adequate sentencing, and when exercising prosecutorial discretion. After all, even some of the voices critical of attaching significance to civil disobedience in the courtroom acknowledge that, in the cases at stake, the rationales for punishment rarely apply. As a result, there is little public interest in sentencing those offenders whose acts display the defining features of civil disobedience.

9.11 Outlook

The analysis of political theory in Chapter 7 and of the law in Chapter 8 taken together with the Chapter at hand allow to draw some conclusions about the relationship between law and civil disobedience. Political theorists advance different reasons for why civil disobedience is admirable in some cases. For example, defenders of the democratic approaches point out that civil disobedience can remedy democratic deficits, others point to the

urgency of certain causes, to the value of communication, or to the absence of reasons to punish those individuals who act under a sincere moral conviction. As we have seen, the potential of the law, in particular German criminal law, to accommodate these arguments, is limited. The law has its own normative structure that does consider factors such as communicative value, democracy, and necessity, but it does so on its own terms. That is to say that the communicative value and the importance and urgency of certain causes may be relevant to, for instance, a legal assessment determining whether freedom of expression is concerned, or whether a necessity justification is triggered. But the legal assessment remains independent of whether the acts in question are to be considered civil disobedience.

And yet, even given this, civil disobedience does matter to a legal study as it allows one to evaluate individual decisions, as well as the law's capacity to respond to the social and environmental challenges of our time. It helps to place concrete decisions and legal changes in the broader context of social and political change. In some cases, the moral pedigree of civil disobedience may even reach further and succeed at winning acquittals for activists even where they are not legally demanded, such as in the recent Shell case in the United Kingdom.[378] Whether this development is desirable is up for debate. Rather than giving cause for celebration, these decisions should invite us to reconsider whether the law is in need of reform, enabling a jury to find that justice can be done by applying the law.

378 PA Media, Jury acquits Extinction Rebellion protesters despite 'no defense in law', The Guardian, 23 April 2021.

Part IV: Deliberative Democracy vs. Agonistic Pluralism

Jurisdictions in the United States, Canada, and Australia have enacted laws hindering the creation and dissemination of undercover footage from animal agriculture facilities. Dubbed 'ag-gag' laws, their constitutionality and compliance with the right to freedom of expression have been called into question by activists, journalists, lawmakers, and Courts. Yet, the distinctively democratic dimension of ag-gag laws has received little attention thus far. The following Chapters employ democratic theory to explain and evaluate ag-gag laws, as well as the legal and public discourse surrounding them. The focus will be on the ag-gag laws and jurisprudence arising in the United States, since this is where ag-gag originated and where Courts and legal scholars have addressed them most comprehensively (Chapter 10). However, Chapter 11 will also shed some light on recent developments in Canada and Australia. Finally, Chapter 12 compares the legal responses to undercover footage in ag-gag jurisdictions and the situation in Germany.

Writing about legal systems other than one's own comes with certain limitations and challenges. Besides the constrains posed by limited knowledge of a different legal system, there is also the constraint that the author is influenced by a particular legal culture in which she has been educated. The theoretical underpinnings and methods of this dissertation stem from a continental European civil law context. As we will see in the following, these theoretical underpinnings are less apt to explaining and evaluating legal responses to undercover footage in other jurisdictions. They reach their limits in the doctrinal aspects of legal responses to undercover footage in the United States. Legal reasoning in response to undercover footage in the United States provides fewer resources for normative reconstruction through the lens of democratic theory then did the German decisions. Thus, the normative reconstruction in the following Chapters will be less philosophically rich than in previous Chapters on Germany. However, for the dissertation at hand, this methodological constraint is simultaneously a source of knowledge. As I will explain in Chapter 12, the lack of such material highlights a paramount difference between the legal system of Germany and that of the United States, including, but not limited to, their differential legal responses to animal activism and undercover footage.

10. Ag-Gag Laws in the United States: Preempting the 'Court of Public Opinion'

10.1 Introduction

Legislation referred to as 'ag-gag' first emerged in the early 1990s in the United States.[1] Since then, it has resulted in a number of Court cases challenging the constitutionality of these laws,[2] as well as a rich body of secondary literature. Central to these sources is the question of whether ag-gag laws violate the First Amendment right to free speech. In the following, I will shift the focus to the distinctively democratic implications of ag-gag by arguing that ag-gag functions to 'preempt'[3] public discourse on animal issues. However, Court decisions applying US ag-gag laws are scarce. In the literature and news reports, the case against Amy Meyer in Utah was the first to gain significant attention.[4] Meyer was filming animals as they were led into a slaughterhouse and was prosecuted for doing so under the Utah ag-gag law.[5] While filming, Meyer was standing on public property, and thus the charges were dropped.[6] Despite the lack of cases, critics argue that the mere existence of ag-gag laws has a chilling effect on free speech, and specifically on animal activism and investigative journalism.[7]

1 For a chronological overview see e.g., Marceau, Justin F., Ag Gag Past, Present, and Future, Seattle University Law Review 38 (2015), 1317–1343.

2 For an overview of past and ongoing litigation see ALDF, Ag-Gag Laws – Full Timeline, last update 22 December 2021 available at: https://aldf.org/article/ag-gag-timeline/ (last accessed 1 February 2022).The timeline provides an important resource as it is being updated continuously and accounts for the most recent developments.

3 The notion of 'preemption' was first employed in the context of ag-gag by communication scholar Joshua Frye. Frye, Joshua, Big Ag Gags the Freedom of Expression, First Amendment Studies 48:1 (2014), 27–43, 28.

4 The case against Meyer received widespread attention. Journalist Will Potter reported on the case. Potter, Will, First Ag-Gag Prosecution: Utah Woman Filmed a Slaughterhouse from a Public Street, Green is the New Red, 29 April 2013, available at: http://www.greenisthenewred.com/blog/first-ag-gag-arrest-utah-amy-meyer/6948/ (last accessed 3 August 2021).

5 Meyer, Amy, 'Ag-gag' laws will deter reporting on animal abuse, The Washington Post, 7 June 2013, available at: https://www.washingtonpost.com/opinions/ag-gag-laws-will-deter-reporting-on-animal-abuse/2013/06/07/f93e8876-ca42-11e2-9245-773c0123c027_story.html (last accessed 3 August 2021).

6 Ibid.

7 See e.g., Landfried, Jessalee, Bound & Gagged: Potential First Amendment Challenges to "Ag-Gag" Laws, Duke Environmental Law & Policy Review 23 (2013) 377–403, 393.

It should be noted that, unlike in previous Chapters, this Chapter will put a spotlight on ag-gag legislation itself, in addition to the decisions of Courts. This makes the lack of published Court decisions applying ag-gag laws non-consequential for the following analysis. This approach is more suitable here, as it is the legislation (rather than its application in distinctive cases) that is tailored to animal activists. Thus, where ag-gag laws exist, the legislation itself, rather than the Court decisions applying it, is the central site for legal change affecting animal activists.

This Chapter will first define ag-gag laws (Section 2), then map existing categories of ag-gag laws in the United States (Section 3), and the current status of litigation and constitutional law challenges that they have given rise to (Section 4). The Chapter does not strive for a comprehensive legal-doctrinal analysis of ag-gag which would be outside the scope of this more normative and comparatively inclined dissertation. That discussion is better left to scholars situated in the United States legal system. Rather, this Chapter will rely on the works of US legal scholars and practitioners, in particular Justin Marceau and Alan K. Chen, in delineating categories of ag-gag and possible First Amendment challenges.[8]

Sections 2 to 4 provide the basis for understanding the following legal analysis and normative reconstruction of the Idaho case: the Idaho ag-gag law is the first one that has been found to be in part unconstitutional by an Appellate Court.[9] Section 5 analyzes the case, and Section 6 normatively reconstructs it while focusing on the notion of the 'court of public opinion.'[10] In so doing, the Chapter shows that neither ag-gag laws, nor jurisprudence and existing literature, sufficiently account for the democratic challenges arising from undercover footage from animal facilities. It will argue that the metaphorical 'court of public opinion' is a site for societal debate about ani-

8 Chen, Alan K./ Marceau, Justin, Developing a Taxonomy of Lies under the First Amendment, Colorado Law Review 89 (2018), 655–705; Marceau, Justin/ Chen, Alan K., Free Speech and Democracy in the Video Age, Columbia Law Review 116 (2016), 911–1062; Chen, Alan K./ Marceau, Justin, High Value Lies, Ugly Truths, and the First Amendment, Vanderbilt Law Review 69 (2015), 1435–1501; Marceau, Ag Gag Past, Present, and Future, 2015.

9 *ALDF et al. v. Lawrence G. Wasden, in his official capacity as Attorney General of Idaho*, 878 F.3d 1184 (9th Cir. 2018), Ninth Circuit Appeal Decision ('*ALDF v. Wasden*,' in the following). The decision is also publicly available: https://www.acluidaho.org/sites/default/files/field_documents/92._opinion.pdf (last accessed 4 August 2021). References to pages in the following refer to page numbers from this publicly available source.

10 Ibid., 7, 12, 13, 22, 25.

mal agriculture, yet it also comes with serious pitfalls: it indicates conflict and antagonism. The legal discourse provides few resources to temper these problems. More precisely, legal discourse in the United States does not reflect the features of deliberative democracy which were so prevalent in previous Chapters that analyzed the decisions of German Courts. Section 7 suggests that, rather than deliberative democracy, an agonistic approach can be employed to explain and evaluate the legal responses to undercover footage in ag-gag jurisdictions. It does so by relying on the works of Chantel Mouffe, who described agonism as a theory of politics that accepts existing conflicts, and does not demand consensus-oriented deliberation, but only a respect for a pluralism of ideas.[11] Thus, this Chapter will argue that ag-gag laws stipulate antagonism towards animal activists, as they are based on criminalization and thus further polarize a pre-existing conflict. As such, they stand in the way of agonistic politics.

10.2 Defining Ag-Gag

Journalist Mark Bittman is credited with having coined the term 'ag-gag' in a New York Times article in 2011.[12] The term alleges that the laws in question 'gag' potential whistleblowers, journalists, and activists in the agriculture industry. A legal term for, or definition of, ag-gag does not exist. Critics commonly describe ag-gag as 'anti-whistleblower' laws.[13] However,

11 See Laclau, Ernesto/ Mouffe, Chantal, Hegemony and Socialist Strategy. Towards a Radical Democratic Politics (London: Verso 2001); Mouffe, Chantal, The Return of the Political (London: Verso 1993); Mouffe, Chantal, The Democratic Paradox (London: Verso 2000); Mouffe, Chantal, On the Political: Thinking in Action (London: Routledge 2005).

12 Bittman, Mark, Who Protects the Animals? The New York Times, 26 April 2011, available at: https://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/ (last accessed 3 August 2021).

13 See e.g., Gibbons, Chip, Ag-Gag Across America: Corporate-backed Attacks on Activists and Whistleblowers, Center for Constitutional Rights and Defending Rights & Dissent, 2017, 4, available at: https://ccrjustice.org/sites/default/files/attach/2017/09/Ag-GagAcrossAmerica.pdf (last accessed 3 August 2021); Humane Society of the United States, Anti-Whistleblower Ag-Gag Bills Hide Factory Farming Abuses from the Public, available at: https://www.humanesociety.org/resources/anti-whistleblower-ag-gag-bills-hide-factory-farming-abuses-public (last accessed 3 August 2021). Referring to animal activists who create undercover footage as whistleblowers is also common in academic literature. See e.g., Shea, Matthew, Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-Gag

as explained in Chapter 4 on animal activism, this description does not always appear accurate for these types of cases. However, as ag-gag has emerged as the most commonly used term in the academic literature,[14] I will use it here as well.

The content of ag-gag legislation differs significantly from state to state. Only a teleological definition can express this variety. For the purpose of this dissertation, ag-gag can be defined as legislation having the primary purpose, and potential effect, of preventing animal and environmental activists from creating and disseminating undercover footage from agriculture facilities.

It is not always clear whether a piece of legislation falls under this definition or not. Particularly legislation that is currently mushrooming in Canada and Australia, analyzed in Chapter 11, might be considered a new form of ag-gag. For example, it is not clear whether laws enacted with the declared purpose of safeguarding biosecurity in fact target animal activists, and thus qualify as ag-gag laws. In these cases, the legislative history may be indicative of whether the legislation's primary purpose and potential effect is to prevent activists from creating and disseminating undercover footage.

10.3 Categorizing Ag-Gag Laws

Authors have mapped ag-gag legislation in the United States into categories[15] or waves.[16] For the purpose of this dissertation, I will focus on three categories, which also broadly align with the three waves of ag-gag outlined by legal scholar Justin Marceau.[17] Yet, it should be kept in mind that the field is dynamic and new categories may appear over time, thus,

Laws, Columbia Journal of Law and Social Problems 48:3 (2015), 337–371, 338, 340; Marceau, Ag Gag Past, Present, and Future 2015, 1335.

14 It is even employed by authors who view these laws in a more positive light: Leamons, Josh W., Eco-Terrorism: A Legal Update on the Laws Protecting Scientific Research from Extremist Activists, Journal of Biosecurity, Biosafety and Biodefense Law 6:1 (2015), 3–45, 39f.

15 See e.g., Adam, Kevin C., Shooting the messenger: A common-sense analysis of state "Ag-Gag" legislation under the First Amendment, Suffolk University Law Review 45 (2012), 1129–1176, 1131; Ladfried 2013, 380.

16 Frye 2013; Hanneken, Sarah, Principles Limiting Recovery Against Undercover Investigators in Ag-Gag States: Law, Policy and Logic, The John Marshall Law Review 50:3 (2017), 649–711, 663; Marceau, Ag Gag Past, Present, and Future, 2015, 1333 ff.

17 Marceau, Ag Gag Past, Present, and Future, 2015, 1333 ff.

the following can merely identify existing prototypes. It remains to be seen whether, in the future, other categories will be added to the list, such as laws creating civil liability.[18]

10.3.1 Prohibition of Recording

Prohibitions of recording on agricultural land were the first type of ag-gag legislation, dating back to before the term ag-gag was coined. This category of ag-gag laws hinges on conduct that was already illegal prior to their enactment.[19] They first appeared in the early 1990s, when Kansas introduced the *Farm Animal and Field Crop and Research Facility Protection Act*.[20] This act criminalized non-consensual entry and recording on an animal facility with intent to cause damage to the enterprise conducted there.[21] Scholars have voiced doubt as to whether the creation of undercover footage could be prosecuted under this law, as 'damage' can be interpreted in accordance with the Kansas law to require direct harm, rather than indirect harm through, for instance, decreasing meat consumption.[22] Most of the law (with the exception of provisions on civil remedies and on physical damage) was struck down by a Court in 2019.[23]

Montana introduced an ag-gag law in 1991.[24] The law requires intent to commit criminal defamation. From this, scholars have concluded that the dissemination of accurate information and footage would not fall within the Montana legislation.[25] North Dakota, on the other hand, passed a more extensive law in 1991 which extended criminal lability to the *attempt* to use

18 On ag-gag and civil damages see Hanneken 2017.
19 Hanneken 2017, 663; Marceau, Ag Gag Past, Present, and Future, 2015, 1333 ff.
20 The Farm Animal and Field Crop and Research Facilities Protection Act, Kansas Statutes Annotated § 47–1825 – 1830 (1990).
21 The Farm Animal and Field Crop and Research Facilities Protection Act, Kansas Statutes Annotated § 47–1825 – 1830 (1990).
22 Landfried 2013, 392; Shea 2015, 341.
23 ALDF, Court Rules Kansas Ag-Gag Law Unconstitutional, 22 January 2020, available at: https://aldf.org/article/court-rules-kansas-ag-gag-law-unconstitutional/ (last accessed 3 August 2021). The decision is not publicly available.
24 The Farm Animal and Research Facilities Protection Act, Montana Code § 81–30–103(2)(d) (1991).
25 Marceau, Ag Gag Past, Present, and Future, 2015, 1334; Landfried 2013, 392; Shea 2015, 342.

recording equipment.[26] Scholars find that the North Dakota version lacked language specifying the intent required, and could thus be applied to a broader range of cases than could the Kansas and Montana legislation.[27]

Ag-gag laws that hinge on recording undisputedly affect speech protected by the First Amendment. US Courts do not make a distinction between the creation of, and the product of, speech when it comes to its protection.[28] The creation of a recording is protected in the same way as is the product of the process.[29] This will be explored below in the legal analysis of the Idaho law, which also contained a recording provision.[30] In the Idaho case, the Courts found that the recording provision was a content-based restriction of speech and did not pass the applicable standard of strict scrutiny.[31]

10.3.2 Employment Fraud

Employment fraud provisions are associated with the second wave of ag-gag, which began in 2012.[32] Iowa enacted the first ag-gag law criminalizing 'agriculture production facility fraud,' which applied to the misrepresentation or making of a false statement when obtaining employment at an agricultural facility knowingly, and with the intent 'to commit an act not authorized by the owner.'[33] The offence of employment fraud did not replace ag-gag in the form of prohibition of recording. Idaho, for example, passed a law containing both elements. Similar bills were considered, but failed, in several other states including in Vermont, New Mexico, and Tennessee.[34]

Marceau, who covered ag-gag most comprehensively, concluded that the ag-gag legislation of 2012, and the following years, criminalizes a broader

26 Animal Research Facility Damage Act, North Dakota Century Code § 12–1–21.1 – 02 – 05 (1991).
27 Marceau, Ag Gag Past, Present, and Future, 2015, 1334; Shea 2015, 342; Adam 1159.
28 *ALDF v. Wasden*, 35 f.; see also *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010) ('*Anderson v. City of Hermosa Beach*,' in the following). The decision is publicly available: https://caselaw.findlaw.com/us-9th-circuit/1537750.html (last accessed 4 August 2021).
29 *ALDF v. Wasden* 35 f.; see also *Anderson v. City of Hermosa Beach.*
30 *ALDF v. Wasden* 34.
31 Ibid., 35.
32 Marceau, Ag Gag Past, Present, and Future 2015, 1335.
33 Agriculture Production Facility Fraud, Iowa Code § 717A.3A (1)(a)-(b) (2012).
34 Shea 2015, 345.

range of conduct than did the laws passed in the 1990s.[35] Marceau further finds that the motivation behind these laws was one of deterring harm to a farm's reputation, even if it resulted from truthful recordings. He states that '[n]othing is more anathema to the First Amendment than punishing someone for the impact of their true speech in shaping political values.'[36]

As will be explored in greater depth in the legal analysis of the Court decisions below, the constitutionality of misrepresentation provisions and employment fraud, in particular, are in dispute. In the Idaho case, the *Wasden* and *Otter* Courts disagreed on this issue. According to the higher Court, at least employment fraud prohibitions in the strict sense do not contravene the First Amendment and are thus constitutional.[37] Chen and Marceau, on the other hand, plead against such provisions, invoking both First Amendment doctrine and theory.[38] In short, the authors argued that 'investigative deceptions,' such as lies told to obtain employment at animal facilities to create undercover footage, are of 'high value' and deserve constitutional protection.[39] They argued that they have 'instrumental value to the goals underlying the first amendment' as they further the search for truth.[40] I will return to this claim and critically evaluate it in light of the *ALDAF v. Wasden* decision discussed below, arguing that the considering of lies as protected speech due to their 'instrumental value' is questionable from the perspective of democracy.

10.3.3 Rapid Reporting

Both Matthew Shea and Justin Marceau considered so-called rapid or mandatory reporting laws to be the next wave of ag-gag, and beginning in 2013.[41] The prototype of this category was passed in Missouri. The provision at issue provides that anyone employed at an agricultural animal facility who records what she believes to be abuse or neglect of a farm animal under the relevant legal provisions, must submit the recording to

35 Marceau, Ag Gag Past, Present, and Future, 2015, 1335.
36 Marceau, Ag Gag Past, Present, and Future, 2015, 1339.
37 *ALDF v. Wasden* 31.
38 Chen/ Marceau 2018.
39 Ibid., 3.
40 Ibid.
41 Marceau, Ag Gag Past, Present, and Future, 2015, 1340; Shea 2015, 352.

law enforcement within 24 hours.[42] Successful First Amendment challenges against rapid reporting provisions seem unlikely.[43] However, Marceau argues that mandatory reporting laws are 'the proverbial wolf in sheep's clothing.'[44] In his view, mandatory rapid reporting of animal abuse is not a measure to protect animals, but to deter long-term undercover activity that could indicate the implication of management and systematic practices rather than isolated conduct of employees.[45]

At the time of writing, Missouri remains the only state with a rapid reporting ag-gag law on the books. Against this backdrop, rapid reporting does not seem to have become as popular as the above critics predicted. Nevertheless, rapid reporting constitutes an interesting paradigm that corresponds to some of the themes of this dissertation, falling at the intersection of animal law and fundamental rights. First and foremost, animal law scholars observed that systematic violations of animal welfare, especially in agriculture, are largely tolerated, while individual violations are prosecuted and punished.[46] Usually this observation is made with regard to the divide between efforts to counter cruelty against pets on the one hand, and lenience towards common agricultural practices on the other. However, it also features within the agriculture industry where the dismissal, and in some cases even criminal prosecution of employees, is less costly to the industry compared to ending widely accepted farming practices that harm animals. This problematic feature of animal welfare law is reproduced by rapid reporting laws. The reporting of individual incidents is encouraged, while the reporting, and possible prosecution, of systematic abuse is discouraged, as delayed reporting is penalized.

Rapid reporting laws also raise social justice concerns.[47] Workers in slaughterhouses and meat packing plants are often immigrants who are precariously waged and exposed to health risks.[48] Holding them accountable

42 Shea 2015, 355; Recordings of farm animals alleged to be abused or neglected, submission to law enforcement required, Revised Statutes of Missouri § 578.013 (2012).

43 Landfried 2013, 400.

44 Marceau, Ag Gag Past, Present, and Future, 2015, 1341.

45 Ibid.

46 In the German context see Bülte, Jens, Zur faktischen Straflosigkeit institutionalisierter Agrarkriminalität, GA 165 (2018), 35–36.

47 For a critical perspective on animal welfare and the criminal law see Marceau, Justin, Beyond Cages. Animal Law and Criminal Punishment (Cambridge: Cambridge University Press 2019).

48 This issue received increased public attention as COVID-19 spread in those facilities. See e.g., Jordan, Miriam/ Dickerson, Caitlin, Poultry Worker's Death Highlights

as individuals for animal welfare violations that are widespread throughout the industry seems questionable, both from a social justice and from an animal welfare perspective.

Shea shares the doubts about rapid, mandatory reporting and shows that mandatory reporting is usually reserved for serious crimes, especially felonies such as sexual assault.[49] Targeting a failure to report, especially via criminal law, is beneficial if, and only if, other measures have been taken to safeguard animal welfare. It is generally understood that the criminal law is the ultima ratio in a liberal democracy. Therefore, before penalizing the failure to report, other means of ensuring a swift response to animal welfare violations should be established. Animal welfare can only be achieved through transparency, rather than secrecy. For example, England made CCTV mandatory in slaughterhouses.[50] Further, channels for whistleblowers to report animal abuse within and outside of their companies could be established. Both would be alternative measure serving the declared aim of uncovering animal abuse without resorting to the criminal liability of individuals.

Nevertheless, it has to be acknowledged that rapid reporting laws are different from ag-gag proper. In fact, extending the term ag-gag to laws that make reporting mandatory is a paradox. Several states already have laws obliging veterinarians to report animal abuse.[51] If it was not for the link to ag-gag, notably through the focus on handing over recordings (rather than just reporting), extending such obligations to workers could potentially tackle the enforcement gap in animal welfare law. However, for this possibility to become reality, reporting would have to be mandatory regardless of

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Spread of Coronavirus in Meat Plants, The New York Times, 9 April 2020, available at: https://www.nytimes.com/2020/04/09/us/coronavirus-chicken-meat-processing-plants-immigrants.html (last accessed 24 October 2021); Laughland, Oliver/Holpuch, Amanda, 'We're modern slaves': how meat plant workers became the new frontline in in Covid -19 war, The Guardian, 2 May 2020, available at: https://www.theguardian.com/world/2020/may/02/meat-plant-workers-us-coronavirus-war (last accessed 24 October 2021).

49 Shea 2015, 363 ff.

50 Department for the Environment, Food & Rural Affairs, Press Release, CCTV becomes mandatory in all abattoirs in England, 4 Mai 2018, available at: https://www.gov.uk/government/news/cctv-becomes-mandatory-in-all-abattoirs-in-england (last accessed 24 October 2021).

51 See American Veterinary Medical Association, Summary Report: Reporting Requirements for Animal Abuse, Updated March 2021, available at: https://www.avma.org/sites/default/files/2021-03/Reporting-requirements-for-animal-abuse.pdf (last accessed 8 June 2021).

footage. Any witnessing of animal abuse, even in the absence of recording, would have to trigger a duty to report. For the animals affected, the fact that cruelty against them has been recorded does not make a difference.

10.4 Litigation

Ag-gag laws have been subject to legal challenges across the United States. Animal advocacy associations, joined by affected individuals, journalists, and media associations,[52] frequently question their constitutionality, with mixed results.[53] The first lawsuit was filed in 2013 by the Animal Legal Defense Fund (ALDF) and others. The case was filed against the ag-gag law of Utah enacted in 2012, arguing that the law violated the First and Fourteenth Amendments.[54] This case involved Amy Meyer as a plaintiff, who had been charged for violating the Utah ag-gag law. The case against Meyer was subject to widespread attention and was soon dismissed.[55] As mentioned above, Meyer had filmed a slaughterhouse, but the Court believed that, while doing so, she was standing on public property.[56] However, *ALDF v. Herbert* is an example of successful litigation against ag-gag since the United States District Court of Utah declared the law unconstitutional in 2017.[57]

52 For an example of the involvement of media associations see e.g., Brief of Amici Curiae The Reporters Committee for Freedom of the Press and 25 Media Organizations In Support of Plaintiffs-Appellants Urging Reversal, in *PETA et al. v. Stein*, filed 11 August 2017, available at: https://www.rcfp.org/wp-content/uploads/imported/2017-08-11-peta-nc.pdf (last accessed 5 August 2021).

53 For an overview of past and ongoing litigation see ALDF, Ag-Gag Laws – Full Timeline, available at https://aldf.org/issue/ag-gag/ (last accessed 3 August 2020). The timeline provides an important resource as it is being updated continuously and accounts for the most recent developments.

54 *ALDF et al. v. Gary R. Herbert in his official capacity as Governor of Utah, and Sean D. Reyes, in his official capacity as Attorney General of Utah*, 2:13-cv-00679RJS (D. Utah 2017), memorandum decision and order ('*ALDF v. Herbert*,' in the following). The decision is also publicly available: https://www.animallaw.info/case/animal-legal-defense-fund-v-herbert-0 (last accessed 5 August 2021).

55 The decision is not available. For a summary see Potter, Will, First Ag-Gag Prosecution: Utah Woman Filmed a Slaughterhouse from a Public Street, Green is the New Red, 29 April 2013, available at: http://www.greenisthenewred.com/blog/first-ag-gag-arrest-utah-amy-meyer/6948/ (last accessed 3 August 2021).

56 Potter, First Ag-Gag Prosecution, 2013.

57 *ALDF v. Herbert.*

Similar cases were brought by ALDF, PETA, and others in several states. So far, Courts have struck down ag-gag laws, in whole or in part, in Utah,[58] Idaho (see below),[59] North Carolina,[60] Iowa,[61] and Kansas.[62] Further decisions, but also the passing of new legislation in response, are to be expected in the near future. For example, Iowa passed a new ag-gag measure in April 2021,[63] after the previous one was struck down in 2020.[64]

Central to the litigation so far has been the question of whether ag-gag legislation violated the Equal Protection Clause of the Fourteenth Amendment, and the right to free speech enshrined in the First Amendment. The Idaho case can speak to so-called employment fraud and recording provisions. Legal challenges against other categories of ag-gag cannot be comprehensively covered here. As to rapid reporting laws, the situation remains as it was in 2013 when Landfried argued that it is difficult to imagine successful First Amendment challenges against them.[65] However, Equal Protection is a more promising starting point in these cases.[66]

Another emerging category is legislation targeting the dissemination, rather than the creation, of footage. This type of ag-gag legislation is likely unconstitutional. Legislation containing such a provision was discussed in Minnesota in 2011.[67] Especially considering the litigation since then, includ-

58 Ibid.

59 *ALDF v. Wasden*.

60 *PETA et al. v. Josh Stein, in his official capacity as Attorney General of North Carolina, and Dr. Kevin Guskiewicz, in his official capacity as Chancellor of the University of North Carolina-Chapel Hill*, (4th Cir.). Briefs are available at: https://food.publicjustice.net/case/peta-et-al-v-cooper-et-al/ (last accessed 5 August 2021).

61 Palotta, Nicolle, Though Ruled Unconstitutional, Industry Keeps Pushing Ag-Gag Laws: Updates in North Carolina, Kansas, and Ontario, ALDF Website, 15 September 2020 available at: https://aldf.org/article/though-ruled-unconstitutional-industry-continues-pushing-ag-gag-laws-updates-in-north-carolina-kansas-iowa-ontario/ (last accessed 9 August 2021). The decision is not publicly available online.

62 *ALDF v. Laura Kelly and Derek Schmidt*, CV 18–2657-KHV, 2020 WL 362626 (D. Kan. 2020), memorandum and order. The decision is publicly available at: https://www.animallaw.info/case/animal-legal-defense-fund-center-food-safety-shy-38-inc-hope-sanctuary-plaintiffs-v-laura-kelly (last accessed 5 August 2021).

63 Iowa Legislature, House File 775, 30 April 2021, available at: https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=hf775 (last accessed 9 August 2021).

64 Pallotta 2020.

65 Landfried 2013, 400; see also Coleman, Jacob, ALDF v. Otter: What does it mean for other State's „Ag-gag" Laws?, Journal for Food Law & Policy 13:1 (2017), 180–227, 221.

66 Coleman 2017, 221.

67 Minnesota Legislature, Office of the Revisor of Statutes, *House File 1369*, a bill for an act relating to agriculture; imposing penalties and remedies for certain offenses;

ing the Idaho case discussed below, legislation prohibiting the possession or dissemination of unlawfully created recordings from animal facilities would not be sustainable under the First Amendment. Just like provisions targeting the creation of recordings, it would constitute a content-based restriction of free speech and would likely be considered overinclusive (see below).[68] Furthermore, the Supreme Court held in *Bartnicki v. Vopper* that the publication of truthful information on a matter of interest to the public was protected by the First Amendment, even if media had reason to believe that it had been obtained illegally.[69]

10.5 A Legal Analysis of Ag-Gag: The Idaho Case *ALDF v. Wasden*

This Section will conduct a legal analysis of the Ninth Circuit decision in *ALDF v. Wasden*.[70] The case pertains to Idaho's ag-gag law. ALDF successfully challenged the constitutionality of the law before the District Court of Idaho in *ALDF v. Otter*.[71] Judge Winmill dismissed Otter as a defendant,[72] and granted a summary judgement to the plaintiffs.[73] The Ninth Circuit Court of Appeals then reversed the lower Court's decision in part.[74]

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proposing coding for new law in Minnesota Statutes, Chapter 17, did not become law, available at: https://www.revisor.mn.gov/bills/text.php?number=Hf1369&version=0&session=ls87 (last accessed 28 August 2022).

68 Landfried 2013, 397 f.

69 *Bartnicki v. Vopper* 532 U.S. 514, 534 (2001). The decision is publicly available at: https://supreme.justia.com/cases/federal/us/532/514/ (last accessed 4 August 2021).

70 *ALDF, et al. v. C. L. Butch Otter in his official capacity as Governor of Idaho; and Lawrence Wasden, in his official capacity as State of Idaho*, 118 F. Supp. 3d 1195, 1199 (D. Idaho 2015), summary judgement decision ('*ALDF v. Otter*, summary judgement decision' in the following). The decision is also available at: https://www.acluidaho.org/sites/default/files/field_documents/summary_judgment_decision_0.pdf (last accessed 4 August 2021). References to pages in the following refer to page numbers from this publicly available source.

71 Ibid.

72 *ALDF, et al. v. C. L. Butch Otter in his official capacity as Governor of Idaho; and Lawrence Wasden, in his official capacity as State of Idaho*, 44 F. Supp. 3d 1009 (D. Idaho 2014), decision denying motion to dismiss ('*ALDF v. Otter*, decision denying motion to dismiss' in the following). The decision is also available at: https://www.acluidaho.org/sites/default/files/field_documents/decision_denying_motion_to_dismiss.pdf (last accessed 4 August 2021). References to pages in the following refer to page numbers from this publicly available source.

73 *ALDF v. Otter*, summary judgement decision.

74 *ALDF v. Wasden.*

The legal analysis will be followed by a normative reconstruction in Section 6. Together, the legal analysis and normative reconstruction of *ALDF v. Wasden* shed light on the legal and normative dimensions of ag-gag. *ALDF v. Wasden* is suitable for this project for several reasons. The decision is the first in which an Appellate Court has struck down provisions of an ag-gag law. Further, the law in question contains elements of the different types of ag-gag laws discussed above. Thus, it holds implications for the ag-gag laws of other states.[75] But, most importantly, the decision of the Ninth Circuit includes references to extralegal notions such as the 'court of public opinion,' and can be linked to a democratic argument for freedom of expression.

10.5.1 Background and Facts

In 2012, the animal advocacy group Mercy for Animals obtained undercover footage from an Idaho dairy farm.[76] It provided an edited version of the footage to the Idaho State Department of Agriculture and, after the investigation was finished, published the footage, thus drawing widespread attention to animal abuse on farms.[77] Idaho's *Interference with Agricultural Production* law was introduced and passed shortly after, signed by Governor Otter on 14 February 2014.[78]

As the Majority Opinion in *ALDF v. Wasden* acknowledged, the bill was drafted by the Idaho Dairymen's Association, a trade organization who represents the dairy industry's interests.[79] One of its declared purposes was to prevent undercover investigations which could 'expose the industry to the "court of public opinion"' and result in a loss of customers.[80] In the legislative debate, lawmakers further invoked privacy and security concerns.[81] Others referred to animal activists as terrorists.[82]

75 See also Coleman 2017.
76 *ALDF v. Otter,* summary judgement decision, 1.
77 Both Court decisions emphasise the link between this incident and the bill. *ALDF v. Otter,* summary judgement decision, 1 f.; *ALDF v. Wasden* 9.
78 *ALDF v. Otter,* summary judgement decision, 2.
79 *ALDF v. Wasden* 11.
80 Ibid.,11 ff.
81 Ibid., 12.
82 Ibid., 13.

Idaho, at this point, already had legislation on the books protecting the agricultural sector from interferences caused *inter alia* by trespass with the intent to cause damage to, or hinder, agricultural research, enshrined in Idaho Code § 18–7040.[83] The new Interference with Agricultural Production law was inserted in § 18–7042 and went even further. When referring to the Idaho Code in the following, I am referring to § 18–7042 of the 2014 version. Subsection (1) read:

'(1) A person commits the crime of interference with agricultural production if the person knowingly:
  (a) Is not employed by an agricultural production facility and enters an agricultural production facility by force, threat, *misrepresentation* or trespass;
  (b) Obtains records of an agricultural production facility by force, threat, *misrepresentation* or trespass;
  (c) Obtains employment with an agricultural production facility by force, threat, or *misrepresentation* with the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers;
  (d) *Enters an agricultural production facility that is not open to the public and, without the facility owner's express consent or pursuant to judicial process or statutory authorization, makes audio or video recordings of the conduct of an agricultural production facility's operations*; or
  (e) Intentionally causes physical damage or injury to the agricultural production facility's operations, livestock, crops, personnel, equipment, buildings or premises.'
  (emphasis added to passages that were challenged).'

Subsection (2)(a)(v) defines agricultural production. The definition covers not only the keeping of livestock and other animals, but is so broad that – as the Court of Appeals noted in *Wasden* – even a grocery store or restaurant with a herb garden could be covered.[84] Subsection (3) provides that someone who commits the above offence is guilty of a misdemeanor and is to be punished with imprisonment for a maximum of one year

83 Ibid., 12 ff.
84 Ibid., 23.

and/or with a fine of up to 5000 US dollars.[85] In addition, according to subsection (4), an offender will be required to:

> 'make restitution to the victim of the offense in accordance with the terms of Idaho Code § 19–5304. Provided however, that such award shall be in an amount equal to twice the value of the damage resulting from the violation of this section.'[86]

10.5.2 Procedural History and *ALDF v. Otter*

In 2014, ALDF (supported by a broad coalition of organizations and individuals such as, for example, PETA, the ACLU Idaho, and media organizations) filed a federal action against Idaho Governor, C.L. "Butch" Otter and Idaho Attorney General, Lawrence Wasden, in the United States District Court for the District of Idaho.[87] They claimed that purpose and effect of the statute were 'to stifle political debate about modern agriculture by (1) criminalizing all employment-based undercover investigations; and (2) criminalizing investigative journalism, whistleblowing by employees, or other expository efforts that entail images or sounds.'[88] ALDF and the other plaintiffs challenged the statute based on free speech (First Amendment) as well as equal protection (Fourteenth Amendment) grounds.[89] Concretely, the plaintiffs challenged § 18–7042(1)(d) and the misrepresentation provisions in § 18–7042(1)(a)-(c) (see above in italics).[90]

The District Court dismissed Otter as a defendant. However, it granted summary judgment to the plaintiffs and declared the Idaho ag-gag law unconstitutional on 3 August 2015.[91] The District Court found that the law violated both the right to free speech enshrined in the First Amendment, and the Equal Protection Clause.[92] It did so regarding the misrepresentation provisions in § 18–70–42(1)(a)-(c)[93] as well as the recording provision

85 Idaho Code § 18–7042 (3) (2014).
86 Idaho Code § 18–7042 (4) (2014).
87 *ALDF v. Otter*, summary judgement decision, 2.
88 *ALDF v. Wasden* 13.
89 ALDF further raised claims under three different federal statutes. However, these claims are not at issue here. *ALDF v. Otter*, summary judgement decision, 3.
90 *ALDF v. Wasden* 17 ft. 8.
91 *ALDF v. Wasden*.
92 Ibid.
93 Ibid., 9 ff.

in § 18–7042(1)(d).[94] Not only did the District Court consider undercover investigations to create 'politically-salient speech,'[95] it also stated that the legislation in question:

> 'seeks to limit and punish those who speak out on topics relating to the agricultural industry, striking at the heart of important First Amendment values. The effect of the statute will be to suppress speech by undercover investigators and whistleblowers concerning topics of great public importance: the safety of the public food supply, the safety of agricultural workers, the treatment and health of farm animals, and the impact of business activities on the environment.'[96]

The state of Idaho appealed.

10.5.3 Applicable Law

The First Amendment was most central to the case. A First Amendment challenge entails three steps.[97] First, the plaintiff must demonstrate that the First Amendment applies; meaning that the activity at stake is in fact protected speech.[98] If this is the case, the Court must, in a second step, determine which First Amendment standards are applicable.[99] Third, the Court must assess whether the government's justification for restricting the speech in question suffices for the applicable standard.[100] The reasoning of the Ninth Circuit engaged all three steps of the analysis.

94 Ibid., 13 ff.
95 *ALDF v. Otter*, summary judgement decision, 12.
96 Ibid., 6.
97 Ibid., 8.
98 Ibid.; citing *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 293 n. 5 (1984). The decision is publicly available at: https://www.law.cornell.edu/supremecourt/text/468/288 (last accessed 6 August 2021).
99 *ALDF v. Otter*, summary judgement decision, 8; citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985) ('*Cornelius v. NAACP Legal Def. & Educ. Fund*,' in the following). The decision is publicly available: https://supreme.justia.com/cases/federal/us/473/788/ (last accessed 6 August 2021).
100 *ALDF v. Otter,* summary judgement decision, 8; citing *Cornelius v. NAACP Legal Def. & Educ. Fund*.

Amongst the cases cited by the Courts, *United States v. Alvarez* stands out.[101] In this case, the Supreme Court struck down the *Stolen Valor Act*, a federal statute making it a crime to lie about receiving military medals or decorations.[102] Central to the case was the question of whether lies are protected speech under the First Amendment. In a nutshell, the plurality opinion and the concurrence found that false speech did not constitute a category generally unprotected by the First Amendment.[103] However, lies may be restricted if they are made for material gain or inflict legally recognizable harm, for example.[104] Both the District Court and the Court of Appeals applied *Alvarez* to the misrepresentation provisions in Idaho Code § 18–7042(1)(a)-(c), to determine whether they restricted speech protected by the First Amendment, and to determine which standard was applicable for possible regulation.[105]

As for the recording provision in § 18–7042(1)(d), *Anderson v. City of Hermosa Beach* requires mentioning.[106] In this case, the Ninth Circuit held – with regard to the process of tattooing – that there is no line to be drawn between the creation of speech and its dissemination.[107] Both are protected by the First Amendment.[108] The *Wasden* Court applied 'strict scrutiny' to the recording provision, requiring 'some pressing public necessity, some essential value that has to be preserved; and, even then, the law must restrict as little speech as possible to serve the goal.'[109]

Further, the Ninth Circuit applied the Equal Protection Clause to § 18–7042(1)(b) and (c). In so doing, it was guided by *City of Cleburne v. Cleburne Living Ctr.*, finding that the targeting of a specific group – in *Cleburne* the group was persons with mental disabilities – did not necessarily require heightened scrutiny and could pass the so-called rational basis

101 *United States v. Alvarez*, 132 S. Ct. 2537 (2012) ('*United States v. Alvarez*,' in the following). The decision is publicly available: https://www.supremecourt.gov/opinions/11pdf/11-210d4e9.pdf (last accessed 6 August 2021).
102 Ibid.
103 Ibid., 7.
104 Ibid., 6, 11.
105 *ALDF v. Otter* 13 ff.; *ALDF v. Wasden* 16 ff.
106 *ALDF v. Wasden* 35 f.; *ALDF v. Otter*, summary judgement decision, 9 f.
107 *Anderson v. City of Hermosa Beach.*
108 Ibid.
109 *ALDF v. Wasden* 34, 38; citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). The decision is publicly available at: https://supreme.justia.com/cases/federal/us/512/622/ (last accessed 9 August 2021).

test, if it was based on a legitimate government aim and not on 'irrational prejudice.'[110]

10.5.4 Reasoning of the Court

Unlike the District Court, the higher Court found only the misrepresentation provision in § 18–7042(1)(a) (entering an agricultural production facility by misrepresentation) and the recording provision in § 18–7042 (making audio or video recordings of an agricultural production facility's operations without consent or other authorization) to violate the First Amendment.[111] In light of this, the Court refrained from analyzing the provisions under the Equal Protection Clause.[112] However, the Court considered the misrepresentation provisions in § 18–7042(1)(b) (misrepresentation to obtain records) and § 18–7042(1)(c) (misrepresentation to gain employment with the intent to cause economic or other injury) permissible under both the First and Fourteenth Amendments.[113]

10.5.4.1 Misrepresentation to Gain Entry

With regard to § 18–7042(1)(a) the Court stated: 'The hazard of this subsection is that it criminalizes innocent behavior, that the overbreadth of this subsection's coverage is staggering, and that the purpose of the statute was, in large part, targeted at speech and investigative journalists.'[114] According to the Court, the misrepresentation to gain entry provision applied to speech protected by the First Amendment.[115] Crucially, the Court stated that speech that is simply false and made in order to gain access to an agricultural production facility does not imply that it effects fraud or is made to 'secure money or other valuable considerations.'[116] Unlike what the

110 *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 440 (1985) ('*City of Cleburne v. Cleburne Living Ctr.,*' in the following). The decision is publicly available at: https://supreme.justia.com/cases/federal/us/473/432/ (last accessed 6 August 2021).
111 *ALDF v. Wasden* 17 ff. (on misrepresentation), 34 ff. (on recording).
112 Ibid., 26 f.
113 Ibid., 27, 29.
114 Ibid., 18.
115 Ibid., 17 f.
116 Ibid., 18 citing *United States v. Alvarez* (opinion of Justice Kennedy).

State of Idaho argued, material gain does not consist of the entry itself.[117] Pursuant to this understanding, a teenager who makes a reservation at a high-end restaurant under his mother's name would be liable under the law – even if he leaves the restaurant before ordering, or if he pays for a meal like any other guest.[118] In both cases, the Court said 'the lie is pure speech,' and damage does not occur.[119] In the same scenario, the teenager would likely not even be liable for ordinary trespass under Idaho law, noted the Court.[120]

Further, the Court pointed to *Food Lion, Inc. v. Capital Cities/ABC, Inc.* and *Desnick v. American Broadcasting Companies, Inc.*[121] In these cases, the Fourth and the Seventh Circuit Courts respectively were required to decide on trespass claims against journalists who misrepresented their identities.[122] Both Courts denied trespass, saying that the entry predicated by misrepresentation did not infringe upon the interests of the plaintiffs that trespass law protects, namely ownership and possession.[123]

Returning to the example of the teenager described above, the Court found that, under the law in question, he could be subjected to criminal prosecution for what was an unimportant lie.[124] The misrepresentation provision in § 18–7042(1)(a) thus covered 'falsity and nothing more' and was, in accordance with the plurality in *United States v. Alvarez*, subject to 'most exacting scrutiny.'[125] This means that the speech restriction in question 'must be "actually necessary" to achieve a compelling government interest, and that there must be a "direct causal link between the restriction imposed and the injury to be prevented."'[126]

The Court found that the misrepresentation provision in § 18–7042(1)(a) did not pass this test. First, the Court assumed that the state of Idaho

117 *ALDF v. Wasden* 18.
118 Ibid., 18 f.
119 Ibid., 19.
120 Ibid., 21.
121 Ibid., 20; *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (1999) ('*Food Lion, Inc. v. Capital Cities/ABC, Inc.*,' in the following). The decision is also publicly available: https://caselaw.findlaw.com/us-4th-circuit/1201654.html (last accessed 6 August 2021). *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345 (1995).
122 *ALDF v. Wasden* 20; *Food Lion, Inc. v. Capital Cities/ABC, Inc.* 581.
123 Ibid.
124 *ALDF v. Wasden* 21.
125 Ibid., citing *United States v. Alvarez* (opinion of Justice Kennedy).
126 *ALDF v. Wasden* 21 f., citing *United States v. Alvarez* (opinion of Justice Kennedy).

had a 'compelling interest' in protecting property rights and the agriculture industry.[127] Even in this case, according to the Court, the provision criminalizing misrepresentation was not necessary. Ordinary trespass laws, which do not restrict speech, would have been sufficient.[128]

However, the Court voiced concern that this was not the main interest behind the legislation.[129] Pointing to the legislative history, and in particular statements of legislators and representatives of the dairy industry, the Court considered the possibility that the objective behind the legislation was in fact to 'quash investigative reporting on agriculture production facilities.'[130] In this case the Court found that the statute 'is even more problematic. The focus of the statute to avoid the "court of public opinion" and treatment of investigative videos as "blackmail" cannot be squared with a content-neutral trespass law.'[131] The Court even goes so far as to voice a 'suspicion that [subsection (a)] may have been enacted with impermissible purpose.'[132] It bases this concern, again on the legislative history, in particular the intent to 'protect members of the agricultural industry from "persecute[ion] in the Court of public opinion"' and from undercover journalists.[133] Although the Court did not find it necessary to determine the motivation behind the law in question with certainty, it made clear that these concerns added to the finding that the provision in question did not satisfy the '"exacting scrutiny" required under *Alvarez*.'[134]

Further, the Court criticized the fact that the misrepresentation provision could lead to selective prosecutions, where only targeted groups, such as investigative journalists, would fear prosecution and risk higher penalties than they did under ordinary trespass laws, while others, such as the teenager in the above example, would remain unaffected.[135] The Court also took issue with the breadth of the statute, considering the definition of 'agricultural production facility' and 'agricultural production' in § 18–7042(2)(a) and (b), respectively.[136] The Court found that these definitions

127 *ALDF v. Wasden* 22.
128 Ibid.
129 Ibid.
130 Ibid.
131 Ibid.
132 Ibid., 25.
133 Ibid.
134 Ibid., 25 f.
135 Ibid., 22 f.
136 Ibid., 23.

would encompass even restaurants with herb gardens or grocery stores, in other words, places generally open to the public.[137] Again, the Court pointed to *Alvarez* where the Supreme Court criticized the *Stolen Valor Act* for its 'sweeping, quite unprecedented reach.'[138] The limitation, through the requirement 'knowingly,' was not considered to counter the broad reach of the statute in the eyes of the Court.[139] Particularly as speakers might still be concerned about being prosecuted if they make a careless statement, which may result in a chilling effect on speech.[140]

Finally, the Court took into account that the majority of the Judges on the Supreme Court, who agreed that the *Stolen Valor Act* must be struck down, could not agree on a common rationale. In his concurring opinion Justice Breyer indicated that intermediate scrutiny should be applicable.[141] In *Wasden*, the Court argued that the misrepresentation provision in § 18–7042(1)(a) would still not pass the test, if intermediate scrutiny was applied: the speech in question would not inflict 'specific harm,' is very broad, and may have a 'chilling effect' on speech not actually covered by the provision.[142] 'A more finely tailored statute' could achieve the government's objective of protecting property rights.[143]

As for possible solutions, the Court found that the State may simply strike out the misrepresentation provision in § 18–7042(1)(a).[144] It also mentioned the option of adding a requirement for specific intent or harm caused, as it is the case in § 18–7042(1)(c).[145] In that case, the provision would be in line with the First Amendment requirements set out in *Alvarez*.

137 Ibid.
138 Ibid., citing *United States v. Alvarez* (opinion of Justice Kennedy).
139 *ALDF v. Wasden* 24.
140 Ibid.
141 *United States v. Alvarez* (opinion of Justice Breyer).
142 *ALDF v. Wasden* 26. In Alvarez there was no consensus over whether strict scrutiny applied. Chen and Marceau side with the Otter Court and convincingly argue that in the case of ag-gag laws strict scrutiny must apply. Chen/ Marceau 2015, 1480 ff.
143 *ALDF v. Wasden* 26.
144 Ibid.
145 Ibid., 24.

10.5.4.2 Obtaining Records by Misrepresentation

The District Court had found all three misrepresentation provisions in Idaho Code § 18–7042 (1)(a)-(c) unconstitutional. It argued that the lies told by undercover investigators were not told in order to facilitate material gain, but to 'advance Core First Amendment values by exposing misconduct to the public eye and facilitating dialogue on issues of considerable public interest.'[146] With regard to the misrepresentation provisions in § 18–7042(1)(b) and (c), the Circuit Court revised the decision of the District Court.

The higher Court found that Subsection (b) did not regulate speech protected by the First Amendment.[147] In its reasoning, the Court highlighted differences between Subsections (a) and (b). First, the act of misrepresentation to obtain records may – unlike misrepresentation to gain entry – 'inflict a property harm upon the owner, and may also bestow a material gain on the acquirer.'[148] The Court showed that similar conduct has long been prohibited in Idaho in a number of statutes, for example, in theft by false pretense in Idaho Code § 18–2403(2)(a), (b). As for the harm to the owner, the Court argued that depriving an agricultural production facility owner of the ability to exercise control over his property constituted a 'legally recognizable harm.'[149] Besides property, other rights protected by Idaho law, such as those relating to trade secrets might also be affected.[150] Obtaining records showing confidential information constitutes a 'material gain.' Thus, prohibiting misrepresentation to obtain them is permissible in accordance with *Alvarez*.[151] In addition, the legislative history behind Idaho Code § 18–7042(1)(b) showed that the conduct prohibited therein has either caused harm or threatens to cause harm. The Court pointed to the damage that can occur when the location of genetically engineered crops is disclosed.[152] Further, the Court inferred from the legislative history that, although some proponents of the law sought to counter undercover investigations, Subsection (b) served the legitimate purpose of preventing harm caused by the taking of records.[153]

146 *ALDF v. Otter*, summary judgement decision, 12.
147 *ALDF v. Wasden* 29.
148 Ibid., 27.
149 Ibid., 28.
150 Ibid.
151 *See United States v. Alvarez* (opinion of Justice Kennedy).
152 *ALDF v. Wasden* 28.
153 Ibid., 28 f.

10.5.4.3 Obtaining Employment by Misrepresentation

Unlike the District Court, the Circuit Court found that Idaho Code § 18–7042(1)(c) was in accordance with guidance given by the Supreme Court in *Alvarez* and with the First Amendment.[154] In *Alvarez*, employment offers were explicitly listed as a kind of material gain, and the government may restrict lies for material gain.[155] Further, the Court found that the scope of Subsection (c) was limited by the requirement of 'intent to cause economic or other injury.'[156] Unlike ALDF claimed, this requirement excluded someone who simply overstates her qualifications in her resume to get a job.[157] Rather, as the government claimed, the provision was in line with 'the covenant of good faith and fair dealing that is implied in all employment agreements in Idaho.'[158]

In its analysis of § 18–7042(1)(c), the Court also turned to the restitution clause in § 18–7042(4) and made clear that it understood this provision not to include reputational or similar damage.[159] It should be noted that debates about so-called 'employment fraud' versions of ag-gag are not settled. Marceau and Chen argued – notably in 2015, prior to the Ninth Circuit Court decision at issue – that even under *Alvarez*, lies told to obtain employment must not always be left unprotected by the First Amendment.[160]

10.5.4.4 Recordings Provision

The Circuit Court found that § 18–7042(1)(d) not only regulated speech protected by the First Amendment, but also constituted a 'content-based restriction that cannot survive strict scrutiny.'[161] First, the Court made clear that creating a recording was speech protected by the First Amendment. Denying this, said the Court, would be 'akin to saying that even though

154 Ibid., 31.
155 Ibid., citing *United States v. Alvarez* (opinion of Justice Kennedy).
156 *ALDF v. Wasden* 31, Idaho Code § 18–7042(1)(c) (2014).
157 Ibid., 31 f.
158 Ibid., 32.
159 *ALDF v. Wasden* 32 f.
160 Ibid., 56 f.; Chen/ Marceau 2015.
161 *ALDF v. Wasden* 34.

a book is protected [...] the process of writing the book is not.'[162] Further, audiovisual recordings constitute 'organ[s] of public opinion' and they are significant 'for the communication of ideas.'[163] The Court further pointed out the importance of recorded images for public discourse.[164] It cited *Fordyce v. City of Seattle*, affirming a right, based on the First Amendment 'to film matters of public interest.'[165] Citing *Anderson v. City of Hermosa Beach* it further showed that drawing a distinction between the process of creating speech and the product of the process would be contrary to existing jurisprudence and common sense.[166]

Further, the Court considered Idaho Code § 18–7042(1)(d) to contain a content-based restriction on speech. The provision criminalized the recording of a 'defined topic' namely 'conduct of an agricultural production facility's operations.'[167] It was clearly a content-based restriction on speech, since, in the words of the Supreme Court in *Reed v. Town of Gilbert*, 'it defin[es] regulated speech by particular subject matter.'[168] A content-based restriction is given when the regulation applies depending on the content of the message 'or when the purpose and justification of the law are content based.'[169] Importantly, the Court further cited *United States v. Stevens*, a landmark case on the connection between animal welfare and the First Amendment. In this case, the Supreme Court struck down a statute pro-

162 Ibid., 35. This clarification is important. Chen and Marceau argue that a misrepresentation is not the 'proximate cause' for reputational damage. Rather, the wrongdoing of the facility operator, is the cause of harm. Chen and Marceau 2015, 1503 ff. This argument does not apply if the facility operator acted in accordance with low welfare standards or industry guidelines. In this case, the legal and social order does not disapprove of the 'risk' for reputational damage created by the facility owner. Against this backdrop, the clarification of the Court based on the wording of the statute and the requirement for 'economic loss' was warranted.

163 *ALDF v. Wasden* 35, citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). The decision is also publicly available at: https://www.law.cornell.edu/supremecourt/text/343/495 (last accessed 6 August 2021).

164 *ALDF v. Wasden* 35, referring to Kreimer, Seth F., Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record, University of Pennsylvania Law Review 159:2 (2011), 335–409.

165 *ALDF v. Wasden* 35, citing *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). The decision is not publicly available online.

166 *ALDF v. Wasden* 35 f.; citing *Anderson v. City of Hermosa Beach*.

167 *ALDF v. Wasden* 35.

168 *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) ('*Reed v. Town of Gilbert*,' in the following). The decision is also publicly available at: https://www.supremecourt.gov/opinions/14pdf/13-502_9olb.pdf (last accessed 6 June 2021).

169 *ALDF v. Wasden* 37, citing *Reed v. Town of Gilbert*.

hibiting commercial production, sale, and possession of videos depicting animal cruelty.[170] The Supreme Court reasoned that the statute was content based as it prohibited images 'depending on whether they depict conduct in which a living animal is intentionally harmed.'[171] According to the Circuit Court, this matched § 18–7042(1)(d): one could record a birthday party, a historic tree, or a farmer's car creation, 'but not the animal abuse, feedlot operation, or slaughterhouse conditions.'[172]

The Court went even further in its criticism, stating that Idaho 'effectively eliminated the [...] recording of agricultural operations made without consent and has therefore "prohibit[ed] public discourse of an entire topic."'[173]Against this backdrop, the relevant standard to test the constitutionality of the recording provision was 'strict scrutiny:' to pass this test, the provision must be 'necessary to serve a compelling state interest' and be 'narrowly drawn to achieve that end.'[174] The District Court had voiced doubts as to the legitimacy of the state interest at stake.[175] It had pointed out, *inter alia*, that agricultural production facilities are heavily regulated, as they impact food and workers safety, as well as the treatment of animals.[176] Where these public interests are at stake there is a lower expectation of privacy, and property, and thus privacy interests cannot weigh too high in these facilities.[177]

The Circuit Court found that, even if the protection of property and privacy on agricultural production facilities may be 'a compelling government interest,' the 'narrow tailoring requirement' was not satisfied.[178] The statute was simultaneously under- and over-inclusive. Singling out 'audio

170 *United States v. Stevens*, 559 U.S. 460, 468 (2010) ('*United States v. Stevens*,' in the following). The decision is also publicly available at: https://www.supremecourt.gov/opinions/09pdf/08-769.pdf (last accessed 6 August 2021).
171 *ALDF v. Wasden* 37, citing *United States v. Stevens*.
172 *ALDF v. Wasden* 37.
173 Ibid., citing *In re Nat'l Sec. Letter*, 863 F.3d 1110, 1122 (9th Cir. 2017). The decision is not publicly available.
174 *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The decision is also publicly available at: https://supreme.justia.com/cases/federal/us/460/37/ (6 August 2021).
175 *ALDF v. Otter*, summary judgement decision, 19.
176 Ibid., 19, 21.
177 Ibid., 19.
178 *ALDF v. Wasden* 38.

or video recordings,' and not including photographs was under-inclusive.[179] Similarly, the limitation to 'operations' as opposed to other conduct on an agricultural facility that may actually raise *more* privacy concerns (such as, for example, a birthday party) was under-inclusive.[180] The Circuit Court endorsed the finding of the District Court that '[t]he recording prohibition gives agricultural facility owners veto power, allowing owners to decide what can and cannot be recorded, effectively turning them into state-backed censors able to silence unfavorable speech about their facilities.'[181] Further, the Circuit Court found itself 'left to conclude that Idaho is singling out for suppression one mode of speech—audio and video recordings of agricultural operations—to keep controversy and suspect practices out of the public eye.'[182]

Yet, the Recordings Clause was simultaneously also over-inclusive as it was found to prohibit more speech than necessary to achieve the stated goal.[183] Agriculture facility owners have tort laws at their disposal to counter infringements of privacy and to protect their trade secrets, as well as defamation laws.[184] The Court concluded by quoting *Alvarez* in saying that '"the remedy for speech that is false is speech that is true" – and not, as Idaho would like, the suppression of that speech.'[185]

10.5.4.5 Equal Protection Clause

The District Court had addressed all equal protection issues arising from the different provisions of Idaho Code § 18–7042 taken together. In so doing, it again argued that the statute protected the interests of the agricultural industry against exposure to 'public scrutiny'[186] and did thus not serve a legitimate government interest: '[t]he State's logic is perverse—in essence

179 Ibid. For under-inclusiveness the Court cites *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994). The decision is publicly available at: https://www.law.cornell.edu/supct/html/92-1856.ZO.html (last accessed 6 August 2021).
180 *ALDF v. Wasden* 38.
181 Ibid., 39, citing *ALDF v. Otter* summary judgement decision, 18.
182 *ALDF v. Wasden* 39.
183 Ibid, referring to *Lone Star Security and Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1197 (9th Cir. 2016) for over-inclusiveness. The decision is not publicly available.
184 *ALDF v. Wasden* 39.
185 Ibid., citing *United States v. Alvarez* (opinion of Justice Kennedy).
186 *ALDF v. Otter*, summary judgement decision, 24.

the State says that (1) powerful industries deserve more government protection than smaller industries, and (2) the more attention and criticism an industry draws, the more the government should protect that industry from negative publicity or other harms.'[187]

The Circuit Court refrained from considering § 18–7042(1)(a) and (d) under the Equal Protection Clause, as it had already found these provisions to violate the First Amendment.[188] However, the Court considered Subsections (b) and (c), and concluded that they did not violate the Equal Protection Clause. It agreed with the District Court that the legislation was motivated, amongst other considerations, by 'animus toward animal welfare groups and other undercover investigators in the agricultural industry,' but did not find the provision unconstitutional on this ground.[189]

According to the rational basis test, a law is presumed to be valid in accordance with the Equal Protection Clause 'if the classification drawn by the statute is rationally related to a legitimate state interest.'[190] If the law in question indicates 'a desire to harm an unpopular group,' Courts may engage in 'a "more searching" application of rational basis review.'[191] If – as in the case at hand – the 'politically unpopular group is not a traditionally suspect class, a Court may strike down the challenged statute under the Equal Protection Clause "if the statute serves no legitimate governmental purpose *and* if impermissible animus toward an unpopular group prompted the statute's enactment."'[192] Applying this test, the Court found that, although the law, displayed animus against reporters and activists, it served the legitimate purpose of protecting property and privacy interests on agricultural production facilities.[193] Thus, the provision did rest on an 'irrational prejudice' against activists only.[194]

187 Ibid.
188 *ALDF v. Wasden* 26, 40.
189 Ibid., 29.
190 *ALDF v. Wasden* 29, citing *City of Cleburne v. Cleburne Living Ctr*.
191 *ALDF v. Wasden* 30, citing *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring). The concurring opinion is available at: https://www.law.cornell.edu/supct/html/02-102.ZC.html (last accessed 6 August 2021).
192 *ALDF v. Wasden* 30, citing *Mountain Water Co. v. Mont. Dep't of Pub. Serv. Regulation*, 919 F.2d 593, 598 (9th Cir. 1990) (emphasis added by the Court). The decision is not publicly available online.
193 *ALDF v. Wasden* 31.
194 Ibid., 32, citing *City of Cleburne v. Cleburne Living Ctr.* 450.

10.5.4.6 Separate Opinion of Judge Bea, Dissenting in Part and Concurring in Part

Judge Bea disagreed with the majority regarding the entry gained through misrepresentation provision in § 18–7042(1)(a). Referring to the common law right to property, and common law trespass, Justice Bea argued that entry by misrepresentation entailed a legally recognizable harm.[195] Further, Justice Bea disagreed with the Majority Opinion on the applicability of *Alvarez* to § 18–7042(1)(a). Unlike *Alvarez*, what was stake in the relevant provision was not just lying but entering an agricultural facility. Thus, according to Justice Bea, the provisions in question did not regulate 'pure speech.'[196] Overall, Justice Bea invoked the protection of property in his dissent regarding Subsection (a), finding that there was no reason to distinguish between Subsections (a) and (b).[197] Regarding the other Subsections Justice Bea concurred with the majority opinion.[198]

10.6 The Idaho Case: A Normative Reconstruction of Ag-Gag

This Section will apply the method of normative reconstruction to the *Wasden* case by employing political philosophy and democratic theory to explain and evaluate the normative underpinnings that transpire from the judicial reasoning in this case.[199] Although the First Amendment featured prominently in the legal analysis above, the Courts did not elaborate on the democratic rationale behind the protection of free speech. The case is no exception in this regard. References to democracy are scarce in Court decisions pertaining to ag-gag laws. This poses a challenge for the method of normative reconstruction. However, one extra-legal notion that alludes to democracy is striking in the decisions analyzed above, namely the 'court of public opinion.' This metaphor best reflects the democracy related concerns raised in the legal and public discourse around ag-gag laws.

The following will show that the 'court of public opinion' is present in the above decisions, and is salient in the legislative history, but does not actually reflect the most pertinent questions of constitutional law. Further,

195 *ALDF v. Wasden* 40 f.
196 Ibid., 43.
197 Ibid., 42, 56.
198 Ibid., 42.
199 For a more detailed explanation of the method see Chapter 2.

connections will be drawn to the previous Chapters and existing literature. While existing literature compellingly identified normative criticism against the function of ag-gag laws being to prevent the Court of public opinion, it has overstated the relevance of this finding to the First Amendment and constitutional law analysis at the risk of *inter alia* conflating *de lege ferenda* and *de lege lata* considerations. Finally, I suggest that the Court of public opinion alludes to what Chantal Mouffe named agonism: a political conflict between adversaries. Rather than promoting agonism, ag-gag turns adversaries into political enemies.

10.6.1 The Court of Public Opinion

The term 'court of public opinion' appears five times in *Wasden* and four times in *Otter*.[200] The *Otter* Court only referred to it in the context of the legislative history and quoted the bill's drafter, Dan Steenson (representative of the Idaho Dairymen's Association) as well as members of the House of Representatives in saying that the legislation aimed at protecting Idaho's agriculture from the 'court of public opinion.'[201] The *Wasden* Court also cited some of these statements.[202] Further, and more importantly, the *Wasden* Court used the same language, in quotation marks, in its reasoning when assessing the purpose of the legislation.[203] The Court voiced concerns that § 18–7042(1)(a) (misrepresentation to gain entry) was

> 'enacted with an impermissible government purpose. […] Our suspicion is not eased after reading the legislative history. The record reflects that the statute was partly motivated to protect members of the agricultural industry from "persecut[ion] in the Court of public opinion."'[204]

The *Otter* Court had also voiced doubts as to the purpose behind the legislation, arguably in even stronger terms, and based on the legislative history: 'a review of § 18–7042's legislative history leads to the inevitable conclusion that the law's primary purpose is to protect agricultural facility owners by, in effect, suppressing speech critical of animal-agriculture practices.'[205]

200 *ALDF v. Wasden* 7, 12 f., 22, 25; *ALDF v. Otter*, summary judgement decision, 4 f.
201 *ALDF v. Otter*, summary judgement decision, 4 f.
202 *ALDF v. Wasden* 12 f.
203 Ibid., 22, 25.
204 Ibid., 25.
205 *ALDF v. Otter*, summary judgement decision, 16.

At this point the Court was considering the recording provision in § 18–7042(1)(d). Although the *Otter* Court did not employ the notion of the 'court of public opinion' here, it is present through the statements cited in relation to the legislative history.

Thus, the notion of the Court of public opinion was present in the legislative history and was relevant for the question of whether the legislation pursued a permissible purpose[206] as avoiding the 'court of public opinion,' said the Courts, is not a permissible purpose. Yet, as the legal analysis clearly shows, this finding played a marginal role for the outcome of the case. The *Wasden* Court especially displayed mixed understandings of the purpose of the statute and did not consider the law to violate the Equal Protection Clause for lacking a legitimate government interest. The role of the 'court of public opinion' in the decisions should not be overstated. Although it clearly encapsulates grave concerns of the Courts, other considerations, first and foremost the reach of the protection of property, were more decisive. This is especially highlighted by the conclusion that § 18–7042(1)(b) and (c) did not violate the First Amendment, and by the, in-part, dissenting opinion of Justice Bea. Although the Court identified a questionable purpose behind the legislation, the compliance of these provisions with the First Amendment ultimately depended on property rights.

10.6.1.1 Meaning of the Court of Public Opinion

Dictionaries do not define the term 'court of public opinion,' and it rarely features in legal literature. However, it does appear in relation to some of the most controversial legal matters in recent US history. For example, Alger Hiss, a US lawyer and public official, who was accused of espionage for the Soviet Union in 1939, later wrote a book on the controversial case titled 'In the Court of Public Opinion.'[207]

The notion of the 'court of public opinion' is generally employed in the context of increased media attention on trials. In this context, Supreme Court Justice Kennedy noted in *Gentile v. State Bar* 'an attorney may take reasonable steps to defend a client's reputation and reduce the adverse

206 This question has been raised both with regard to misrepresentation provisions (in *Wasden*) and recording provisions (in *Otter*).

207 Hiss, Alger, In the Court of Public Opinion (New York: Harper & Row 1972).

consequences of indictment [...] including an attempt to demonstrate in the Court of public opinion that the client does not deserve to be tried.'[208] Jonathan M. Moses used the term to describe the practice of lawyers advocating for their clients outside the courtroom by speaking to the media, and thus to the public.[209] One example he invoked is the infamous trial against OJ Simpson which received widespread media attention.[210] Despite the quote of Judge Kennedy, there is clearly a concern that the course of a case is stirred by public opinion communicated through the media, rather than the law.

In legal literature, the 'court of public opinion' was further invoked in the context of the United States involvement with the International Criminal Court. Monroe Leigh, (who vigorously argued in favor of the United States becoming a party to the Rome Statute) noted critics' concern that 'a politically motivated prosecutor might attempt to convict the United States in the Court of public opinion of a violation of international law, by charging one of its military or civilian officials with war crimes, crimes against humanity, or genocide [...] The United States can be put in the dock of public opinion at any time it applies military power abroad.'[211]

Most recently, the 'court of public opinion' also featured in the debate surrounding Special Counsel Robert Mueller's report on Russian involvement in Donald Trump's 2016 presidential campaign. Legal scholar Bruce A. Green assessed whether the comparatively low level of media presence raised accountability questions, and defended Mueller against these accusations.[212] Green was critical of prosecutors seeking publicity: '[w]hen prosecutors present their case in the Court of public opinion, no one with inside knowledge can present the other side.'[213]

From these references to 'the court of public opinion,' taken together, we can infer that this concept is usually contrasted against a Court of law. The term is invoked in the context of politically sensitive cases or decisions.

208 *Gentile v. State Bar*, 501 U.S. 1030, 1043 (1991), 27 June 1995. The decision is publicly available at: https://supreme.justia.com/cases/federal/us/501/1030/ (last accessed 10 August 2021).

209 Moses, Jonathan M., Ethics and Advocacy in the Court of Public Opinion, Columbia Law Review 95:7 (1995), 1811–1856.

210 Ibid.

211 Leigh, Monroe, The United States and the Statute of Rome, The American Journal of International Law 95:1 (2001), 124–131, 129.

212 Green, Bruce A., Prosecutors in the Court of Public Opinion, Duquesne Law Review 57:2 (2019), 271–292.

213 Ibid.

It alleges that, if prosecution under the law fails, an accused might still be subject to prosecution by the media in front of the public. Such a 'prosecution' bears the potential for significant reputational damage, even if the accused has the law on her side.

However, usage in existing literature not necessarily implies that these are the terms in which this phrase should be understood. In any case, the 'correct' definition or usage is secondary here, for I am more interested in how the 'court of public opinion' is invoked in the Court decisions at issue. In the statements by the Idaho lawmakers cited in the above decisions, the 'court of public opinion' clearly has a strong negative connotation. This is indicated by the invocation of a 'persecution'[214] in the 'court of public opinion.' It 'destroys farmers' reputations [and] results in death threats.'[215] 'Farm terrorists' use it for their ends.[216]

Besides the negative connotation, the language in these statement links the 'court of public opinion' to actual court proceedings: '[a]fter the infiltrator's work is done, the vigilante operation assumes the *role of prosecutor* in the Court of public opinion by publishing edited recordings' (emphasis added).[217] Further, the lawmakers claim that agricultural producers are 'declar[ed] guilty in the court of public opinion.'[218]

Interestingly, at least the *Wasden* Court implied a slightly more positive understanding of the 'court of public opinion.' As noted above, the Court took up statements from the legislative history in its reasoning regarding the purpose of the legislation, holding that preventing agricultural producers from exposure to the 'court of public opinion' was not a permissible purpose for legislation.[219]

10.6.1.2 The Rules of the Intellectual Battle of Ideas in the Court of Public Opinion

Looking back on previous Chapters and the decisions of German Courts, the *Tierbefreier* case and the 'rules of the intellectual battle of ideas,' which

214 *ALDF v. Wasden* 13; *ALDF v. Otter*, summary judgement decision, 4.
215 *ALDF v. Wasden* 12.
216 *ALDF v. Otter,* summary judgement decision, 5.
217 Ibid.
218 Ibid.
219 *ALDF v. Wasden* 25.

were the central subject of Chapter 5, come to mind. The 'intellectual battle of ideas' and the 'court of public opinion' represent two different conceptions of public debate. Unlike an 'intellectual battle of ideas,' 'the Court of public opinion' does not allow for respectful exchange between proponents of a variety of different views. Rather, it represents an adversarial system where two parties – animal activists and animal facility operators – stand opposed to each other. Each party can only win or lose, and the stakes are high. Lawmakers cited above maintain that activists, or 'farm terrorists,' assume the role of prosecutors to obtain a guilty verdict for the agricultural industry.[220] It seems that the 'rules' of the 'intellectual battle of ideas' do not apply, as non-deliberative forms of communication are salient on both sides. Personal attacks and emphasis on moral disagreement, rather than on compromise, are only the start. Not only are advocates of the industry concerned about death threats,[221] they themselves arguably also bend the 'rules' when linking the creation of undercover footage to terrorism.[222] In addition, 'the Court of public opinion' is more personal than 'the intellectual battle of ideas.' It seems that, in 'the Court of public opinion,' it is the people, rather than their ideas, who are on trial. The intellectual battle, on the other hand, is a battle of ideas.

It appears that 'the Court of public opinion' forms the stage on which the conflict between animal activists and the agricultural industry takes place. Public, and to some extent even legal, discourses are far from the deliberative ideal; deliberative democracy is inapposite to capture and explain the debate. This raises the question of whether there is another approach to politics and democracy that is equipped to do so. In a next step, one may ask how ag-gag laws (with the declared purpose of preventing the Court of public opinion) are to be viewed through the lens of this approach.

10.6.2 Democracy and the Court of Public Opinion in Ag-Gag Literature

As seen above in the Idaho case, references to democracy are scarce in Court decisions on ag-gag. The following will explore whether this is also reflected in existing literature on ag-gag. The focus of this Section are the works of Joshua Frye, Katharine Gelber and Siobhan O'Sullivan, Justin

220 *ALDF v. Otter*, summary judgement decision, 5.
221 *ALDF v. Wasden* 12.
222 Ibid., 13; for more details on links between ag-gag and eco-terrorism legislations see Chapter 12.

Marceau and Allan Chen as the works of these authors stand out as the most theory driven contributions. As such, they are best suited for the following analysis as they promise the most insights regarding the role of democracy in ag-gag discourse.

10.6.2.1 Frye: From the Public Sphere to the Public Screen and the Politics of Preemption

In his 2014 essay, communications scholar Joshua Frye employed communication theory to analyze ag-gag as a political strategy.[223] He finds that the second wave of ag-gag (see above) 'hinges on freedom of expression.'[224] Further, he identified 'message framing, pre-empting the public screen, and discursive closure' as mechanisms at play, and argued that they negatively impact on democracy.[225]

The public screen is sometimes invoked in communication theory, and describes a version of Habermas' concept of the public sphere, adapted to the 21st century and to recent technological developments.[226] Frye invokes the theory to describe how rational deliberation amongst citizens in public places, which was present in the second half of the 20th century, has been replaced by 'fragmented, yet uniform individualized reception via new electronic mass media,' in a 'return to the spectacle of the Middle Ages.'[227] The second wave of ag-gag was structured around communication, rather than property rights, according to Frye's analysis, as it prevents content about animal welfare from reaching the public screen.[228]

In this context, Frye uses the notion of preemption.[229] He points out that preemption as a policy option was legitimized by former US President George W. Bush since 2002: it allows one to act, or even use military force, in response to an anticipated future threat without 'material evidence' of such threat.[230] Similarly, Frye seemed to imply, potential threats to the agriculture industry through increased consumer awareness are prevented

223 Frye 2014.
224 Ibid., 27.
225 Ibid.
226 Ibid., 36.
227 Ibid.
228 Ibid., 37.
229 Ibid., 38.
230 Ibid.

by preempting the public screen. I borrow the notion of preemption in this context from Frye.

Unfortunately, Frye did not delve deeper into the different concepts invoked in this analysis. My understanding of this argument, therefore, remains tentative. In particular, it is unclear why Frye invoked the public screen rather than the original Habermasian concept of the public sphere. For the sake of Frye's argument, the public screen seems to be the functional equivalent of the public sphere, but one that already displays certain pathologies. This is interesting because the metaphor of the public screen – unlike what is commonly assumed by critics of ag-gag – indicates that engagement with undercover footage and animal welfare, even if not preempted, would not take the form of ideal Habermasian deliberation in the public sphere.

10.6.2.2 Marceau and Chen: Translating First Amendment Theory into Legal Doctrine

Above, in the introductory Sections, I heavily relied on the works of US lawyers and scholars Marceau and Chen. The authors served as legal counsel for plaintiffs challenging ag-gag laws in before Courts, including in Idaho.[231] Their work on the issue is the most comprehensive, and they are the only US scholars to have extensively written on ag-gag laws by connecting First Amendment doctrine and theory so far. They employed First Amendment theory to argue against both the recording and misrepresentation provisions. The idea that undercover footage contributes to public discourse is salient in their work, although the empirical side of this claim is not unpacked in detail.

As for recording provisions, Marceau and Chen conclude that the First Amendment implies a right to film matters of public interest, even on private property, when lawfully present even if that is without consent of those in charge.[232] As we have seen in the Idaho case, this conclusion resonates with existing jurisprudence. The Courts – although they do not discuss this in the form of a right to film on private property – are highly critical of recording provisions.[233]

231 Marceau/ Chen 2016, 995, ft. 17.
232 Ibid., 1038 f.
233 *ALDF v. Wasden* 34 f.

Regarding misrepresentation provisions, Marceau and Chen argue that the First Amendment protects 'high value lies' which promote the democracy and truth-finding function of free speech.[234] As the Idaho decisions show, Courts did not follow this line of argument. The legal validity dimension of this claim is therefore up for debate. The issue is further complicated by the fact that in *Alvarez*, the most important precedent on this issue, the judges could not agree on a rationale.[235]

However, the theoretical element of Marceau and Chen's account is of greater interest to the inquiry at stake here, as it involves arguments from democracy. Put bluntly, the authors argue that lies invoked to enable the creation of undercover footage deserve protection due to their 'instrumental' value:[236] they are preparatory to protected speech in that they are 'a necessary precursor to public debate about important political, social, and moral issues.'[237] Therefore, the authors argue, misrepresentation provisions in ag-gag laws contravene the First Amendment.

This claim appears controversial. One could take the opposing view and argue that lies made for instrumental reasons disserve the cause of democracy and the search for truth. Identifying 'high value' lies requires distinguishing between good and bad, or worthy and unworthy, causes, or even political aims in the process of deciding which lies are covered by free speech, a distinction that is impossible to make without privileging certain political agendas over others and thus distorting the democratic process. For instance, false speech can severely impact the democratic process, most evidently if it occurs in election campaigns. This is not to say that lies should not be protected. Especially in cases where there is no harm caused, good reasons speak against censoring lies: above all, governments may not always be well placed to determine what is true and what is false.[238] Further, restricting lies might have a chilling effect on speech generally, including true speech.[239] Yet, the argument that Marceau and Chen point to seems to be distinct, as it seeks to protect only a specific kind of falsehood for narrowly constructed instrumental reasons.

234 Chen/ Marceau 2018, 1473.
235 For further implications of Alvarez, its tension with free speech theory and prior jurisprudence see Sunstein, Cass R., Liars: Falsehood and Free Speech in an Age of Deception (New York: Oxford University Press 2021), 112 f.
236 Chen/ Marceau 2018, 1472.
237 Ibid., 1473.
238 See Sunstein 2021, 56 f.
239 Ibid., 61.

Regardless of what one may think of the argument in substance, there are numerous normative and empirical assumptions underlying it that are not sufficiently transparent. If one allows the idea that free speech and its underlying rationales are important to ag-gag, the relevant and controversial question is not: does the First Amendment and existing jurisprudence allow extending protection to 'high value lies;' but rather, is doing so really desirable from the perspective of democracy and other rationales behind the First Amendment? Appealing to democracy and the search for truth as rationales behind the First Amendment requires unpacking the implications, and considering the effects of the arguments on these very values. In other words, it requires taking democratic theory seriously, too.

Marceau and Chen present their arguments as First Amendment theory, and thus as distinctively legal claims. This may create the impression that legality and only legality considerations are relevant to a legal study on ag-gag laws. For the adjudication of Court cases, legality is of course paramount. But relying on legality in scholarly arguments has a serious downside as it leaves animal advocates empty handed in the face of new, more carefully drafted ag-gag laws that cannot be said to raise the same constitutional challenges. The First Amendment claims are further unhelpful when ag-gag laws are discussed in other jurisdictions. Even if the First Amendment protects 'high value lies,' this is not necessarily the case in other jurisdictions. The German Basic Law, for example, does not protect false statements of *fact* (as opposed to *opinion*). On a normative level, one may attempt to argue that it should, but it would be clearly *contra lege*, and in light of this, very few lawyers and legal scholars would consider it convincing.

Relying on legality alone neglects other, and arguably stronger, arguments against ag-gag laws, especially arguments from democracy. The focus on legality thus results in an overemphasis on the First Amendment, touching upon, but not really substantiating, the democratic rationales behind free speech that speak against ag-gag laws.

10.6.2.3 Gelber and O'Sullivan: Democratic Arguments for Free Speech

The Australian political science scholars Katharine Gelber and Siobhan O'Sullivan are, so far, the only authors who have focused in on ag-gag

and public deliberation on matters of public importance.[240] Yet, they too presented their arguments as a matter of free speech. The authors argue that trespass is a peaceful, non-violent, yet illegal activity and that it was the only way of obtaining certain information about animal welfare at farms.[241] According to the authors, this information is essential to public deliberation about animal welfare, which is a matter of public interest.[242] As such, trespass on animal facilities can further public deliberation and the democratic process. Thus, legislative attempts to hinder this activity via ag-gag laws impact on animal activists' ability to shed light on issues relevant to public deliberation.[243] Against this backdrop, ag-gag laws – at least in the Australian context – are questionable under the democratic argument for free speech.[244]

Gelber and O'Sullivan's account is compelling. They seminally spelled out distinctively democratic arguments against ag-gag laws. Yet, the contribution leaves some crucial questions unanswered. The central claim of the authors is that ag-gag laws are not supported by the democratic rationale for freedom of expression. Although this conclusion follows from the finding that ag-gag laws do not further democracy, the focus on freedom of speech rather than democracy itself is surprising, considering that the crux of the argument is not the (fairly undisputed) relevance of democracy for freedom of expression, but the relevance of undercover footage to democracy.

10.6.2.4 Common Elements

The majority of authors in the literature consider ag-gag laws primarily as an encroachment upon free speech, and as a matter of legality only. This is even the case for the most theory driven works on the topic that were discussed above. The focus on free speech is strategically conceivable, as those arguments are fertile in legal disputes. Yet, it is unfortunate as it takes the contribution of undercover footage to democracy for granted, and

240 Gelber, Katharine/ O'Sullivan, Siobhan, Cat got your tongue? Free speech, democracy and Australia's 'ag-gag' laws, Australian Journal of Political Science 56:1 (2021), 19–34.
241 Ibid., 19.
242 Ibid., 19, 29.
243 Ibid.
244 Ibid., 20.

glosses over distinctively non-deliberative means such as lies and trespass. One could argue that these acts are justified given the lack of transparency in the agricultural industry but, in order to do so, one must acknowledge that they are problematic in the first place. The focus on free speech usually does not leave room for these crucial inquiries. Especially with regard to employment fraud ag-gag laws, the arguments brought forward are thus incomplete and therefore unconvincing both from the perspective of political theory and legal theory, at least if one considers the latter to include considerations beyond US constitutional law.

10.6.3 Conclusion: Brushing over Democracy

The above section reconstructed how legislators and – with reference to those legislators – Courts invoked 'the Court of public opinion' in the context of ag-gag laws. While legislators explicitly want to avoid subjecting the agriculture industry to 'the Court of public opinion,' the Courts voiced doubts as to whether this would constitute a legitimate government interest allowing encroachment on activities otherwise protected by the First Amendment. Voices in the literature go further than the Courts, and portray the industry's exposure to public scrutiny as a desirable development that furthers democracy.

Clearly, to what extent animal agriculture should be subjected to public scrutiny, and whether this is enough to outweigh privacy and property interests, is a central point of disagreement between advocates and opponents of ag-gag laws. However, even theoretically inclined literature has not yet explored this angle in great depth, and has instead focused on free speech, likely because this corresponds to a legal claim that promises a finding that some existing ag-gag laws are unconstitutional. Outside the courtroom, or when it comes to addressing ag-gag laws in other jurisdictions or those more carefully crafted ag-gag laws in the United States, this line of argument results in dead ends.

Courts, proponents, and opponents of ag-gag alike are thus brushing over the crucial democratic element of this discussion. In the existing discourse, democracy is covered beneath free speech and, sometimes, animal welfare concerns, although it constitutes a promising framework to address challenges raised by undercover footage and its regulation via the legal system. Courts seem to recognize the democratic dimension at stake, but engage with it only to a very limited extent. In the case analyzed above,

the metaphor of 'the Court of public opinion' is the only reference that touches upon questions of democracy. However, as we have seen above, the rationales behind free speech, including democracy, do not form a central element of legal reasoning. Rather, it was the reach of property protection that was decisive.

Proponents of ag-gag highlight the dangers of a 'court of public opinion,' presenting its 'preemption' as adequate remedy. However, 'preemption' is problematic from the perspective of democracy. As many those scholars referred to above have pointed out (although mostly within a framework centering free speech), ag-gag legislation hinders the exposure of practices that the public is not sufficiently informed about. As such, ag-gag can be criticized from an epistemological perspective, as it hinders the creation of knowledge. The same authors also implied that, if citizens were better informed, they would demand better protection for animals. Ag-gag can thus be questioned from the perspective of self-governance, for a society cannot legislate for itself about matters unknown. Finally, 'preemption' stifles deliberation, for it circumvents public debate on animal welfare as matter of public interest.

Yet, opponents of ag-gag also tend to gloss over democracy concerns. For example, US scholars critical of ag-gag rarely acknowledge the history of violent animal activism in the United States, which arguably cannot be squared with (deliberative) democracy.[245] Further, the empirical assumptions mentioned above, especially the assumption that citizens would demand higher animal welfare standards if they were informed about animal agriculture, are not substantiated.

10.7 From Antagonism to Agonism

Clearly, deliberative democracy is not apt to reconstruct legal responses to undercover footage in jurisdictions with ag-gag laws within the United States. Both public and legal discourse on ag-gag, as well as on industrialized animal farming more generally, are characterized by antagonism. In Germany, antagonism between animal activists and those they consider responsible for animal abuse is salient, too. However, as we have seen throughout the previous Chapters, the law, and especially legal reasoning,

245 Ibid. Gelber and O'Sullivan mention this point.

find ways to temper the existing antagonism through features of deliberative democracy, for example, by invoking public interest, balancing tests, and distinctions between lawful and unlawful activities on animal facilities. In ag-gag states, such an element of deliberative democracy, which could function as a bridge between interests of animal facility operators and those of animal activists, is distinctly absent.[246] So then, if deliberative democracy cannot explain the theory behind ag-gag, which stream of theory can conceptualize the legal responses to undercover footage in the United States?

10.7.1 Agonism, Activism, and Ag-Gag

Agonism may provide a framework capable of explaining and evaluating legal responses to undercover footage in ag-gag jurisdictions. Agon is a Greek word that is usually translated to 'struggle' or 'contest.'[247] Agonism is a stream of political theory which emphasizes the inevitable, and positive, nature of conflict in (democratic) politics. Foundations of today's models of agonism can be found in the works of Friedrich Nietzsche,[248] Carl Schmitt,[249] Hannah Arendt[250] and Michel Foucault.[251] Today, Chan-

246 I develop this aspect further in Chapter 12.

247 See e.g., Minkkinen, Panu, Agonism, Democracy, and Law, in: Simon Stern, Maksymilian Del Mar, and Bernadette Meyler (eds.), The Oxford Handbook of Law and Humanities (New York: Oxford University Press 2019), 427–442, 427; Wenman, Mark, Agonistic Democracy: Constituent Power in the Era of Globalisation (Cambridge: Cambridge University Press 2013), 4.

248 Nietzsche, Friedrich, Homer's Contest, in: Friedrich Nietzsche, On the Genealogy of Morality (Cambridge: Cambridge University Press 2007), 174–181; see also Davis Acampora, Christa, Naturalism and Nietzsche's Moral Psychology, in: Keith Ansell Pearson (ed.), A Companion to Nietzsche (Oxford: Blackwell 2006), 314–333; Davis Acampora, Christa, Contesting Nietzsche (Chicago: University of Chicago Press 2013).

249 Schmitt, Carl, The Concept of the Political, Expanded Edition (London: University of Chicago Press 2008).

250 Arendt, Hannah, Between Past and Future (New York: Penguin Books 2006); Arendt, Hannah, The Human Condition (Chicago: University of Chicago Press 2nd ed., 2013).

251 Foucault, Michel, The Order of Things (New York: Pantheon Books 1971); Foucault, Michel, Society Must Be Defended (London: Penguin 2003). For an overview of how the works of the aforementioned authors are related to each other and to agonism in contemporary political theory see Paxton, Marie, Agonistic Democracy: Rethinking Political Institutions in Pluralist Times (New York: Routledge 2019), 29–52.

tal Mouffe,[252] Bonnie Honig[253] and William E. Connolly[254] are the most prominent defenders of agonism in political theory. While their positions are far from uniform, the rejection of deliberative democracy is a common element of their work.

The following focuses on the works of Mouffe, which are usually discussed under the headline of 'agonistic pluralism.' Mouffe criticizes deliberative democracy *inter alia* for denying antagonism. According to Mouffe, antagonism is ever present in human societies and cannot be eradicated.[255] Controversially, proponents of agonism argue that deliberative democracy denies antagonism by claiming that a consensus on political questions can be found through rational deliberation.[256] To this, deliberative democrats would likely object that deliberation is a way to overcome antagonism by listening and offering reasons in pursuit of the common good, as explained in Chapter 3. However, according to proponents of agonism, such a rational solution simply does not exist for most 'properly political' conflicts.[257] Mouffe defines 'the political' as 'the antagonistic dimension which is inherent in all human societies' and human relations.[258]

Further, Mouffe criticizes deliberative democracy for being too focused on rationality and underestimating the role of passion.[259] According to Mouffe, passion creates political identities ('us' and 'them').[260] The 'us' and 'them' distinction is inevitable, given the pluralism and diversity of perspectives and values.[261] The paramount question is, then, how to acknowledge this pluralism and conflict without creating a 'friend/enemy confrontation'

252 Laclau/ Mouffe 2001; Mouffe 1993; Mouffe 2000; Mouffe 2005.
253 Honig, Bonnie, Political Theory and the Displacement of Politics (Ithaca: Cornell University Press 1993).
254 Connolly, William E., Pluralism (Durham: Duke University Press 2005); Connolly, William E., Political Theory and Modernity (London: Cornell University Press 1993); Connolly, William E., The Terms of Political Discourse (Princeton: Princeton University Press 1993).
255 Mouffe, Chantal, Democratic Politics and Conflict: An Agonistic Approach, Política Común 9 (2016) not pagniated.
256 Ibid.
257 Mouffe, Chantal, By Way of a Postscript, Parallax 20:2 (2014), 149–157, 150.
258 Politics, on the other hand is 'the ensemble of practices, discourses and instructions which seek to establish a certain order and to organize human coexistence in conditions which are always potentially conflicting' since they are not immune to 'the political.' Mouffe 2016.
259 Mouffe 2014.
260 Ibid., 150.
261 Ibid.

where 'the enemy is to be destroyed.'[262] The challenge of democratic politics is to transform antagonistic enemies into *agonistic* adversaries.[263] Agonism allows one to conceive of the opponents as adversaries, whose existence is legitimate although their ideas will continue to be fought vigorously.[264] In any case, consensus remains out of reach.[265]

Now, the question is what we can take from this idea of agonism arising in politics for the understanding of animal activism and ag-gag laws. Although agonism has received some attention in political theory, it very rarely features in legal literature. Yet, agonism is relevant to the law, first and foremost because, as Panu Minkkinen observed, both share a concern for democracy.[266] Further, legal theorist Carl Schmitt is frequently mentioned as an influential figure for agonism.[267] In light of his support of the Nazi regime, it is questionable whether Schmitt can be invoked at all in the context of democracy. Yet, he is credited with establishing the friend/ enemy distinction that is at issue in contemporary models of agonism.[268] This kind of thinking is clearly at odds with deliberative democracy. Yet, it may provide resources to capture the reality of the conflict between animal activists and those deemed as complicit in causing animal suffering in the United States.

In Chapter 3, I argued that deliberative democracy, even as non-ideal theory, provides resources to improve the wellbeing of animals. I also argued that I consider the treatment of animals to be a topic of reasonable disagreement. The topic evokes strong emotions and involves questions of morality. Consequently, consensus is difficult to reach. Nevertheless, I maintain that it can be approached as a matter of rational argument, which can take the form of deliberation. However, in this Chapter, I have shown that this approach might be out of reach in some jurisdictions. Here, the question is not: 'which democratic theory should govern the

262 Ibid., 150 f.
263 Ibid.
264 Ibid. 151.
265 Ibid.
266 Minkkinen 2019, 427.
267 Ibid.; see also Paxton, 2019.
268 Schmitt, Carl, Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Corollarien (Berlin: Duncker & Humblot, 1963), 26–37. For a systematic comment on the friend/enemy distiction in the work or Carl Schmitt see Ladwig, Bernd, Die Unterscheidung von Freund und Feind als Kriterium des Politischen, in: Reinhard Mehring (ed.), Carl Schmitt: Der Begriff des Politischen. Ein kooperativer Kommentar (Berlin: Akademie Verlag 2003), 45–70.

discourse on how humans ought to treat animals?' Rather, the question is: 'which democratic theory can explain existing legal responses and the *status quo* well enough to open room for evaluation?' As regards that latter question, agonism as employed by Chantal Mouffe is promising in ag-gag jurisdictions.

Antagonism is omnipresent in debates on animal activism. Animal activists criticize that the animal agriculture industry in US ag-gag states causes immense animal suffering. At the same time, animal agriculture forms the basis of livelihood, at least for those working in animal agriculture. Animal activists find animal suffering to be intolerable and demand an end to these practices, thus questioning the basis of other people's livelihood. The antagonism inherent in that conflict is indisputable.

In a next step, one may ask how the law in general, and ag-gag laws in particular, respond to this antagonism. Ag-gag laws aim to prevent or – as Frye aptly suggested – even 'preempt'[269] the conflict. Clearly, they do not strive for consensus. But as we have seen above, some might argue that a consensus is impossible to reach regardless. Against this backdrop, the question is whether ag-gag laws at least turn existing antagonism into agonism. This question must be answered in the negative. Special criminal laws targeting animal activists imply that there is no place for their activities in society; they are enemies, not adversaries.

According to Mouffe's agonistic approach, the role of the enemy should be reserved for those who 'reject the very basic idea of pluralist democracy.'[270] This may be appropriate for some animal activists who engage in coercive direct action. It is not appropriate, however, with regard to those who create and disseminate undercover footage precisely to take part in what Mouffe calls the 'agonistic struggle,'[271] to fight for their ideas by persuading others to join their cause.

To illustrate the above claims, one can return to the notion of 'the Court of public opinion.' Above, I described 'the Court of public opinion' as a metaphor for the situation in which the public passes a judgement that is not based on the law, but on opinion. It is inherently antagonistic, as either side can only either win or lose, rather than entering into a consensus. This image describes a form of antagonism that can potentially become agonism. If we take the metaphor of the Court seriously, it implies that

269 Frye 2014, 38.
270 Mouffe 2014, 151.
271 Ibid.

the opponents are adversaries but not enemies. In a Court, the parties are equal. They have rights, which are guarded by procedural law, for example. In a criminal trial, there is a presumption of innocence. The purpose of the trial is to achieve justice, and not to destroy an opponent. Against this backdrop, a trial, especially in the Anglo-American system, can be considered 'a contemporary agonistic context *par excellence*' in the words of Minkkinen.[272]

If a matter is prevented from reaching the Court of public opinion through ag-gag laws, the underlying conflict does not cease to exist. What ceases to exist is merely the opportunity for one side, namely animal activists ('them'), to make their case. They are excluded from the 'agonistic struggle' as the enemy, which – as I have argued above – is inappropriate.

10.7.2 Legal Implications

From the Section above, it should be clear that ag-gag laws tend towards antagonism rather than agonism: towards conceiving of animal activists as enemies rather than adversaries. As such, they are not only unsustainable under the demanding framework of deliberative democracy, but also for those who endorse agonism.

In principle, the critique from agonism applies to all categories of ag-gag, as they single out animal activists and hinder the flow of information about animal welfare, making it impossible for activists to take part in the 'agonistic struggle.' Compared to deliberative democracy, the idea of agonism is less developed and less suited to inform legal discourse. This implies that, even more than with arguments from deliberative democracy, the agonistic objection against ag-gag is a matter of legal policy rather than of the law itself. These conclusions might be unsatisfying for lawyers. Yet, they may help to re-calibrate our focus and urge us to take seriously the arguments concerned with democracy.

Finally, one should consider that ag-gag laws are not the origin, but the result of antagonism towards animal activism. A critique and attempts for improvement informed by agonism must start with a public discourse on animal activism. The existing conflict cannot be resolved through the criminal law alone. Just like the problem with ag-gag does not consist of it

272 Minkkinen 2019, 427.

being unconstitutional, the solution to the democratic challenges it raises is not within hard law. The labeling of animal activists as terrorists,[273] as well as the depiction of their cause as deviating from the common good, are a necessary precondition for passing ag-gag legislation. Agonism does not require eradicating these causes, but rather argues that they must be tempered so that they do not collapse into the friend/enemy distinction envisaged by Schmitt.

11. Ag-Gag in Other Jurisdictions

So-called ag-gag laws are not a uniquely United States phenomenon. Such legislation has been considered, and in some cases passed, also in Australia and Canada. These developments are very recent, evidencing the growing relevance of the topic at hand, and the need for the comparative and normative methodology that is employed here. While legal doctrinal arguments based on the United States constitution have little to contribute to the debate in Australia, for example, appraising the legislation through the lens of democratic theory can be fruitful for other jurisdictions.

11.1 Ag-Gag in Australia

11.1.1 Ag-Gag Legislation

Several jurisdictions in Australia have recently either considered or passed legislation that critics consider to be comparable to United States ag-gag legislation.[274] The first category of laws discussed under this headline of ag-gag in Australia are laws that operate under the paradigm of the protection of biosecurity. They could affect activists who enter animal facilities without permission, thus potentially creating risks to biosecurity. The *New South Wales Biosecurity Act 2015* includes a penalty of up to three years imprisonment for individuals creating the risk of a significant impact on

273 For more details on the connection between animal terrorism and other illegal methods of the movement see Chapter 12.

274 Gelber, Katharine/ O'Sullivan Siobhan, Cat got your tongue? Free speech, democracy and Australia's 'ag-gag' laws, Australian Journal of Political Science 56:1 (2021), 19–34; Whitfort, Amanda S., Animal Welfare Law, Policy, and the Threat of "Ag-Gag:" One Step Forward, Two Steps Back, Food Ethics 3 (2019), 77–90.

biosecurity.[275] Similar provisions exist in the *Queensland Biosecurity Act 2014*.[276] However, the New South Wales law further imposes a duty to report the suspected creation of such a risk by others.[277] Legal scholar Amanda Whitfort discussed these biosecurity laws under the headline of ag-gag, while Katharina Gelber and Siobhan O'Sullivan did not include them in that category.[278] Against this backdrop, it can be debated whether these measures should be considered ag-gag. One argument against doing so is that biosecurity is absent from the ag-gag debates in the United States, and thus constitutes a different paradigm. I will return to this issue in the comparison presented in Chapter 12.

In 2016 New South Wales passed the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Bill 2016*,[279] amending the *Inclosed Lands Protection Act (NSW) 1901* to criminally prohibit interfering, or attempting to interfere, with a business conducted on the land.[280] The broad term 'interference' reminds one of early US ag-gag laws. In 2019, the *Right to Farm Act (NSW)*[281] was passed, also amending the *Inclosed Lands Protection Act* and prohibiting *inter alia* the incitement or counselling of someone to commit the above offense.[282]

Similar measures were recently introduced in other states. In 2020 in Queensland, the *Agriculture and Other Legislation Amendment Act (Qld) 2020* was passed, amending Section 13 of the *Summary Offences Act (Qld)*

275 *New South Wales Biosecurity Act 2015,* Sections 23 and 279, available at: https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/act-2015-024 (last accessed 7 September 2021).

276 *Queensland Biosecurity Act 2014*, available at: https://www.legislation.qld.gov.au/view/whole/html/inforce/current/act-2014-007 (last accessed 7 September 2021). Specifically, section 23 introduces a 'general biosecurity obligation.'

277 *New South Wales Biosecurity Act 2015* Sections 38–40.

278 Whitfort 2019, 83; Gelber/ O'Sullivan 2021.

279 *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Bill* 2016, available at: https://www.parliament.nsw.gov.au/bill/files/3275/Passed%20by%20both%20Houses.pdf (last accessed 7 September 2021).

280 *Inclosed Lands Protection Act (NSW) 1901* Section 4B, available at: https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-1901-033 (last accessed 7 September 2021).

281 *Right to Farm Act (NSW) 2019*, available at: https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2019-015 (last accessed 7 September 2021).

282 *Inclosed Lands Protection Act (NSW) 1901* Section 4C.

2005 and making it an offence to unlawfully enter or remain on land used *inter alia* for animal husbandry or the exhibition of animals.[283]

Further, Surveillance Devices Acts play an important role, although they are not limited to the agriculture industry and differ from state to state. The *South Australian Surveillance Devices Act 2016*, for example, bans the recording or publication of private activities or conversations.[284] The maximum penalty for a breach is 3 years' imprisonment.[285] However, the law includes a public interest exception: the prohibition does not apply to the use or installation of listening or video recording devices if it is in the public interest.[286] Prior to the use, communication, or publication of the material, public interest must be confirmed by a judge,[287] unless the publication is made *to* or *by* a media organization and is also in the public interest.[288]

Despite the public interest exception, the law has been criticized for stifling advocacy, in particular in the area of animal protection.[289] Although the law is of a general nature and not limited to the agriculture industry or animal facilities, critics were concerned that animal advocacy would be negatively impacted.[290] A member of the South Australia Upper House and the Greens party proposed an amendment, stating that 'issues of animal welfare will, in the absence of proof to the contrary, be taken to be in the public interest.'[291] The proposed amendment did not pass.

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283 *Agriculture and Other Legislation Amendment Act (Qld)* 2020 Section 13, available at: https://www.legislation.qld.gov.au/view/html/asmade/act-2020-003#sec.133 (last accessed 7 September 2021).

284 *South Australian Surveillance Devices Act 2016,* available at: https://www.legislation.sa.gov.au/LZ/C/A/SURVEILLANCE%20DEVICES%20ACT%202016/CURRENT/2016.2.AUTH.PDF (last accessed 7 September 2021).

285 Ibid., Sections 4 f.

286 Ibid., Section 6.

287 Ibid., Section 10 (1).

288 Ibid., Section 10 (2).

289 MacLennan, Leah, Ag-gag bill will make exposing animal cruelty harder: Law Society, ABC News, 2 September 2015, available at: https://www.abc.net.au/news/2015-12-03/ag-gag-bill-surveillance-devices-sa-parliament/6994516 (last accessed 7 September 2021).

290 Ibid.

291 Government of South Australia, *Surveillance Devices (Animal Welfare) Amendment Bill 2016*, did not become law, available at: https://www.legislation.sa.gov.au/LZ/B/ARCHIVE/SURVEILLANCE%20DEVICES%20(ANIMAL%20WELFARE)%20AMENDMENT%20BILL%202016_HON%20TAMMY%20FRANKS%20MLC.aspx (last accessed 7 September 2021). See also Whitford 2019, 84.

Finally, legislation was attempted on the federal level. If passed, the *Criminal Code Amendment (Animal Protection) Bill 2015* would have made 'failing to report malicious cruelty to animals after recording it' an offence.[292] This resembles the mandatory or rapid reporting law discussed in the United States context. The proposed Bill also included new offences titled '[i]nterfering with the carrying on of animal enterprises,' through destruction or damaging of property[293] or through '[c]ausing fear of death or serious bodily injury' specifically through 'threats, vandalism, property damage, criminal trespass, harassment, or intimidation.'[294] Defenses include *inter alia* 'publishing in good faith a report or commentary about a matter of public interest.'[295] Unlike the other Bills discussed above, the attempted legislation at the federal level was evidently targeted at animal activists. Australian animal advocacy organizations spoke out against it,[296] and the Bill lapsed at the end of the Parliamentary session in July 2019.[297]

Later in 2019, the federal government passed the *Criminal Code Amendment (Agricultural Protection) Bill 2019*.[298] The amendment makes it a criminal offence to use a carriage service to transmit, or otherwise make available, material with the intent of inciting trespass on agricultural land, while being reckless as to the trespass causing 'detriment to a primary production business that is carried out on the agricultural land.'[299] There is an exception if the transmitted 'material relates to a news report or current affairs report, that: (a) is in the public interest; and (b) is made by a per-

292 Parliament of South Australia, *Criminal Code Amendment (Animal Protection) Bill 2015,* Proposed Amendment of the Criminal Code Act 1995, inserting Part 9.7 Protecting Animals and Animal Enterprises, Section 383.5, did not become law, available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s994 (last accessed 7 September 2021).

293 Ibid.

294 Ibid., Section 385.10 (1).

295 Ibid., Section 385.15 (c).

296 Voiceless, Submission to the Senate Rural and Regional Affairs and Transport Legislative Committee, 10 March 2015, available at: https://voiceless.org.au/wp-content/uploads/2019/10/Voiceless-Submission-to-the-Senate-Rural-and-Regional-Affairs-and-Transport-Legislation-Committee.pdf (last accessed 7 September 2021).

297 See *Criminal Code Amendment (Animal Protection) Bill* 2015, Progress, available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s994 (last accessed 7 September 2021).

298 *Criminal Code Amendment (Agricultural Protection) Bill 2019*, available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6351 (last accessed 7 September 2021).

299 Ibid., inserting 474.46 (1) into the *Criminal Code Act 1995*.

son working in a professional capacity as a journalist.'[300] The amendment contained similar provisions for incitement as were applicable to theft and property damage on agricultural land.[301] As Gelber and O'Sullivan pointed out, this law falls into a new category of 'ag-gag' as it does not target those committing trespass, but others associated with them.[302] They argued that it could subject one to the possibility of prosecution for being a member of a group in which someone else makes the decision to trespass.[303] The concern that the law could have, at the very least, a chilling effect on the exchange of information between animal activists seems warranted.

The issues surrounding animal activism, including the creation and dissemination of undercover footage, continues to be discussed in Australia. For example, in 2020 in Victoria there was an inquiry into the impact of animal rights activism on Victorian agriculture.[304] The report identified the risks posed by animal rights activism, and especially the risks to farming communities and to biosecurity, but it also proposed modernizing animal welfare law.[305]

11.1.2 Litigation

Animal activists Dorottya Kiss and Christopher Delforce were charged under the *NSW Surveillance Devices Act* in 2015, but the charges were dismissed in 2017.[306] The reason for the dismissal was a procedural issue; a form had not been dated and failed to comply with police investigation and charging procedures.[307] The case is pertinent since Christopher Delforce is a filmmaker, and one of Australia's most prominent animal activists.

300 Ibid., inserting 474.46 (2) into the *Criminal Code Act 1995*.
301 Ibid., inserting 474.47 into the *Criminal Code Act 1995*.
302 Gelber/ O'Sullivan 2021, 28 f.
303 Ibid., 29.
304 Parliament of Victoria, Legislative Council Economy and Infrastructure Committee, Inquiry into the impact of animal rights activism on Victorian agriculture, February 2020, available at: https://www.parliament.vic.gov.au/file_uploads/LCEIC_59-02_Impact_of_animal_activisim_on_Victorian_agriculture_n8Zx02Bz.pdf (last accessed 7 September 2021).
305 Ibid., xvii-xx.
306 Bettles, Collin, Animal activists 'let off' charges under the NSW Surveillance Devices Act due to technicality, Farm Online National, 8 August 2017, available at: https://www.farmonline.com.au/story/4842862/animal-activists-let-off-charges-due-to-technicality/ (last accessed 7 September 2021).
307 Ibid.

His documentary 'Dominion' is well known in Australia and internationally. Throughout his work, Delforce emphasizes his motivation to increase transparency in the agricultural industry.

As Executive Director of 'The Farm Transparency Project' (formerly 'Aussie Farms') Delforce is now spearheading Australia's first legal challenge of ag-gag laws.[308] A case has reached the High Court of Australia, arguing that the *NSW Surveillance Devices Act* is unconstitutional as it violates the right to political communication which is implied as an indispensable part of the system of representative and responsible government enshrined in the Australian Constitution.[309] The Farm Transparency Project argues *inter alia* that the legislation covers the publication of non-private activity and, as such, it cannot be justified by the protection of privacy.[310] The plaintiff further problematizes that the legislation is an ag-gag measure[311] and that the 'disincentivisation of "farm trespass"' could be an additional legislative purpose, which is not legitimate under the implied freedom of political communication.[312]

The case is highly relevant for the topic of this dissertation. Precisely because the Australian Constitution does not provide a right to freedom of expression, the case will give an opportunity to explore distinctively

308 High Court of Australia, *Farm Transparency International Ltd & Anor v State of New South Wales* (ongoing) file number S83/2021, filings available at: https://www.hcourt.gov.au/cases/case_s83-2021 (last accessed 18 March 2022); see also Knaus, Chrstopher, High Court to hear bid to overturn New South Wales hidden camera laws, The Guardian, 28 June 2021, available at: https://www.theguardian.com/australia-news/2021/jun/29/high-court-to-hear-bid-to-overturn-new-south-wales-ag-gag-laws (last accessed 7 September 2021).

309 High Court of Australia, *Farm Transparency International Ltd & Anor v State of New South Wales* (ongoing) file number S83/2021; on the right to political communication in Australia see High Court of Australia, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; High Court of Australia, *Australian Capital Television Pty LtD v the Commonwealth* (1992) 177 CLR 106. The decisions are not publicly available.

310 High Court of Australia, *Farm Transparency International Ltd & Anor v State of New South Wales* (ongoing) file number S83/2021, plaintiff outline of oral submissions, 2, available at: https://cdn.hcourt.gov.au/assets/cases/08-Sydney/s83-2021/FarmTransparency-NSW_Pltf-OOA.pdf (last accessed 18 March 2022).

311 High Court of Australia, *Farm Transparency International Ltd & Anor v State of New South Wales* (ongoing) file number S83/2021, plaintiffs' submissions, 12, available at: https://cdn.hcourt.gov.au/assets/cases/08-Sydney/s83-2021/FarmTransparency-NSW_Pltf.pdf (last accessed 18 March 2022)

312 High Court of Australia, *Farm Transparency International Ltd & Anor v State of New South Wales* (ongoing) file number S83/2021, plaintiff outline of oral submissions, 2.

democratic challenges to ag-gag. This issue is particularly pressing in NSW as the *NSW Surveillance Devices Act*, unlike many other states' Surveillance Devices Acts, does not include a public interest exception. However, at the time of writing the case is still ongoing.

About 20 years ago, a majority within the High Court of Australia was receptive to the arguments arising from democracy for the dissemination of undercover footage from animal facilities. Long before the first ag-gag laws were passed in Australia, the High Court decided the case *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.[313] The Court in that case denied an interlocutory injunction against the dissemination of undercover footage from a brush tail possum meat processing plant, depicting the slaughter of possums.[314] An unknown third party created the footage without the knowledge or consent of the facility operator and did so 'in a clandestine manner.'[315] ABC, a publicly funded broadcaster, received the footage from Animal Liberation Limited and was not complicit in the creation of the footage. Yet, at least since the court proceedings, ABC was aware of how the footage had been created.[316] ABC intended to broadcast the footage on a news program.[317]

This decision covers the entire range of issues typically associated with the dissemination of undercover footage, including trespass and the balancing between privacy and the public interest in free speech. Celebrated by animal activists' organizations is, in particular, the following quote by Judge Kirby, affirming animal welfare as a matter of public debate and the role of animal advocates in society:[318]

> 'The concerns of a governmental and political character must not be narrowly confined. To do so would be to restrict, or inhibit, the operation of the representative democracy that is envisaged by the Constitution.

313 High Court of Australia, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, (hereafter *ABC v Lenah Game Meats*) full text publicly available at: https://www.animallaw.info/case/australian-broadcasting-corporation-v-lenah-game-meats-pty-ltd (last accessed 7 September 2021). Citations to particular paragraphs in the following refer to this source.

314 Ibid., para. 3.

315 Ibid., para. 1.

316 Ibid., para. 24.

317 Ibid., para. 69.

318 See Giuffre, Emmanuel, Case Note: ABC v Lenah Game Meats, Voiceless, available at: https://voiceless.org.au/case-note-abc-v-lenah-game-meats/ (last accessed 7 September 2021).

> Within that democracy, concerns about animal welfare are clearly legitimate matters of public debate across the nation [...] Many advances in animal welfare have occurred only because of public debate and political pressure from special interest groups. The activities of such groups have sometimes pricked the conscience of human beings. Parliamentary democracies, such as Australia, operate effectively when they are stimulated by debate promoted by community groups. To be successful, such debate often requires media attention. Improvements in the condition of circus animals, in the transport of live sheep for export and in the condition of battery hens followed such community debate. Furthermore, antivivisection and vegetarian groups are entitled, in our representative democracy, to promote their causes, enlisting media coverage, including by the appellant [ABC]. The form of government created by the Constitution is not confined to debates about popular or congenial topics, reflecting majority or party wisdom. Experience teaches that such topics change over time. In part, they do so because of general discussion in the mass media.'[319]

This statement is remarkable, as it goes to the core of the democratic argument for the dissemination of undercover footage. It not only states that animal welfare is a matter of public debate, but also engages with examples of successful advocacy for animal welfare in the past. What is noteworthy in this respect is that, in the absence of a stand-alone right to free speech in the Australian Constitution, this argument is closely tied to democracy.

More importantly, *ABC v Lenah Game Meats* sets limits to ag-gag legislation in Australia. In Australia's common law system, the decision of the High Court is law; the legislator cannot legislate against it. Thus, the pending case against the NSW law will show how the High Court squares this view on undercover footage and animal welfare with ag-gag laws.

11.1.3 Public Interest and Journalism

Unlike ag-gag in the United States, at least some of the laws discussed above account for the public interest and the work of journalists. Public interest exceptions are present in Australian legislation that is applicable to undercover footage, namely in the *South Australian Surveillance Devices Act 2016* and the *Criminal Code Amendment (Agricultural Protection) Bill 2019*. The

319 High Court of Australia, *ABC v Lenah Game Meats*, (2001) 208 CLR 199, paras. 217 f.

South Australian Surveillance Devices Act 2016 is not limited to agriculture, but restricts the use of optical surveillance devices. In Subsection 5 it prohibits one to 'knowingly install, use or maintain an optical surveillance device on or in premises, a vehicle or any other thing, (whether or not the person has lawful possession or lawful control of the premises, vehicle or thing) to record visually or observe the carrying on of a private activity without the express or implied consent of each party to the activity.' However, it provides, in Subsection 6 (2) (a), that this rule does not apply 'to the use of an optical surveillance device to record visually or observe the carrying on of a private activity if the use of the device is in the *public interest*' (emphasis added). Subsection 10 (1) regulates the use of the information obtained by those means and is also subject to the public interest exception: '[a] person must not knowingly use, communicate or publish information or material derived from the use of [...] an optical surveillance device in circumstances where the device was used in the public interest except in accordance with an order of a judge under this Division.' Subsection 10 (2) offers an exception from the requirement to obtain an order from a judge, stating that 'Subsection (1) does not apply to the use, communication or publication of information or material derived from the use of [...] an optical surveillance device in circumstances where the device was used in the public interest if— (a) the use, communication or publication of the information or material is made to a media organisation; or (b) the use, communication or publication of the information or material is made by a media organisation and the information or material is in the public interest.'

The federal *Criminal Code Amendment (Agricultural Protection) Bill 2019* added Section 474.46 to the *Criminal Code Act 1995*. Subsection 474.46 (1) makes it an offence to use a carriage service to distribute material with the intent to incite another person to trespass on agricultural land and recklessness regarding any detriment caused to a production business on the agricultural land by the trespasser. According to Subsection (2), the above 'does not apply to material if the material relates to a news report, or a current affairs report, that: (a) is in the public interest; and (b) is made by a person working in a professional capacity as a journalist.'

Again, there is an exception accommodating the public interest, and the role of professional journalists. Additionally, Subsection 174.48 (1) states that the above 'does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.'

In a nutshell, one can say that the public interest plays a decisive role for the creation of footage, and also for its dissemination. The media are

privileged with regard to dissemination, as disclosing footage by them does not require an order. Further, they may disseminate the material themselves if it is in the public interest to do so.

In practice, the reach of these exceptions and privileges will, of course, depend on how the public interest is established, in particular, whether animal welfare is considered to be a matter of public interest at all. In the 2001 landmark case *ABC v Lenah Game Meats*, the High Court of Australia left no doubt that animal welfare was a matter of public debate.[320] The Court considered this in favor of the publication of footage with had been unlawfully obtained by a third party.[321] Yet, whether this implies that reporting on animal welfare is in the public interest is unclear. The failed attempt to expressly state in the legislation that animal welfare qualifies as such, illustrates this difficulty. Unfortunately, this introduces an element of uncertainty, which is problematic especially in criminal law. Activists, or even freelance journalists, will certainly be held back by these laws, not knowing with any certainty whether their conduct would be covered by the public interest exceptions.

Further guidance on how to interpret the criterion of public interest in Australian legislation concerning animal activists can be found in other areas of law. The public interest test features most prominently in the law pertaining to freedom of information. In this area, the public interest test is well established.[322] The same test cannot be applied to undercover footage from animal facilities, first and foremost because the information at stake is not held by government agencies. Nevertheless, the factors considered relevant to the public interest in the context of freedom of information may be instructive for the interpretation of the public interest provisions in ag-gag laws.

The Commonwealth *Freedom of Information Act 1982 (Cth)* requires public agencies and ministers to consider the public interest when deciding on the disclosure of information.[323] Section 11B (3) lists factors to be considered as favoring access to a document due to it being in the public interest.

320 Ibid., para. 218.

321 Ibid.

322 For an overview of the public interest test see Information and Privacy Commission NSW, What is the public interest test? Fact Sheet June 2018, available at: https://www.ipc.nsw.gov.au/sites/default/files/2019-02/Fact_Sheet_What_is_the_public_interest_test_June_2018.pdf (last accessed 7 September 2021).

323 *Freedom of Information Act 1982 (Cth)*, available at: https://www.legislation.gov.au/Details/C2019C00055 (last accessed 7 September 2021).

It speaks in favor of public interest if access to the document promotes objects of the *Freedom of Information Act* (Section 3, 3A), such as by giving the community access to information and promoting representative democracy through 'increased public participation' (Section 3(2)(a)) as well as 'scrutiny, discussion, comment and review of the Government's activities' (Section 3(2)(b)). Further, it is to be considered whether disclosure would: 'inform debate on a matter of public importance' (Section 11B(3)(b)); 'promote effective oversight of public expenditure' (Section 11B(3)(c)); or 'allow a person to access his or her own personal information' (Section 11B(3)(d)). Some of these criteria, promoting representative democracy and informing debate on matters of public importance in particular, are relevant to the public interest in the context of undercover footage from animal facilities.

Similarly, the public interest features in the access to information legislation on a state level. Queensland's *Right to Information Act 2009 (Qld)* lists factors favoring disclosure in the public interest in Schedule 4, Part 2.[324] Notably, it speaks in favor of public interest if 'disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability' (No. 1); 'contribute to positive and informed debate on important issues or matters of serious interest' (No. 2); 'contribute to the protection of the environment' (No. 13); 'reveal environmental or health risks or measures relating to public health and safety' (No. 14); or 'contribute to the enforcement of the criminal law' (No. 18). Depending on the case in question, these rationales could also be advanced for undercover footage from animal facilities. On the other hand, according to the *Right to Information Act 2009 (Qld)*, factors favoring nondisclosure based on lack of public interest (Schedule 4, Part 3) are, for example, if: 'disclosure of the information could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of entities' (No. 2); 'prejudice the protection of an individual's right to privacy' (No. 3); 'prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct' (No. 6); or 'prejudice trade secrets, business affairs or research of an agency or person' (No. 15). These rationales could be invoked against the dissemination of undercover footage.

324 *Right to Information Act 2009 (Qld)*, available at: https://www.legislation.qld.gov.au/view/html/inforce/current/act-2009-013#sch.4 (last accessed 7 September 2021).

In New South Wales, the *Government Information (Public Access) Act 2009 (GIPA Act)* contains public interest considerations.[325] As example of public interest considerations in favor of disclosure it lists *inter alia* in Division 2 (12)(2)(a) the promoting of 'open discussion of public affairs' and contribution to 'positive and informed debate on issues of public importance.'

Adding the criterion of public interest introduces an element of uncertainty, and discretion, into these decisions. Unlike in the context of freedom of information, the laws relevant to undercover footage do not provide guidance as to which considerations weight in favor of, or against, the public interest. This uncertainty and discretion are particularly problematic in the context of undercover footage, as the laws concerned create criminal liability. However, these concerns could be mitigated if legislation concerned clearly stated that animal welfare is a matter of public debate and importance, so that the gathering and publication of information regarding this topic is to be considered in the public interest, unless weighty arguments speak against it. Certainly, accounting for the public interest even in a vague manner is an improvement compared to not accounting for the public interest at all. Given the reasoning in *ABC v Lenah Game Meats*, the public interest considerations may act to temper concerns regarding the constitutionality of the recently introduced legislation. At the same time, however, the absence of a public interest exception in the NSW ag-gag law makes it a target for legal challenges.

11.2 Ag-Gag in Canada

Recent developments in Canada warrant a brief look into ag-gag legislation enacted there. As these developments are only just emerging, little has been written on the issue so far. However, Jodi Lazare provided an overview, and critically examined the legislation in question, pointing to interferences with freedom of expression and demanding careful scrutiny through legislators and Courts.[326]

325 *Government Information (Public Access) Act 2009 (GIPA Act)*, available at: https://legislation.nsw.gov.au/view/html/inforce/current/act-2009-052#sec.12 (last accessed 7 September 2021).

326 Lazare, Jodi, Ag-Gag Laws, Animal Rights Activism, and the Constitution: What is Protected Speech?, Alberta Law Review 58 (2020), 83- 105.

Lazare zeroed in on legislation in Alberta and Ontario. The Alberta *Trespass Statutes (Protecting Law-Abiding Property Owners) Amendment Act 2019* reads like a common trespass law, prohibiting both the unauthorized entry onto land and the act of remaining after being directed to leave.[327] However, it also deems a 'person who obtains by false pretences permission to enter on land [...] to have entered on the land without permission.'[328] This could impact undercover investigations whereby animal activists gain employment in an animal facility. It could therefore be discussed under the category of 'employment fraud.' Yet, one could also argue that it remains within the realm of regular trespass laws.

In 2020 Alberta passed the *Critical Infrastructure Defense Act*,[329] which could arguably impact other forms of animal activism such as the practice of 'bearing witness' when animals are transported to slaughter, which is common in the toolkit of Canadian animal activists.[330]

Meanwhile, Ontario passed *Bill 156* in 2020, 'an Act to protect Ontario's farms and farm animals from trespassers and other forms of interference and to prevent contamination of Ontario's food supply.'[331] As the name suggests, this legislation is more narrowly tailored to animal facilities, but shares features present in both of the Alberta laws described above.[332] The animal advocacy organization Animal Justice, together with a journalist, have filed a lawsuit challenging the constitutionality of the law in early 2021.[333] It remains to be seen how the Courts approach and decide the legal questions posed by the legislation and outlined by Lazare. In particular, the Courts will have to examine the compliance of the legislation with the Section 2(b) of the Canadian Charter of Rights and Freedoms which enshrines freedom of expression.

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327 *Trespass Statutes (Protecting Law-Abiding Property Owners) Amendment Act 2019*, *Petty Trespass Act*, Section 3(1) f., available at: https://www.qp.alberta.ca/Documents/AnnualVolumes/2019/ch23_19.pdf (last accessed 8 September 2021).

328 Ibid., Section 3(2.4).

329 *Critical Infrastructure Defense Act 2020*, available at: https://www.qp.alberta.ca/Documents/AnnualVolumes/2020/C32p7_2020.pdf (last accessed 8 September 2021).

330 Lazare 2020.

331 *Bill 156 2020 (Ontario)*, available at: https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2020/2020-06/b156ra_e.pdf (last accessed 8 September 2021).

332 See also Lazare 2020, 89.

333 Animal Justice Press Release, Animal Justice Files legal Challenge to Ontario "Ag-Gag" Law, 9 March 2021, available at: https://animaljustice.ca/media-releases/animal-justice-files-legal-challenge-to-ontario-ag-gag-law (last accessed 8 September 2021).

Biosecurity is salient in ag-gag debates in Canada. Another recent development is the passing of Manitoba's *Bill 62: The Animal Diseases Amendment Act*.[334] This legislation focuses on biosecurity and prohibits entry into biosecurity zones without the consent of the owner (Section 13.1(a)) as well as interfering with vehicles transporting animals (Section 13.2(1)). At the federal level, *Bill C-205* was introduced as a private member's bill. If passed, it would 'amend the Health of Animals Act to make it an offence to enter, without lawful authority or excuse, a place in which animals are kept if doing so could result in the exposure of the animals to a disease or toxic substance that is capable of affecting or contaminating them.'[335] Again, the aim of protecting biosecurity is central to the legislative debate.[336] So far, animal activist associations have not expressed their intent to challenge these laws in Court.

11.3 Conclusion

The brief exploration of recent developments in Canada and Australia illustrates that ag-gag is of growing importance in jurisdictions beyond the United States. Further, it provides examples of the criminalization of conduct associated with undercover footage. The *Criminal Code Amendment (Agricultural Protection) Bill 2019*, creating the offence of the use of a carriage service to disseminate material with the intent of inciting trespass, is particularly illustrative of the matter. However, looking to legislation in Australia also shows that the label of ag-gag is applied broadly, and perhaps unfairly, to legislation that is not specifically targeting the agriculture industry and which accounts for the public interest. In so doing, this legislation provides more room for arguments made from democracy. Thus, it seems that the normative frameworks employed in legal responses to undercover footage in Australia are more receptive towards democracy. I will return to these issues in Chapter 12.

334 *Bill 62 2020 (Manitoba)*, available at: https://web2.gov.mb.ca/bills/42-3/b062e.php (last accessed 8 September 2021).

335 House of Commons of Canada, *Bill C-205*, as of February 2020 (first reading), available at: https://www.parl.ca/DocumentViewer/en/43-1/bill/C-205/first-reading (last accessed 8 September 2021).

336 See e.g., Statements of Pat Finnigan, Simon-Pierre Savard-Tremblay and Lianne Rood on *Bill C-205*, available at: https://openparliament.ca/bills/43-2/C-205/ (last accessed 8 September 2021).

12. Comparison: Legal Responses to Undercover Footage in Germany and in the United States

12.1 Introduction

The previous Chapters alluded to remarkable differences between the legal responses to undercover footage in Germany and in the United States, as well as in Australia and Canada. Even in absence of the favorable decisions of German Courts discussed here, one could say that in Germany, in principle, the same sanctions apply to activists and journalists investigating and reporting on animal welfare as would apply to any other activist or journalist reporting on a matter of interest to the public. In the United States, on the other hand, legislation exists that undisputedly affects those, and only those, who investigate and report on the conditions in animal facilities.

This Chapter will examine these differences through a distinctively comparative lens. The comparison is not an end in itself. Rather, it functions to reaffirm the claim that looking at democracy can help to explain different legal responses to undercover footage. Alternatively, ag-gag could be explained by the protection of property rights, for example. But this approach would fall short of important subsequent questions, which are highlighted by a comparative lens: how is the balancing between competing values conducted? Which concepts are being employed? Why are certain arguments made in one jurisdiction, and not in the other? Where protection of property rights, for example, fails as an explanation capable of answering these questions, democratic theory can contribute to providing answers.

This Chapter is guided by questions on the different normative underpinnings, as well as legal and legal-policy arguments, that guide legislative and judicial reasoning. In identifying the relevant differences, this Chapter makes recourse to the findings of earlier Chapters, which were based on legal analysis and normative reconstruction.[337] Thus, this Chapter is not a detached, stand-alone, comprehensive comparison of the legal responses to undercover footage. Rather, certain factors are chosen and illustrated because of their relevance to the core themes and arguments of this dissertation. For example, I provide a more detailed account of the role of the public interest and the criminal law, as these issues are relevant to

337 For a detailed explanation of these methods see Chapter 2.

deliberative democracy and civil disobedience. Socio-legal scholars would certainly prioritize economic and societal factors instead, and functionalist comparative lawyers might consider both approaches equally flawed. I provide a more detailed defense of my comparative method in Chapter 2 of this dissertation.

Despite the focus on the normative level, the comparison conducted here is not intended as a search for the better answer for a given societal problem or tension. Instead, it may help to develop a more critical perspective of the approaches taken in both systems. As I will acknowledge further below, which approach is 'better' depends, not only on answers to ethical questions (regarding animal ethics and democracy), but also on other variables such as the culture of the animal rights movement in a given jurisdiction.

The Chapter proceeds in three steps. First, it will describe the differences observed throughout the previous Chapters. Second, it will advance possible explanations for these differences. Third and finally, I will draw conclusions as to the future of legal responses to undercover footage in Germany, the United States, and other jurisdictions based on the comparison. In so doing, this Chapter responds to the question of whether ag-gag legislation could be introduced in Germany, and whether it is likely that it will continue to exist in the United States, and whether it will likely be successful in Australia and Canada also.

12.2 Relevant Differences between Legal Responses to Undercover Footage

To begin, this Chapter provides a descriptive account, which refrains from explanation or judgement.[338] The account explores the differences, as indicated in previous Chapters, that exist in the legal responses to undercover footage in Germany and in the United States, as well as Australia and Canada.

12.2.1 Legislation Targeting Animal Activists

The defining difference between Germany and ag-gag jurisdictions in the United States (or between jurisdictions with and without ag-gag legislation

338 Taking recourse to the findings of previous Chapters entails some repetition. Nevertheless, the direct contrast helps to put a spotlight on the differences and examine them with greater precision.

more generally) is that the latter provides legislation specifically protecting animal facilities from conduct commonly leading to their public exposure. In Germany, legislation specifically protecting animal facilities from public exposure does not exist. As a consequence, there are no laws that could be said to single out and target animal activists who create and disseminate undercover footage.

Yet, the paradigmatic difference between the targeting of animal activists, and its absence, should not be overestimated. In some cases, it is not entirely clear whether legislation actually aims at hindering the creation and dissemination of undercover footage, or if it pursues other aims. Scholars have argued that even legislation with the declared purpose of protecting animal welfare by ensuring rapid reporting of animal abuse, or the laws protecting biosecurity, qualify as ag-gag.[339] In these cases, it is up to critics to show that the legislation in question does not only affect but specifically target animal activists, based on the legislative history, for example. Legislation with the declared purpose of protecting biosecurity, such as some of the proposals which are currently prominent in Australia, is an exemplary borderline case. This includes the *New South Wales Biosecurity Act 2015* and the *Queensland Biosecurity Act* 2014.[340] If legislation does not target animal activists, the ag-gag label is questionable.

12.2.2 The Role of the Criminal Law

Another feature distinguishing legal responses to undercover footage in Germany and those in parts of the United States is the role of criminal law. This aspect is particularly relevant to the arguments of this dissertation, as criminalization is indicative of the place assigned to animal activists and undercover footage in any given democracy.

Most ag-gag laws are criminal laws which operate to prohibit recording, misrepresentation to gain employment or access, or failure to report animal

339 On rapid reporting see Marceau, Justin F., Ag Gag Past, Present, and Future, Seattle University Law Review 38 (2015), 1317–1343, 1340 ff.; on biosecurity see Whitfort, Amanda S., Animal Welfare Law, Policy, and the Threat of "Ag-Gag:" One Step Forward, Two Steps Back, Food Ethics 3 (2019), 77–90, 83.

340 *New South Wales Biosecurity Act 2015,* available at: https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/act-2015-024 (last accessed 7 September 2021); *Queensland Biosecurity Act 2014*, available at: https://www.legislation.qld.gov.au/view/whole/html/inforce/current/act-2014-007 (last accessed 7 September 2021).

abuse after having recorded it. The first two categories, misrepresentation provisions (in the form of employment fraud), and recording provisions were discussed in Chapter 10 using the example of Idaho's law on interference with agricultural production, enshrined in in Idaho Code § 18–7042. Someone who commits the above offence is guilty of a misdemeanor and is to be punished with imprisonment for a maximum of one year and/or with a fine of up to 5000 US Dollars, according to Idaho Code § 18–7042 (3). Another, more recent, example is *Iowa House File 755* which was passed in 2021.[341] Iowa Code 727.8A now makes the placing or using of recording devices while trespassing an aggravated misdemeanor, and in the case of a second or subsequent offence, a class D felony.[342] Criminalization can also affect those who disseminate undercover footage. For example, in Australia the *Criminal Code Amendment (Agricultural Protection) Bill 2019*, as discussed in Chapter 11, makes it an offence to use a carriage service for the distribute of material with the intent of inciting another person to trespass on agricultural land, and recklessness regarding detriment caused to a production business on the agricultural land by the trespasser.[343] In these jurisdictions, then, criminal sanctions attach to an array of different behaviors associated with the creation and dissemination of undercover footage.

However, it should be noted that ag-gag is not always a matter of criminal law. North Carolina's *Property Protection Act* enacted in 2013 provides a civil cause of action for employers targeted by employment based undercover investigations.[344] Arkansas followed suit in 2017, enshrining a civil cause of action for unauthorized access to property in Arkansas Code § 16–118–113.[345] These laws allow employers to sue for monetary damages.[346]

In Germany, legal responses to undercover footage also entail criminal law remedies. Chapters 8 and 9 discussed the possibility of criminal liability

341 Iowa Legislature, *House File 775*, available at: https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=hf775 (13 September 2021).

342 Ibid.

343 *Criminal Code Amendment (Agricultural Protection) Bill 2019*, Subsection 474.46 (1), available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6351 (last accessed 7 September 2021).

344 See Hanneken, Sarah, Principles Limiting Recovery Against Undercover Investigators in Ag-Gag States: Law, Policy and Logic, The John Marshall Law Review 50:3 (2017), 649–711, 666 ff.

345 Civil Cause of Action for Unauthorized Access to Property, Arkansas Code § 16–118–113 (2017).

346 See Hanneken 2017, 669 ff. for a critical analysis.

under § 123 of the Criminal Code (trespass). However, distinctly from the United States or other ag-gag jurisdictions, this criminality is more limited in that it generally only attached to the trespass element. Although, those who gain access to animal facilities by other means, for example by obtaining employment, or those who are already employed and later become whistleblowers after witnessing animal abuse, are not immune from criminal prosecution either. The laws that might apply to whistleblowers in all industries could be discussed here.[347] However, in the 'paradigmatic' case of undercover footage, liability under these provisions seems unlikely, as it does not usually feature confidential conversations or business secrets.

Neither is criminal lability likely to arise from employment fraud in the context of undercover investigations. Employment fraud is dealt with as a subcategory of fraud, § 163 of the Criminal Code [Betrug].[348] In short, it requires that an employee cannot perform the duties required by a given position, typically due to the employee having lied about qualifications necessary to perform the tasks in question.[349] Absent a lack of qualification, fraud is only discussed in the context of gaining employment in fairly narrowly construed categories (e.g., hiding a criminal record or the position requiring a special level of trust), none of which seem applicable here.[350]

Finally, there exists no obligation in Germany to rapidly report animal abuse after recording it. In fact, the Naumburg Court allowed four months to pass before the activists notified law enforcement and handed over footage, arguing that time was needed in order to prepare a report.[351]

To sum up, one can say that, in the absence of trespass, criminal liability for the creation of undercover footage is unlikely in Germany. If trespass has been committed, criminal liability remains possible depending

347 § 23 of the Act for the Protection of Business Secrets [Gesetz zum Schutz von Geschäftsgeheimnissen] might be invoked in these cases. In addition, § 203 of the Criminal Code (violation of private secrets [Verletzung von Privatgeheimnissen]), as well as § 353b of the Criminal Code (breach of official secrecy and special obligation of secret [Verletzung des Dienstgeheimnisses und einer besonderen Geheimhaltungspflicht]), and § 201 of the Criminal Code (violation of privacy of spoken word [Verletzung der Vertraulichkeit des gesprochenen Wortes]) would have to be discussed in this context.

348 Hefendehl, Roland, § 263 Betrug, in: Volker Erb, Jürgen Schäfer (eds.), Münchner Kommentar zum Strafgesetzbuch (München: C.H. Beck 4th ed., 2022), para. 667.

349 Ibid., para. 668.

350 Ibid., para. 669 ff.

351 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065).

on *inter alia* whether the footage depicts violations of animal protection law. Criminal liability for employment fraud in the context of undercover investigations is unlikely. Thus, there is a limited scope for the applicability of criminal law.

Contrarily, one can say that ag-gag can extend the scope of conduct that is potentially subject to criminal prosecution. In the United States, this is pertinent in the context of employment fraud. Ag-gag can extend the circle of individuals subject to criminal prosecution, as the *Criminal Code Amendment (Agricultural Protection) Bill 2019* in Australia shows.[352] In other words, ag-gag may extend the reach of criminal law in response to undercover footage, in terms of both the conduct covered and the persons affected. As a result, the criminal law is more salient in legal responses to undercover footage in ag-gag jurisdictions. As was discussed in Chapter 9, subjecting forms of protest to criminal prosecution limits the room for scholarly arguments from democracy, as criminal law comes with its own structure and categories which are relatively closed to considerations from constitutional law or other normative arguments from democracy. Thus, an extension of reach of the criminal law limits, or excludes, these arguments. This connects to the next point discussed below: criminal law also leaves little room to discuss animal welfare as a matter of public interest.

12.2.3 Animal Welfare as a Matter of Public Interest

For the purpose of this dissertation, one of the most interesting differences between ag-gag states in the United States and Germany is the role ascribed to the public interest, to animal welfare as a matter of public interest generally, and public debate more specifically. Is animal welfare a matter of public interest? Does undercover footage contribute to the public debate? Does it further democracy? This Section will illustrate that the differences between Germany and ag-gag jurisdictions, in terms of their approach to undercover footage on the issue of animal welfare, cannot be understood without taking recourse to democracy.

Technically, there is a difference between animal welfare being *in the public interest* and animal welfare being *of interest to the public*, in the sense

352 *Criminal Code Amendment (Agricultural Protection) Bill 2019*, available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6351 (last accessed 7 September 2021).

that the public has an interest in engaging in discussions on this matter. However, as we have seen throughout the previous Chapters, these two questions are closely linked in the reasoning of Courts and will therefore be discussed together here.

In the jurisdictions discussed in this dissertation it is clearly established that some speech enjoys an increased level of protection. In the United States, this is typically referred to as political or ideological speech.[353] The ECtHR too confers a high level of protection on political speech or 'debate of questions of public interest.'[354] In Germany, the question of whether speech is political or contributes to a debate of public interest becomes relevant especially when freedom of expression is to be balanced against the rights of others.[355]

German Courts and the ECtHR leave no doubt that animal welfare is a matter of public interest. The ECtHR stated this most clearly in *PETA Deutschland v. Germany*,[356] as well as in a range of other cases.[357] German domestic Courts referred to animal welfare as a matter of public interest throughout the cases discussed in this dissertation, for example in *Tierbefreier* and in the organic chicken case.[358] In fact, the claim that animal welfare is not a matter of public interest would be difficult to sustain, considering that Article 20a of the Basic Law enshrines animal protection as a state objective.

353 Congressional Research Service, The First Amendment: Categories of Speech, updated 16 January 2019, available at: https://fas.org/sgp/crs/misc/IF11072.pdf (last accessed 13 September 2021).

354 See e.g., ECtHR, *Verein gegen Tierfabriken Schweitz (VgT) v. Switzerland* (no. 2), App. no. 32772/02, 30 June 2009, para. 92.

355 OLG Hamburg [Hamburg Regional Court] 19 July 2016, 7 U 11/14, BeckRS 131241, 2016 (para. 12), with reference to BGH [Federal Court of Justice], 30 September 2013, VI ZR 490/12, NJW 782, 2015 (784).

356 ECtHR, *PETA Deutschland v. Germany*, App. no. 43481/09, 8 November 2012, para. 47.

357 ECtHR, *Bladet Tromsø and Stensaas v. Norway*, App. no. 21980/93, 20 May 1999, paras. 63 f., 73; ECtHR, *Steel and Morris v. UK*, App. no. 68416/01, 15 February 2005, para. 88; ECtHR, *Verein gegen Tierfabriken Schweiz v. Switzerland*, App. no. 32772/02, 30 June 2009, para. 92.

358 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (134); OLG Hamburg [Hamburg Regional Court] 19 July 2016, 7 U 11/14, BeckRS 131241, 2016 (para. 12). In cases unrelated to undercover footage German Courts go even further and describe animal welfare as a matter of the 'common good' ['Gemeinwohl']: BVerfG [Federal Constitutional Court] 2 October 1973, 1 BvR u. 477/72, NJW 1974, 30; BVerfG [Federal Constitutional Court] 6 July 1999, 2 BvF 3–90, NJW 1999, 3253.

The legal provisions and legal standards applied by German Courts in deciding on the dissemination of undercover footage, include a consideration of whether the matter in question is of interest to the public. As explained in Chapter 6, '[t]he basic right to freedom of opinion is assigned more weight, the more a contribution to the intellectual battle of ideas in a question considerably concerning the public is at issue' ['[d]em Grundrecht auf Meinungsfreiheit kommt umso größeres Gewicht zu, je mehr es sich um einen Beitrag zum geistigen Meinungskampf in einer die Öffentlichkeit wesentlich berührenden Frage handelt'].[359] One can say that the question of whether the footage speaks to a debate on a matter of public interest is one of the paramount factors in deciding whether its publication is lawful. The public interest factor negotiates between free speech, privacy, and property interests on a case-by-case basis. As I explained in greater detail in Chapter 6, this focus on the question of whether the publication of something speaks to a debate of a matter of public interest is also present in the jurisprudence of the ECtHR. Finally, even in a criminal law case, the Naumburg Regional Court relied on animal welfare as a 'legal interest of society as a whole' ['Rechtsgut der Allgemeinheit'].[360]

Yet, the same cannot be said about the legal responses to undercover footage in the United States. As a rule, ag-gag laws do not account for the public interest; they do not leave room to consider whether footage contributes to a debate on a matter of public interest on a case-by-case basis.

Now, one might say that this comparison misses the point: after all, most ag-gag laws are criminal laws, they concern the creation and not the dissemination of undercover footage. In criminal law, it would be uncommon to consider the public interest. Rather, the general laws applicable to the dissemination of undercover footage may be more open to public interest considerations. And yet, we should not disregard the absence of a public interest tests from ag-gag laws as irrelevant. The relevant difference is not that ag-gag laws do not account for an assessment of whether footage contributes to a debate on matters of public interest. Rather, public interest considerations (or lack thereof) in the legislative process are telling: the very existence of ag-gag laws, their drafting and enactment, indicate that undercover investigations on animal welfare are presumed to not entail

359 BGH [Federal Court of Justice] 10 April 2018, NJW 2877, 2018 (2880).

360 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065).

speech particularly worthy of protection. Ag-gag laws imply that both the creation and the dissemination of undercover footage concerning animal welfare do not entail political speech relevant to a debate of public interest, such that that content would call for increased protection (rather than an additional burden imposed by specialist legislation).

The Courts concerned with the constitutionality of ag-gag laws have scrutinized this point to some extent. As the Court noted in *ALDF v. Otter*:

> 'lies used to facilitate undercover investigations actually advance core First Amendment values by exposing misconduct to the public eye and *facilitating dialogue on issues of considerable public interest*. This type of *politically-salient speech* is precisely the type of speech the First Amendment was designed to protect'[361] (emphasis added).

However, it is possible for legislation to increase the risk of legal sanctions in the context of undercover footage while accommodating public interest considerations. Legislation in Australia, in particular the *South Australian Surveillance Devices Act 2016*, does privilege conduct in the public interest.[362] Nevertheless, the impact of this remains unclear: it is not guaranteed that animal welfare would be considered to qualify as capable of triggering the benefits of the public interest exceptions.[363]

The presence of public interest arguments in legal responses to undercover footage in Germany, the absence of such considerations in US ag-gag legislation, and the ambivalent role of the public interest in emerging legislation in Australia, are all striking. These differences encapsulate the

361 *ALDF, et al. v. C. L. Butch Otter in his official capacity as Governor of Idaho; and Lawrence Wasden, in his official capacity as State of Idaho*, 118 F. Supp. 3d 1195, 1199 (D. Idaho 2015), summary judgement decision, 3 August 2015, p. 12 ('*ALDF v. Otter*, summary judgement decision' in the following). The decision is also available at: https://www.acluidaho.org/sites/default/files/field_documents/summary_judgment_decision_0.pdf (last accessed 8/4/2021). References in the following refer to page numbers from this publicly available source.

362 *South Australian Surveillance devices Act 2016,* Section 6(2)(a), available at: https://www.legislation.sa.gov.au/LZ/C/A/SURVEILLANCE%20DEVICES%20ACT%202016/CURRENT/2016.2.AUTH.PDF (last accessed 7 September 2021).

363 A proposed amendment of the *South Australian Surveillance Devices Act 2016*, specifying that animal welfare was a matter of public interest did not pass. See *Surveillance Devices (Animal Welfare) Amendment Bill 2016*, available at: https://www.legislation.sa.gov.au/LZ/B/ARCHIVE/SURVEILLANCE%20DEVICES%20(ANIMAL%20WELFARE)%20AMENDMENT%20BILL%202016_HON%20TAMMY%20FRANKS%20MLC.aspx (last accessed 7 September 2021). See also Whitford 2019, 84.

different conceptions of the status of animal welfare in democracy, and in law, an issue that I will return to below.

12.2.4 Privileges Conferred to the Media and Journalism

Similarly, ag-gag legislation in the United States does not account for the role of journalists and the media. In Germany, the FCJ decision in the organic chicken case suggests that the media are privileged when it comes to the dissemination of undercover footage. In Chapter 6, I highlighted how the German FCJ titled the media a 'public watchdog,' and allowed them to disseminate even footage illegally created by a third party.[364]

Comparable privileges do not exist in ag-gag legislation in the United States. However, this finding is not conclusive as to the role of the media, since ag-gag laws in the United States concern, first and foremost, the creation of undercover footage rather than the dissemination. In Germany, it is established that freedom of the press does not cover the unlawful creation of footage; journalists are not exempt form general laws such as those of the criminal code.[365] This is in line with the jurisprudence of the ECtHR which does not afford immunity from general criminal law to journalists.[366] Thus, journalists are not privileged regarding the unlawful creation of undercover footage.

Interestingly, Australian legislation does explicitly privilege media when it comes to the dissemination of undercover footage. Most significantly, the *South Australian Surveillance Devices Act 2016* allows privileges for footage disseminated to and by the media.[367] This resonates with the reasoning of Judge Kirby in *ABC v Lenah Game Meats*, who pointed out the importance of 'general discussion in the mass media.'[368]

364 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2880).

365 The FCC took a clear stance on this issue in its infamous Walrafff-Springer decision, see BVerfG [Federal Constitutional Court] 25 January 1984, 1 BvR 272/81, NJW 1741, 1984 (1743).

366 ECtHR, *Pentikänien v. Finland*, App. no. 11882/10, 20 October 2015, para. 91, see also ECtHR, *Stoll v. Switzerland*, App. no. 69698/01, 10 December 2007, para. 102; ECtHR, *Bladet Tromsø and Stensaas v. Norway*, App. no. 21980/93, 20 May 1999, para. 65.

367 Section 10 (2).

368 High Court of Australia, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, paras. 217 f. The full text is publicly available at: https://www.animallaw.info/case/australian-broadcasting-corporation-v-lenah-game-mea

The role ascribed to the media in legal responses to undercover footage is very relevant to the questions explored in this dissertation, as it is closely linked to the democracy enhancing function of freedom of expression. In light of the above, it can be said that, at least regarding the creation of undercover footage, there are no obvious differences between Germany and ag-gag jurisdictions. However, it is remarkable that the media are privileged when it comes to the dissemination of footage, both in Germany and in Australia.

12.2.5 Public Interest and Journalism in Australia and in the United States

The two variables above, public interest and journalism, sharply distinguish recent developments in Australia from ag-gag legislation in the United States. As explained in Chapter 11 and above, some of the legislation discussed under the headline of ag-gag in Australia actually accounts for both public interest and journalism, which also corresponds to the jurisprudence of the High Court on this matter in the case *ABC v Lenah Game Meats*.[369] At the same time, public interest exceptions and privileges for the media, and the work product of professional journalists, are absent from ag-gag legislation in the United States. These features of the Australian approach rather bring to mind the legal responses to undercover footage in Germany; where the public interest in animal welfare, and information related thereto, militated in favor of activists and the media to continue disseminating footage in Chapters 5 and 6. I raised the issue of the privileging of the media over activists when it came to the dissemination of footage. The arguments from deliberative democracy that speak against formal distinctions between journalists and activist, made in Chapter 6, are applicable here as well. Media reporting can be false, or on-deliberative, as it can be sensationalist, polarizing, and can exaggerate disagreement on moral questions. Further, a formal distinction based on institutional affiliation does not do justice to the broad spectrum of journalism and activism. Particularly, a categorical distinction between activists and journalists cannot be maintained in an increasingly indeterminate media landscape, and especially not in the online sphere.

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ts-pty-ltd (last accessed 7 September 2021). Citations to particular paragraphs in the following refer to this source.

369 Ibid.

Finally, it is worth mentioning that the public interest, although absent from ag-gag legislation in the United States, at least does feature in the associated scholarly debate. Marceau and Chen defend the claim that there should be a right to record even on private property without consent, but place this right under the limitation that the recording must 'pertain to a matter of public concern or at least have a strong connection to public discourse. That is, the recordings must somehow relate to a general matter of political, social, or moral significance that is an appropriate subject of public debate.'[370] Through this limitation, Marceau and Chen coupled the right to record to the First Amendment via the rationales of 'democratic self-governance and the search for truth.'[371] The focus on matters of public concern is supported by the jurisprudence of the United States Supreme Court, which affords speech on such matters of public concern the highest protection.[372] The authors apply these considerations to ag-gag laws, and conclude that they 'would be unconstitutional to the extent that the recordings were of activities that would implicate the legal regulation of factory farms and the ethical choices our society makes about the treatment of nonhuman animals.'[373] As such, the issue of public interest is essential and calls for explanations from democracy, advanced below.

12.2.6 Differentiating Between Legal and Illegal Conditions in Animal Facilities

Ag-gag laws in the United States do not attach any relevance to whether the animal welfare conditions revealed by secretive recording were lawful or unlawful. In Germany, on the other hand, both civil and criminal Courts grappled with this aspect in the course of the cases discussed in this dissertation. In the *Tierbefreier* case, for example, the Courts explained that the fact that the footage did not depict unlawful conditions implied that the grievances revealed by the publication were not sufficient to trigger increased public interest.[374] This standard was not always decisive; in the

370 Marceau, Justin/ Chen, Alan K., Free Speech and Democracy in the Video Age, Columbia Law Review 116 (2016), 911–1062, 1038.
371 Ibid.
372 Ibid.
373 Ibid., 1039.
374 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (135).

organic chicken case, the FCJ found that interest in publication prevailed despite the depicted conditions being lawful.[375]

The distinction between lawful and unlawful animal welfare conditions is also relevant in criminal law. In the Naumburg case, it was essential to the necessity justification. Although the Court left open whether the conditions in the facility were sufficient to give rise to criminal charges, it also found that the operator of the facility had put the wellbeing of animals at risk, and thus had to tolerate interferences with their rights to a larger extent than someone not responsible for such conditions.[376]

Ag-gag laws do not make such distinctions. If anything, it matters rather whether the activists capture something they *believe* to be animal abuse, which could have the effect of working to their disadvantage. Missouri's ag-gag law provides that anyone employed at an agricultural animal facility who records what she beliefs to be abuse or neglect of a farm animal under the relevant legal provisions must submit the recording to law enforcement within 24 hours.[377] To be clear, it seems to be irrelevant here whether the scenes depicted do constitute animal abuse. It cannot be excluded that Courts would take breaches of animal welfare law into account in favor of activists in applying ag-gag laws as well, but in absence of published decisions this question cannot be answered.

12.2.7 Rights and Values Invoked in the Context of Undercover Footage

A variety of legally protected values and rights feature in the legal discourse surrounding undercover footage from animal facilities. As will be shown below, property and privacy rights, along with freedom of expression (to varying degrees), feature in Court decisions in both Germany and the United States. However, based on the cases discussed in this dissertation, it seems that German Courts were more inclined to engage with values other than those of individual rights.

375 However, even in this case the Court explained in detail why the depicted conditions being lawful was not decisive, BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2880 ff.).

376 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065).

377 Revised Statutes of Missouri § 578.013 (2012); see also Shea, Matthew, Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-Gag Laws, Columbia Journal of Law and Social Problems 48:3 (2015), 337–371, 355.

In Germany, the so-called domiciliary right ['Hausrecht'] plays an essential role in legal responses to the creation of undercover footage. The domiciliary right is the legal value that the prohibition of trespass contained in § 123 of the Criminal Code seeks to protect. It describes the interest in exercising one's own will in one's home or other protected area without being interfered with by unauthorized persons.[378] In the words of the Frankfurt Regional Court, it confers the 'freedom to decide who shall have access to the dwelling, business premises, or pacified possession' ['Freiheit der Entscheidung darüber, wer zur Wohnung, zu Geschäftsräumen oder zu einem befriedeten Besitztum Zutritt haben soll'].[379] It should be noted that the domiciliary right is not congruent with ownership: even the owner of a property can commit trespass against a tenant.[380] As the breach of the prohibition of trespass enshrined in § 123 (1) of the Criminal Code forms the basis of criminal liability for the creation of undercover footage, the domiciliary right must be considered as the central value militating for criminal sanctions against undercover footage in Germany.[381]

In addition, courts invoke other values without linking them to specific legal provisions. For example, risks to the state's monopoly on the use of force are mentioned in the Naumburg decision, although in passing.[382] In addition to the mention by the Court, legal commentators criticized the lenient approach of the Court *inter alia* for allowing animal activists to circumvent the state's monopoly on the use of force.[383] Chapter 8 explained

378 Heger, Martin, § 123 Hausfriedensbruch, in: Karl Lackner, Christian Kühl (eds.), Strafgesetzbuch Kommentar (München: C.H. Beck 29th ed., 2018), para. 1.

379 OLG Frankfurt [Frankfurt Regional Court] 16 March 2006, 1 Ss 189/05, NJW 1746, 2006.

380 Heger 2018, para. 2.

381 This assessment is based on the dominant view on trespass and the domiciliary right in legal literature. However, a minority of voices in the literature conceive of trespass as protecting a multitude of different values. They call for an approach based on sociological considerations that would account for the different social functions of the protected entities, for example differentiating between homes and workplaces. See Schall, Hero, Die Schutzfunktionen der Strafbestimmung gegen den Hausfriedensbruch: Ein Beispiel für die soziologisch fundierte Auslegung strafrechtlicher Tatbestände (Berlin: Duncker & Humblot 1974). This minority view might warrant a different conclusion regarding the domiciliary right in agricultural facilities.

382 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2066).

383 Scheuerl, Walter/ Glock, Stefan, Hausfriedensbruch in Ställen wird nicht durch Tierschutzziele gerechtfertigt, NStZ (2018), 448–451, 451.

how the Heilbronn District Court further invoked democracy, and specifically the importance of accepting majority decisions as arguments against a possible justification for trespass.[384] Hypothetically, in specific constellations, the right to free development of one's personality [freie Entfaltung der Persönlichkeit], enshrined in Article 2 (1) of the Basic Law, and the right to informational self-determination, derived from Article 2 (1) in conjunction with Article 1 (1) of the Basic Law, could also be invoked.[385]

With regard to the dissemination of undercover footage, rather than its creation, Courts further consider a range of different rights and values. In the organic chicken case discussed in Chapter 6, the FCJ noted that the dissemination of the footage interfered with the farming collective's general right to personality[386] [allgemeines Persönlichkeitsrecht]. More specifically, the 'social claim to validity as business enterprise' ['sozialer Geltungsanspruch (…) als Wirtschaftsunternehmen'] as derived from Article 2

384 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 36).

385 As explained above, other criminal law provision could be invoked against the creation of undercover footage. No decisions applying these provisions to the creation of undercover footage have been published. If footage includes the spoken words of for example facility employees, § 201 of the Criminal Code (violation of privacy of spoken word [Verletzung der Vertraulichkeit des gesprochenen Wortes]) would be pertinent. In this case – which thus far remains a hypothetical – the right to free development of one's personality [freie Entfaltung der Persölichkeit], enshrined in Article 2 (1) Basic Law, would be a stake; see Graf, Jürgen-Peter, § 201 Verletzung der Vertraulichkeit des gesprochenen Wortes, in: Volker Erb, Jürgen Schäfer (eds.), Münchner Kommentar zum Strafgesetzbuch (München: C.H. Beck Verlag, 4th ed. 2021), para. 2. If § 203 of the Criminal Code (violation of private secrets [Verletzung von Privatgeheimnissen]) was applied, the right to informational self-determination derived from Article 2 (1) in conjunction with Article 1 (1) of the Basic Law would be at stake; see Heger, Martin, § 203 Verletzung von Privatgeheimnissen, in: Volker Erb, Jürgen Schäfer (eds.), Münchner Kommentar zum Strafgesetzbuch (München: C.H. Beck Verlag, 4th ed. 2021), para. 1. Finally, if activists were charged with a violation of § 353b of the Criminal Code (breach of official secrecy and special obligation of secrecy [Verletzung des Dienstgeheimnisses und einer besonderen Geheimhaltungspflicht]), the values at stake could include the protection of the secrets in question as well as the trust of the general public in the discretion of public services; see Puschke, Jens, § 353b Verletzung des Dienstgeheimnisses und einer besonderen Geheimhaltungspflicht, in: Volker Erb, Jürgen Schäfer (eds.), Münchner Kommentar zum Strafgesetzbuch, (München: C.H. Beck Verlag 3th ed., 2019), para. 2. Yet, it is hardly conceivable how these norms could be infringed by undercover footage from animal facilities.

386 The more common term in English would be 'right to privacy,' however, the translation employed here better corresponds to the German Basic Law.

(1) in conjunction with Article 19 (3) of the Basic Law, as well as Article 8 of the ECHR.[387] The footage was capable of impacting the reputation of the farmer's collective as it differed from how the collective chose to present itself.[388] Further, the FCJ noted that the dissemination of the footage touched upon the plaintiff's right to an established and operated business enterprise, enshrined in Article 12 (1) in conjunction with Article 19 (3) of the Basic Law.[389] The footage in question depicted the circumstances of production, and thus impacted the interest of a business enterprise to shield its internal sphere from the public.[390]

Additionally, and in favor of the creation of undercover footage, courts considered animal welfare and often did so with reference to Article 20a of the Basic Law.[391] In the context of dissemination, Courts predominantly relied on the freedom of expression enshrined in Article 5 of the Basic Law, sometimes enhanced by animal welfare through Article 20a of the Basic Law.[392] Although not explicitly named as such, consumer protection also played a role in the organic chicken case:[393] the FCJ took issue with the discrepancy between what consumers would expect organic farming to entail, and the conditions under which animals were kept in the facility in question.[394]

Differently from the German cases, in the United States cases concerning the constitutionality of ag-gag focus rather on individual rights. The rights most clearly advanced by supporters of ag-gag laws are privacy and property. These rights are prominent when Courts assess the compliance of ag-gag laws with the constitution, for example in the *Wasden* and *Otter*

387 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2879).
388 Ibid.
389 Ibid.
390 Ibid.
391 LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018 (173); OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065).
392 On the interplay between animal welfare and freedom of expression see OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (134 f.); without freedom of expression see BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2879).
393 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2881).
394 Ibid.

decisions covered in Chapter 10.[395] Both property and privacy are advanced as legitimate government interests warranting ag-gag legislation.[396]

Notably, some ag-gag provisions which were found to be unconstitutional were located amongst offences against property in criminal codes, such as, for example, Utah's 'agricultural interference' offence which was held unconstitutional in *ALDF v. Herbert* in 2017.[397] Property interests also featured prominently in the case against North Carolina's version of ag-gag which provided civil remedies for interference with property *inter alia* by entering non-public areas of a business as an employee and creating recordings.[398]

As I showed in Chapter 10, Courts critically questioned whether the ag-gag laws examined were tailored to privacy and property interests. The Court indicated that the Idaho ag-gag law also sought to prevent exposure of the animal industry to the 'court of public opinion.'[399] Tentatively, one could say that the Courts seemed to point to the protection of animal facilities as another interest backing ag-gag legislation. It seems that ag-gag, unlike trespass or protection of privacy laws, protects these facilities comprehensively, and for their own sake, not just as property or as a site of risks to privacy. This is particularly clear in the titles of the laws that enshrine early ag-gag provisions: *Farm Animal and Field Crop and Research Facilities Protection Act* (Kansas)[400] and the *Farm Animal and Research Facilities Protection Act* (Montana).[401] It is also present in more recent ag-gag legisla-

395 See e. g., *ALDF v. Otter* 7, 19, 20; *ALDF v. Wasden* 30, 34.

396 See e.g., *ALDF v. Wasden* 8, 31.

397 *ALDF et al. v. Gary R. Herbert in his official capacity as Governor of Utah, and Sean D. Reyes, in his official capacity as Attorney General of Utah*, 2:13-cv-00679RJS (D. Utah 2017), memorandum decision and order, 7 July 2017. The decision is publicly available at: https://www.animallaw.info/case/animal-legal-defense-fund-v-herbert-0 (last accessed 5 August 2021).

398 *PETA et al. v. Josh Stein, in his official capacity as Attorney General of North Carolina, and Dr. Kevin Guskiewicz, in his official capacity as Chancellor of the University of North Carolina-Chapel Hill*, (4th Cir.). Briefs are available at: https://food.publicjustice.net/case/peta-et-al-v-cooper-et-al/ (last accessed 5 August 2021).

399 *ALDF v. Wasden* 25.

400 Kansas Statutes Annotated § 47–1825 – 1830 (1990), available at: https://www.animallaw.info/statute/ks-ecoterrorism-Chapter-47-livestock-and-domestic-animals#s1825 (last accessed 13 September 2021).

401 Montana Code § 81–30–101- 105 (1991), available at: https://www.animallaw.info/statute/mt-ecoterrorism-Chapter-30-protection-farm-animals-and-research-facilities#s101 (last accessed 13 September 2021).

tion, for example in Missouri's *Animal Research and Production Facilities Protection Act*.[402]

The only value not tracible to individual rights that was invoked in favor of ag-gag laws in the United States, is that of animal welfare, which is advanced to support rapid reporting.[403] Although presented as animal welfare measure, critics suspect adverse effects on animal activism.[404]

In Australia and Canada, yet another interest, namely biosecurity, is salient. Biosecurity features prominently in debates surrounding Australian legislation,[405] such as both the *Queensland Biosecurity Act 2014* and the *New South Wales Biosecurity Act 2015*. The same can be said for Canada, for example, the most recent legislative measures affecting animal activists are contained in Manitoba's *Bill 62*, the *Animal Diseases Amendment Act*.[406] *Bill 62* does not mention video recording at all. Instead, it prohibits entry into biosecurity zones without the consent of the owner (Section 13.2(1)). Other recent legislative proposals point into the same direction. At the federal level, *Bill C-205* was introduced as a private member's bill. If passed, it would 'amend the Health of Animals Act to make it an offence to enter, without lawful authority or excuse, a place in which animals are kept if doing so could result in the exposure of the animals to a disease or toxic substance that is capable of affecting or contaminating them.'[407] The aim of protecting biosecurity is also salient in the legislative debate on this bill.[408]

Canadian animal advocacy associations have spoken out against biosecurity-oriented laws that target animal activists, arguing *inter alia* that infectious diseases are linked to common practices in animal agriculture,

402 The Animal Research and Production Facilities Protection Act, Revised Statutes of Missouri § 578.405 (2017).

403 Revised Statutes of Missouri § 578.013 (2012).

404 Marceau, Ag Gag Past, Present, and Future, 2015, 1341.

405 Whitfort discussed these biosecurity laws under the headline of ag-gag, Gelber and O'Sullivan do not include them. Whitfort 2019, 83; Gelber, Katharine/ O'Sullivan, Siobhan, Cat got your tongue? Free speech, democracy and Australia's 'ag-gag' laws, Australian Journal of Political Science 56:1 (2021), 19–34.

406 *Bill 62 2020 (Manitoba)*, available at: https://web2.gov.mb.ca/bills/42-3/b062e.php (last accessed 8 September 2021).

407 House of Commons of Canada, *Bill C-205* (at the time of writing at report stage in the House of Commons), available at: https://www.parl.ca/DocumentViewer/en/43-1/bill/C-205/first-reading (last accessed 8 September 2021).

408 See e.g., statements of Pat Finnigan, Simon-Pierre Savard-Tremblay and Lianne Rood on *Bill C-205*, available at: https://openparliament.ca/bills/43-2/C-205/ (last accessed 8 September 2021).

rather than animal activism.[409] However, as will be explained further below, enlisting biosecurity as rationale for ag-gag laws is interesting in that it shifts the debate from relatively abstract values and rights towards more concrete interests which require debate on a factual rather than normative level.

In conclusion, one can say that in Germany the so-called domiciliary right (related to, but distinct from property), privacy, the state's monopoly on the use of force, and democracy are invoked against the creation and dissemination of undercover footage. In ag-gag jurisdictions, on the other hand, property, privacy, the protection of animal businesses as such (beyond the property and privacy dimension) including from exposure to the 'court of public opinion,' and – more recently – biosecurity and animal welfare are advanced in favor of strict legal responses to the creation and dissemination of undercover footage. Across the board, freedom of expression or freedom of speech are invoked in favor of lenient approaches, and in Germany these arguments are enhanced by animal welfare. As such, the debates in Germany are not limited to individual rights, but are also guided by other values affecting society.

12.2.8 Connection to Animal and Environmental Terrorism

In the United States, specialized legislation on animal terrorism is enshrined in the federal *Animal Enterprise Terrorism Act* (AETA) which was adopted in 2006. As Steve Cooke points out, in that context, the discourse on illegal activities of animal activists is intertwined with the discourse on environmental and animal terrorism.[410] Amongst legal scholars, disagreement exists as to whether the AETA could apply to activists who create and disseminate undercover footage.[411] While this matter cannot be resolved

409 Animal Justice, Animal Advocacy or Animal Agriculture? Disease Outbreaks & Biosecurity Failures on Canadian Farms, 13 May 2021, available at: https://animaljustice.ca/wp-content/uploads/2021/05/Disease-Outbreaks-Biosecurity-Failures-on-Canadian-Farms-May-202021.pdf (last accessed 13 September 2021).

410 Cooke, Steve, Animal Rights and Environmental Terrorism, Journal of Terrorism Research 4:2 (2013), 26–36, 27.

411 Landfried, Jessalee, Bound & Gagged: Potential First Amendment Challenges to "Ag-Gag" Laws, Duke Environmental Law & Policy Review 23 (2013), 377–403, 393 f. (arguing that the AETA could be applied to the creation of undercover footage); Hill, Michael, The Animal Enterprise Terrorism Act: The Need for a

here, it can be said that an application of the AETA to cases of undercover footage seems, at least, highly unlikely, given that, as Michael Hill argues, it was not the drafter's intention for the legislation to be used in this way.[412] In any case, the AETA and public and academic discourse related to animal activists as terrorists may have some influence, which will be discussed below. At the very least, an overlap exists in so far as it is the same groups who may be affected by both ag-gag and animal terrorism legislation.[413]

In public and legal discourse in Germany, references to animal activists as terrorists are absent. Neither does there exist specific legislation on animal terrorism, nor would acts typically discussed under this headline be likely prosecuted as terrorism under the definition of § 278c of the Criminal Code.

12.2.9 Deliberative Democracy vs. (Ant)agonistic Politics

The previous Chapters normatively reconstructed legal responses to undercover footage. In doing so, they unpacked extra-legal notions invoked by Courts and linked them to streams of democratic theory. This process identified, in the reasoning of German Courts, references to deliberative democracy and civil disobedience. With regard to deliberative democracy, Chapter 5 highlighted the rules of deliberation or – in the words of the Court – the 'rules of the intellectual battle of ideas,' while Chapter 6 identified the role of the media as 'public watchdog.' Additionally, the elements of civil disobedience were present in debates around the necessity justification for trespass to create undercover footage covered in Chapters 8 and 9.

In the United States, such references were largely absent, not only from the law and the reasoning of Courts, but also from the literature and legal debates on animal activism and undercover footage. The focus in the legal discourse on ag-gag rather rested on the competing interests at stake: property and privacy, as well as the protection of animal businesses as such, which are pitted against free speech and (at least in the literature) animal welfare. Importantly, except for animal welfare, the interests invoked

Whistleblower Exception, Case Western Reserve Law Review 61:2 (2010), 649–678, 653, 678 (arguing that application of the AETA to these cases is unlikely).

412 Hill 2010, 653, 678.

413 Leamons, Josh W., Eco-Terrorism: A Legal Update on the Laws Protecting Scientific Research from Extremist Activists, Journal of Biosecurity, Biosafety and Biodefense Law 6:1 (2015), 3–45, 39 f.

in legal discourse on this matter in the United States can all be linked to individual rights: property, privacy, free speech.

In addition, the law as well as the legal discourse on undercover footage, is linked to the law and legal discourse on environmental and animal terrorism. This speaks to a different underlying conception of appropriate legal responses to moral disagreement on animal and environmental issues in a democracy. As such, the deliberative ideal advocated by German Courts can be contrasted against the antagonistic position displayed in the United States.

The factors described above make for a more polarized, even antagonistic legal and public debate in the United States. This extends beyond legislation and the reasoning of Courts. As discussed in Chapter 10, it is also reflected in scholarly contributions to the debate. This points to different conceptions of democracy behind legal responses to undercover footage: instead of deliberative democracy, an agonistic account of politics is needed to capture these findings.

One could go so far as to say that animal activists are denied a proverbial 'seat at the table' in the formation of public opinion in ag-gag jurisdictions in the United States. Yet, in this respect, the risk of projecting the values of the German system on other jurisdictions is high. The absence of mechanisms enhancing the formation of public opinion in legal responses to undercover footage in the United States only becomes visible in comparison to the German system. While the formation of public opinion does not feature in legal responses to undercover footage in the United States, its absence is not a deficit; it merely indicates a different conception of democracy, and of the place of moral disagreement particularly regarding animals, in a democracy.

Finally, it should be said that the above does not necessarily apply to all ag-gag jurisdictions, especially outside of the United States. Comparable legislation in Australia and in Canada has not yet been subject to constitutional challenges and, as a result, normative frameworks cannot be identified in the reasoning of Courts. However, precedent in Australia, as well as the prevalence of public interest exceptions, point towards a more deliberative approach.

I will return to these points below when looking for possible explanations of the differences observed and when arguing that doctrinal and even socio-legal explanations are not sufficient to account for these differences. Instead, to understand these differences, one needs to look at democracy.

12.3 Possible Explanations

A variety of cumulative factors may explain the different legal responses to undercover footage from animal facilities in Germany and in the United States. In the following, I will point to several possible explanations, but focus most on those related to democracy and to the different political cultures. Again, it cannot be stressed enough that this should not be read as a search for which system does 'better.' Neither will the explanations cover deeply rooted structural differences between the German and the United States' legal system, or common law and civil law systems more generally. Rather, this Section explains the different legal responses to undercover footage from animal facilities by taking into account the underlying normative frameworks in general, and democracy in particular.

12.3.1 Socio-Legal Explanations

Socio-legal factors play an essential role in explaining legal responses to undercover footage. The importance of agriculture in a given region, lobbyism, traditions of animal activism, and public discourse on animal activism are pertinent. The impact of these factors on legal responses to animal activism is better assessed by social science methods, and thus cannot be covered comprehensively. Nevertheless, the following points provide a roadmap for further studies in this area. In any case, these socio-legal factors cannot account for some of the legal differences described above: most importantly, they neither explain German Courts' reliance on public debate, nor the absence of such references in the United States.

12.3.1.1 Importance of Agriculture

The importance attached to agriculture, and in particular animal agriculture, varies between Germany and ag-gag jurisdictions in the United States. In Germany in 2019, according to the federal government's agriculture report, the agriculture sector generated only 0.7 percent of gross value added and just 1.4 percent of the employable population works in this sector.[414]

414 Bundesministerium für Ernährung und Landwirtschaft, Agrarpolitischer Bericht der Bundesregierung 2019, Deutscher Bundestag Drucksache 19/14500, 24 October

However, as the report also notes, these numbers do not accurately reflect the importance of the industry to the economy. For example, employment in other sectors, especially the food trade, is dependent on agriculture.[415] If these sectors are considered, agriculture can be said to make up 6.6 percent of the gross value added.[416] In Idaho, on the other hand, agriculture is 'the single largest contributor' to the state's economy.[417] It is considered essential not only to the state's economy, but also to its 'way of life.'[418] Agriculture and food processing together generate 18 percent of the state's total economic output in sales, and 13 percent of gross domestic product.[419]

These parameters are those advanced by the respective governments, and they are not entirely comparable, not only because they are not the same, but also because it cannot be ensured that in calculating these numbers, the same factors were considered. In the absence of a comparative economic study, a correlation between the importance of agriculture and ag-gag legislation remains largely speculative. Still, these indicators may suggest that the importance of agriculture in a given society is a contributing factor.

12.3.1.2 Lobbyism and the American Legislative Exchange Council

Voices in the literature stress the corporate interests behind ag-gag, and their influence on legislation.[420] They refer especially to the role of the American Legislative Exchange Council (ALEC).[421] ALEC describes itself as 'America's largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free mar-

2019, 51, available at: https://www.bmel-statistik.de/fileadmin/daten/DFB-0010010-2019.pdf (last accessed 13 September 2021).

415 Ibid.

416 Ibid.

417 Idaho State Department of Agriculture website, available at: https://agri.idaho.gov/main/about/about-idaho-agriculture/ (last accessed 13 September 2021).

418 Idaho State Department of Agriculture, Idaho Agriculture Facts and Statistics, updated October 2020, available at: https://agri.idaho.gov/main/idaho-agriculture-facts-and-statistics/ (last accessed 13 September 2021).

419 Ibid.

420 Frye, Joshua, Big Ag Gags the Freedom of Expression, First Amendment Studies 48:1 (2014), 27–43, 28; McCoy, Kimberly, Subverting Justice: An Indictment of the Animal Enterprise Terrorism Act, Animal Law 14 (2007), 53–70, 57.

421 Ibid.

kets and federalism.'[422] ALEC's main mission is to draft model legislation for state legislators.[423] According to their website, ALEC comprises almost 'one-quarter of the country's state legislators.'[424] Further, representatives of the private sector are members of ALEC.[425] In the media, ALEC appears as socially conservative and as furthering industry friendly policies.[426] Scholars have criticized ALEC arguing that it erodes the policy-making process by advancing legislation that reflects corporate interest.[427]

ALEC was also involved in the development of ag-gag and animal terrorism legislation. It produced its seminal draft of an ag-gag bill in 2004.[428] Titled the Animal and Ecological Terrorism Act (AETA), it states in § 3 (A) (2) (b):

> 'An animal or ecological terrorist organization or any person acting on its behalf or at its request or for its benefit or any individual whose intent to commit the activity was {optional language insert "politically motivated"} is prohibited from: [...] Obstructing or impeding the use of an animal facility or the use of a natural resource without the effective consent of

422 American Legislative Exchange Council (ALEC), About ALEC, available at: https://www.alec.org/about/ (last accessed 13 September 2021).

423 American Legislative Exchange Council (ALEC), About ALEC; for a critical perspective see Mabry, Brittany Lauren, The Influence and Impact of the American Legislative Exchange Council (ALEC), thesis for Masters of Professional Studies, submitted at The George Washington University, (ProQuest: Ann Arbor) 2016, 6, available at: https://www.proquest.com/docview/1845316972?accountid=11004 (last accessed 25 October 2021).

424 American Legislative Exchange Council (ALEC), About ALEC.

425 Ibid.

426 Controversies arose in particular regarding its stance on climate change. Mathiesen, Karl/ Pilkingdon, Ed, Royal Dutch Shell cuts ties with Alec over rightwing group's climate denial, The Guardian, 7 August 2015, available at: https://www.theguardian.com/business/2015/aug/07/royal-dutch-shell-alec-climate-change-denial (last accessed 13 September 2021); Hamburger, Tom/ Warrick, Joby/ Mooney, Chris, This conservative group is tired of being accused of climate denial – and is fighting back, The Washington Post, 5 April 2015, available at: https://www.washingtonpost.com/news/energy-environment/wp/2015/04/05/this-conservative-group-is-tired-of-being-accused-of-climate-denial-and-is-fighting-back/ (last accessed 13 September 2021).

427 Mabry 2016, 71.

428 ALEC, Draft Legislation: The Animal and Ecological Terrorism Act (AETA), finalized 1 January 2004, amended 28 February 2013, available at: https://www.alec.org/model-policy/the-animal-and-ecological-terrorism-act-aeta/ (last accessed 13 September 2021).

the owner by: (b) entering an animal or research facility that is at the time closed to the public.'[429]

Section 3 (A) (3) proposes prohibiting supporting acts of 'animal terrorism,' for instance, by providing 'resources' that will be used to 'publicize' or 'promote' animal terrorism. In § 5 the draft suggests creating a 'registry of animal and ecological terrorists' with the Attorney General.

Clearly, some of the language and the overarching target of this draft legislation resembles ag-gag legislation introduced throughout the country. And yet, ALEC cannot be credited with the invention of ag-gag. As explained in Chapter 10, the first 'wave' of ag-gag dates back to the early 1990s and predates the ALEC draft. Nevertheless, it is a strong indicator of the corporate interests and sustained lobbying that have fueled the increase of ag-gag laws across the United States.

In Germany, it is not as common for model legislation to be drafted by an entity comparable to ALEC. Nevertheless, lobbyism is a part of the political reality. NGOs allege that representatives of the federal ministry for food and agriculture are more inclined to meet with representatives of the food and agriculture sector than with other actors concerned with consumer and environmental protection.[430] In early 2021, the NGO Foodwatch brought a lawsuit in administrative Court seeking access to information regarding meetings between the minister for food and agriculture, at that time Julia Klöckner, and representatives of the food industry.[431] Critics argue that the close ties between industry and politics hinders meaningful reforms towards transparency and healthier food choices, as well as in the area

429 Ibid., Section 3 (A) (2) (b).

430 Pontius, Jakob, interview with representatives of Foodwatch, Julia Glöckner stellt sich schützend vor die Zuckerlobby, Die Zeit, 5 February 2021, available at: https://www.zeit.de/zeit-magazin/wochenmarkt/2021-02/foodwatch-klage-julia-kloeckner-rauna-bindewald-transparenz-gesunde-ernaehrung (last accessed 13 September 2021).

431 Foodwatch, Geheime Lobbytreffen von Julia Glöckner: Foodwatch klagt, 2 February 2021, available at: https://www.foodwatch.org/de/aktuelle-nachrichten/2021/geheime-lobbytreffen-von-julia-kloeckner-foodwatch-klagt/ (last accessed 13 September 2021). Zeit online/ dpa, Foodwatch reicht Klage gegen Ernährungsministerin ein, Die Zeit, 2 February 2021, available at: https://www.zeit.de/wirtschaft/2021-02/julia-kloeckner-foodwatch-agrarministerin-klage-lobbyismus-verbraucherschutz (last accessed 13 September 2021).

of animal welfare.[432] Again, a comparative study based on social science methods could be enlightening here.

12.3.1.3 Traditions of Animal Activism

Differences in the history and methods of animal activism may be a further factor shaping legal responses to undercover footage. Social science literature comparing the methods of animal activists in the United States and in Germany (or in Europe generally) does not exist.[433] In the absence of a comprehensive comparative study on this issue, the assessment of animal activism by the FBI and the European Union's law enforcement agency Europol may be able to shed some light.

In 2004, the FBI named 'animal rights extremists and ecoterrorism matters' as the 'highest domestic terrorism investigative priority' of the FBI.[434] According to an FBI estimate of 2004, the Animal Liberation Front, Earth Liberation front 'and related groups' have caused damages of approximately 110 million US Dollars between 1976 and 2004 alone.[435] Besides threats, intimidation tactics and property destruction, arson is also among the repertoire of some animal activists in the United States.[436] The classification

432 Winter, Sabrina, wie die Zuckerlobby eine Steuer auf Limonade verhindert, Abgeordnetenwatch, 5 July 2019, available at: https://www.abgeordnetenwatch.de/blog/lobbyismus/wie-die-zuckerlobby-eine-sondersteuer-auf-limonade-verhindert (last accessed 13 September 2021); Balser, Markus/ Geier, Moritz/ Heidtmann, Jan/ Liebrich, Silvia, Wie Lobbyisten bestimmen was wir essen, Süddeutsch Zeitung, 15 September 2017, available at: https://www.sueddeutsche.de/wirtschaft/report-hegen-und-pflegen-1.3668000 (last accessed 13 September 2021).

433 For a comparative study of repressive action against animal activists within Europe (in the United Kingdom, Austria, Spain and Italy) see Josse, Melvin, Repression and Animal Advocacy, PhD thesis submitted at the University of Leicester, School of History, Politics, and International Relations, 2021, available at: https://leicester.figshare.com/articles/thesis/Repression_and_Animal_Advocacy/18319376 (last accessed 6 April 2022).

434 Statement of John E. Lewis (Deputy Assistant Director), Counterterrorism Division, FBI, in a hearing before the committee on the judiciary United States Senate May 2004, Serial No. J-108–76, available at: https://www.govinfo.gov/content/pkg/CHRG-108shrg98179/html/CHRG-108shrg98179.htm (last accessed 13 September 2021).

435 Ibid.

436 Ibid.

as terrorism has raised some criticism,[437] yet the appraisal of these activities as constituting a severe threat is plausible, especially considering the risk that arson poses, not only to property, but also to human life, and the fear that it spreads in farming communities.

Data on the activities of animal activist groups in Germany is scarce.[438] Europol and its annual EU Terrorism Situation & Trend Report (TE-SAT) provide the most promising insights, and the category of 'crimes in furtherance of animal rights' first appeared in the report in 2002.[439] The report maintains that 'several successful law enforcement operations have been carried out' in this regard in EU countries.[440] Further, it mentions convictions of ALF members in Belgium, who received prison sentences between 30 months and five years.[441]

Only since 2008 has animal rights extremism been listed as single-issue terrorism in the reports.[442] The 2008 report lists threats against those associated with companies considered responsible for animal abuse as well as 'arson attacks, letter bombs, […] product contamination,' and 'wide-spread acts of vandalism' as acts committed by animal activists in 2007.[443] In 2008 and the following years, the ALF and SHAC (up to 2014) are explicitly noted in the report.[444] Recent developments indicate that the threat posed by animal activists is considered to be limited. In the 2020 report, it is noted that single issue extremism, including animal rights extremism, 'continued

437 Steve Cook criticizes that even academic literature sometimes conflates a range of illegal activates of the animal and environmental movement with terrorism. Cooke 2013, 26 f.

438 Some information on this topic has been subject to an inquiry by members of parliament to the government in 2012. Deutscher Bundestag, Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Andrej Hunko, Ulla Jelpke, Jan Korte, weiterer Abgeordneter und der Fraktion DIE LINKE, Internationale Polizeizusammenarbeit zur Kontrolle politischer Gruppen am Beispiel Umwelt- und Tierrechtsaktivismus, Drucksache 17/8962, 9 March 2012, available at: https://dserver.bundestag.de/btd/17/089/1708961.pdf (last accessed 22 September 2021).

439 Terrorist Activity in the European Union: Situation and Trend Report (TE-SAT) October 2001 – mid October 2002, The Hague, 14 November 2002, File No. 2566–21. The report has been made available to the author by Europol upon request.

440 Ibid., 12.

441 Ibid.

442 Europol, European Union Terrorism Situation and Trend Report, Publications Office of the European Union, Luxembourg, 2008, 8, available at: https://www.europol.europa.eu/activities-services/main-reports/te-sat-2008-eu-terrorism-situation-trend-report (last accessed 13 September 2021).

443 Ibid., 40.

444 See e.g., ibid.

to pose a limited threat to public order' and that most of the activities were non-violent (protests, etc.).[445] This may indicate a trend towards the risk posed by animal activists being perceived as lower.

The assessment by Europol is not necessarily congruent with that of the member states of the EU. Interestingly, the 2008 TE-SAT report notes that the majority of member states reported 'single issue activities' as extremism and not as terrorism.[446] When asked about the classification of the activities of militant animal activists, the German government answered in 2012 that the activities of militant animal activists in Germany are considered a matter of politically motivated crime.[447] The government further answered that it was not aware of the acts of animal activists being classified as terrorism in any member state of the EU.[448] This indicates that the threat posed by militant animal activists may be considered lower by authorities in the member states than it is by Europol. If extremist animal activism is not classified as terrorist activity by member states, the EU system seems to consider the threat posed by activists to be lower than in the United States where the perceived threat is considered more significant.

Melvin Josse also explains different degrees of repressive action against animal activists within Europe depending on the level of threat. In the United Kingdom, where clandestine and, in part, violent strategies of animal activists are more prominent, animal activists face more repressive legal responses than in other European countries analyzed by Josse.[449] As such, similar trends may be at play in the present comparison indicating that the different level of threat posed by animal activists in Germany and in the United States may have an influence on legal responses to undercover footage in the two jurisdictions.

Yet, ag-gag legislation has also been passed in jurisdictions where animal activists have employed less violent strategies, especially in Australia. This has been shown by Gelber and O'Sullivan who point out that ag-gag in Australia is particularly questionable as animal activism there has a less

445 Europol, European Union Terrorism Situation and Trend Report, Publications Office of the European Union, Luxembourg, 2020, 80, available at: https://www.europol.europa.eu/publications-events/main-reports/european-union-terrorism-situation-and-trend-report-te-sat-2020 (last accessed 5 February 2022).
446 Europol, TE-SAT 2008, 41.
447 Deutscher Bundestag, Drucksache 17/8962, 2012, 4.
448 Ibid.
449 Josse 2021, 145 ff.

violent reputation than in the United States.[450] The correlation between violent animal activism and legal and institutional responses to it on the one hand, and undercover footage and legal and institutional responses to it on the other, could be the subject of further research.

12.3.1.4 Public Discourse on Animal Activism and Undercover Footage

The above showed that crimes committed by animal activists are considered to be politically motivated crime in Germany, but not terrorism. Neither are animal activists commonly referred to as terrorists in the context of undercover footage. However, the societal debate on animal activism is heated. The questionable term 'Stalleinbrüche' [stable break-ins] to describe trespass on animal facilities is symptomatic of that.[451] We also find the metaphor 'an den Pranger stellen,'[452] which might, in some cases, be the most sensible translation for prosecuting someone in the 'court of public opinion.' The motives of animal activists are called into question when it is said that they are 'self-appointed' for animal protection.'[453] Both the first and the last one of these expressions have made their way into Court decisions on undercover footage. The public discourse on undercover footage would be an interesting subject for a comparative study. But again, without such a study, precise conclusions as to the differences in the public discourse and its influence on legal responses to undercover footage cannot be drawn. However, it seems that the tensions described above have not reached the same level as in the United States, given that animal activists are not commonly associated with terrorism in Germany.

Interestingly, in Germany, animal activists have also successfully taken legal action to defend themselves against allegations made by opponents in the context of undercover footage. In 2015, the Münster District Court had to decide a case in which an animal activist association successfully sued the publisher of a magazine and online publications for the agricultural sector.[454] The Court prohibited the publisher, *inter alia*, from claiming that

450 Gelber/ O'Sullivan 2021, 29.
451 Scheuerl/ Glock 2018, 451.
452 Sebald, Christian, Wiesenhof am Pranger, Süddeutsche Zeitung, 11 September 2013, available at: https://www.sueddeutsche.de/bayern/strafanzeige-gegen-huehnermaester-wiesenhof-am-pranger-1.1767417 (last accessed 22 September 2021).
453 Scheuerl/ Glock 2018, 451.
454 LG Münster [Münster District Court] 8 July 2015, 012 O 187/15, BeckRS 2015, 15818.

it was part of the animal welfare association's 'business model' to generate images of staged animal welfare violations.[455] This was found to be untrue, as in the scenario in question the plaintiff association had received footage from an independent third party.[456] The case thus illustrates how the communication relating to undercover footage is subject to legal challenges. Although public discourse on animal activism, and undercover footage in particular, shows signs of polarization, it is overall less polarized than in the United States. Further, as the above case shows, the legal system provides remedies to counter excessive mobilization against animal activists in public discourse.

12.3.2 Doctrinal Legal Explanations

Doctrinal legal factors shape different legal responses to undercover footage. Again, a comprehensive account including all relevant doctrinal differences is not the goal of this dissertation. I will focus instead on the most salient issues that promise to shed light on the main questions explored here. In particular, the next Section will consider the legal status of animals, the structure of the criminal code, and private/public boundaries in the law.

12.3.2.1 The Legal Status of Animals and the Animal Welfare State Objective

The German Basic Law enshrines the state objective of animal protection in Article 20a. This constitutes one of the most evident differences in animal law between Germany and the United States. In the United States, a norm comparable to Article 20a of the Basic Law does not exists. Animal welfare is not a value of constitutional rank. Against this backdrop, the question arises as to whether Article 20a of the Basic Law shapes the more favorable legal responses to undercover footage in Germany.

In deciding cases on the dissemination of undercover footage from animal facilities, German Courts regularly refer to the Basic Law. This means that, besides freedom of expression and the legal interests of the facility operator, they must also take the animal protection state objective (Article

455 Ibid.
456 Ibid.

of the 20a Basic Law) into account. Although it does not confer subjective rights, this norm comprises a value of constitutional rank which may add weight to basic rights. In the *Tierbefreier* case, for example, the Hamm Regional Court considered Tierbefreier's right to freedom of expression enshrined in Article 5 (1) of the Basic Law, as reinforced by the state objective on animal protection in Article 20a of the Basic Law.[457] However, in Chapter 6, the landmark decision of the FCJ in favor of the dissemination of undercover footage, did not mention Article 20a of the Basic Law. Nevertheless, the potential role of Article 20a of the Basic Law as supporting Article 5 (1) of the Basic Law (freedom of expression) is clear in cases on the dissemination of undercover footage.

Article 20a of the Basic Law is also discussed in the context of criminal law. In the Heilbronn case discussed in Chapter 8, the defendants considered the act of trespass justified in light of Article 20a of the Basic Law.[458] The Heilbronn District Court rejected this idea.[459] Regardless of whether animal protection as enshrined in Article 20a of the Basic Law is 'another legal interest' in the sense of § 34 of the Criminal Code (necessity), it is, the Court found, not up to animal activists but the state to achieve that objective.[460] Voices in the literature are critical of this decision: Hans-Peter Vierhaus and Julian Arnold criticize the conclusion of the Heilbronn District Court, especially in light of Article 20a of the Basic Law.[461]

Other Courts ascribed more relevance to Article 20a of the Basic Law in cases concerning trespass to create undercover footage. The Magdeburg Court invoked Article 20a of the Basic Law to conclude that an act of trespass was justified pursuant to § 32 of the Criminal Code (self-defense/ third party defense) and § 34 of the Criminal Code (necessity). The Court considered Article 20a of the Basic Law in finding that the Animal Protection Act created a 'right of the animals to a keeping according to the requirements of the Animal Protection Act and the Farm Animal Protection Regulation' ['das Recht der Tiere auf eine Haltung nach den Vorgaben des Tier-

457 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (134 f.).

458 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 106).

459 Ibid., para. 116, 123.

460 Ibid., para. 123.

461 Vierhaus, Hans-Peter/ Arnold, Julian, Zur Rechtfertigung des Eindringens in Massentierhaltungsanlagen, NuR 41 (2019), 73–77, 74, 76.

schutzgesetzes und der Tierschutz-Nutztierhaltungsverordnung'].[462] This is the, so far, furthest reaching interpretation of Article 20a of the Basic Law relevant to undercover footage. However, this interpretation was rejected in the literature.[463]

The Naumburg Regional Court took a different approach, but also considered the act of trespass justified pursuant to § 34 of the Criminal Code (necessity). It conceded that Article 20a of the Basic Law does not apply directly between private parties ['keine unmittelbare Drittwirkung'].[464] Yet, Article 20a of the Basic Law is binding for the state and its organs.[465] From this, the Court concluded that the judiciary must interpret indeterminate legal concepts ['unbestimmte Rechtsbegriffe'] giving due regard to Article 20a of the Basic Law.[466] According to the Naumburg Court, this has bearings on the interpretation of § 34 of the Criminal Code (necessity), with the result that it is applicable to animal welfare.[467] This approach seems the most convincing so far. However, it remains to be seen how it is received in future cases.

To sum up, one can say that the role of Article 20a of the Basic Law in cases arising from the creation and dissemination of undercover footage is far from clear. In civil disputes, it can play a role in favor of allowing the dissemination of footage. Yet, it is not decisive: in 2018 the FCJ decided in favor of continued dissemination without making recourse to Article 20a of the Basic Law. Against this backdrop, progressive decisions in civil law disputes cannot be credited to the state objective alone. In criminal cases, the role of Article 20a of the Basic Law is much contested. As we have seen above, at least three different approaches exist. What can be said with certainty, however, is that the justification of trespass pursuant to § 34 of the Criminal Code (necessity) crucially depends on the state objective. Specifically, the Naumburg Court found that the judiciary must interpret indeterminate legal concepts ['unbestimmte Rechtsbegriffe'] giving due regard to

462 LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, WZUR 172, 2018 (173).
463 Ritz, Julius-Vincent, Das Tier in der Dogmatik der Rechtfertigungsgründe, JuS (2018), 333–336, 336.
464 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065).
465 Ibid.
466 Ibid.
467 Ibid.

Article 20a of the Basic Law.[468] According to the Naumburg Court, this has bearings on the interpretation of § 34 of the Criminal Code (necessity): animal protection qualifies as 'legal interest of society as a whole' ['Rechtsgut der Allgemeinheit'] which may trigger a necessity justification.[469]

Finally, Article 20a of the Basic Law has implications for legal policy. Any criminal law amendment aimed at imposing harsher punishments for trespass to create undercover footage from animal facilities would be difficult to sustain in light of Article 20a of the Basic Law. Ag-gag laws would contravene the expressed intent to work towards more effective animal protection.

12.3.2.2 Structure of the Criminal Code

Criminal law provisions specifically protecting a particular private industry are alien to the German Criminal Code. Against this backdrop, an offence protecting animal facilities and only animal facilities from trespass or employment fraud would be rather unusual, but not entirely inconceivable. Yet, as I will explain below, introducing such a specialized offence tailored to the agriculture industry would not render justifications, and in particular the necessity justification advanced by the Naumburg Court (see Chapter 8), inapplicable. The justifications and excuses enshrined in the general part of the Criminal Code apply to all offenses of the non-general part. In other words, while it is at the discretion of the legislator to pass a law making it a criminal offense to trespass on animal facilities, this would not rule out the applicability of the necessity justification.

12.3.2.3 Private/ Public Boundaries, Criminal Law, and the Public Interest

Recall that above I listed the prevalence of criminal sanctions in response to undercover investigations as distinctive feature of ag-gag, and argued that criminalization narrows the room for public interest considerations on a case-by-case basis. Approaches in Australia differ on this matter and account for the public interest, which brings these cases closer to the legal responses to undercover footage advanced by German Courts. Against this

468 Ibid.
469 Ibid.

backdrop, the question is: which arguments can explain the prevalence of criminalization and absence of public interest considerations in the United States?

Criminalization indicates that the legislator considered the question of public interest and answered it in the negative. Public interest is always relevant to the criminal law at the stage of law-making: the question of whether undercover footage from animal facilities contributes to public debate in a way sufficient to render it in the public interest has been answered in the negative by legislators in US ag-gag jurisdictions.

The absence of the public interest element and the legislator's clear decision for criminalization could be considered a strength of the ag-gag approach, as it reflects the distinctively public nature of the issue at stake. What is at stake in the creation and dissemination of undercover footage is a distinctively public matter. The ethical treatment of animals is not (only) a matter of individual food choices. Rather, it concerns society as a whole and constitutes an issue that is, and that should be, debated publicly. At a minimum, it relates to the way in which food is being sourced; an issue that directly affects consumers. Undercover footage, which aims to bring these issues closer to the public's eyes, is likewise, or even more so, a distinctively public matter. As such, it is plausible that legal responses to undercover footage are primarily a matter of public law, even if this is the criminal law.

Given the public nature of undercover footage from animal facilities, and the fact that it concerns every consumer of animal products, one could argue that grappling with this issue primarily in civil Court is inappropriate. It should be up to the democratically elected legislator, and not only to the Courts, to decide whether undercover footage is in the public interest. In other words, the interference by Courts in political matters should be kept to a minimum.

Considering the public interest introduces a high level of uncertainty that is problematic when criminal sanctions are at stake. In Germany, and also in Australia, significant legal uncertainty exists for those who create and disseminate undercover footage. The Courts are left to make difficult decisions on a case-by-case basis although the matter in question is undisputedly of a public and democratic relevance. As such, one may argue, the democratically elected legislator is better placed to attend to the matter and is called upon to make the legal consequences of creation and dissemination of undercover footage more foreseeable.

To be clear, these claims are not substantive about which response to undercover footage is appropriate. They are merely about who gets to de-

cide. If these issues are centered, they can support the United States ag-gag approach. In ag-gag jurisdictions, democratically elected legislators have decided that undercover investigations at animal facilities do not contribute to public debate in a way significant enough to consider them in the public interest. In so doing, the legislators in question realized the distinctively public nature of these acts and therefore considered it appropriate to address them through the criminal law, thus contributing to legal certainty.

This more favorable explanation should not be considered to exclude the more commonly advanced socio-legal explanations pointed out above. Critics of ag-gag may argue that these legislators foregrounded the protection of businesses in the agricultural industry and did not attach due weight to the public interest. However, this explanation reduces the law to economic factors and is thus overly simplistic. The above considerations regarding the public interest paint a more nuanced picture.

12.3.3 Explanations from Political Culture and Context

After looking at socio-legal and legal doctrinal factors, some aspects of the different legal responses to undercover footage remain unexplained. For example, why do German Courts assess the contribution of undercover footage to public debate, while Courts in the United States remain more legalistic? Why do they invoke free speech without considering its democratic dimension? Varying support for deliberative democracy, different views on the relationship between fundamental rights and democracy, as well as different conceptions of the role of Courts in a democracy may contribute to answering these questions. Yet, these general explanations should not distract from the fact that legal responses to undercover footage do not necessarily align with legal responses to (other) political extremism.

To be clear, it is not my claim that the factors explored in the following are *causal* for different legal responses to undercover footage. This would require an in-depth empirical analysis. Rather, it is argued that the political cultures and contexts support different legal responses to undercover footage. The aim is to better understand both systems, and to shed light on the political cultures and contexts that support different responses to undercover footage.

12.3.3.1 Varying Support for Deliberative Democracy

The reasons given above explain, in part, why the legal responses to undercover footage are stricter in ag-gag jurisdictions in the United States. However, they do not explain the different underlying normative frameworks that are present, not just in legislation, but also in the reasoning of Courts and in the literature. Chapter 10 found that even legal literature on ag-gag focuses on free speech, while glossing over the challenges to democracy that undercover footage and its regulation raise. Often, scholars and Courts appeal to competing values, most importantly animal welfare and free speech vs. property and industry interests. If they do appeal to democratic principles, most do not explore them fully.

Support for the difference may be found in the fact that deliberative democracy is less influential in the United States in practice, than it is in the German context. Some of the most prominent scholars in political science and political theory writing on deliberative democracy are situated in the United States, such as James Fishkin, Joshua Cohen, Amy Gutmann and Dennis Thompson. However, in practice, the German political system may be more inclined towards deliberative democracy. Studies indicate that deliberation is slightly more prevalent in the German political system than in the United States.[470] In particular, communication scholars find that television is slightly more deliberative in Germany than in the United States.[471] They link this finding to the 'consensus-oriented political culture' present in Germany, contrasted against the more majoritarian political system in the United States.[472] However, it should be noted that other communication scholars who research deliberation in German and US television do not necessarily share this conclusion: in a study on the public debate on abortion, communication scholars found that the discourse in Germany and the United States was, despite differences, overall similarly deliberative.[473] The authors find that, on the issue of abortion in public discourse the 'clash of absolutes' is more salient in Germany, although public discourse

470 Wessler, Hartmut/ Rinke, Eike Mark, Deliberative Performance of Television News in Three Types of Democracy: Insights from the United States, Germany, and Russia, Journal of Communication 64:5 (2014), 827–851.

471 Ibid., 837 ff.

472 Ibid., 843.

473 Marx Frerree, Myra/ Gamson, William, Shaping Abortion Discourse: Democracy and the Public Sphere in Germany and the United States (Cambridge: Cambridge University Press 2002).

on the same matter in the United States is 'tempered [...] by the wave of anti-abortion violence found in the United States.'[474]

A comparable study on the issue of animal activism in public discourse in Germany and in the United States does not exist. The findings of this dissertation clearly indicate a higher level of deliberation in Germany than in ag-gag jurisdictions in the United States. However, this is based on an analysis of legal rather than public discourse, and thus is not necessary indicative for the latter. A comprehensive study comparing the level of deliberation in public discourse on animal activism in Germany and in the United States could lead to different and surprising results, similar to those findings in the case of abortion. Therefore, an explanation for the different legal responses drawing on the prevalence of deliberation in practice, or deliberative democracy in its theoretical dimension, remains speculative.

12.3.3.2 The Relationship Between Democracy and Fundamental Rights in Law

It seems that Courts in the United States have refrained from invoking considerations from deliberative democracy in examining ag-gag laws: we rarely find references to democracy at all in these cases. This is surprising considering that they engage constitutional law to a much higher degree than, for example, the decisions in criminal cases in Germany. Constitutional law tends to invite more reflections on the rationales behind free speech, including that of democracy. Against this backdrop, it is surprising that the Courts hardly engaged with these matters.

The absence of explicit references to democracy may be related to the focus on individual rights and autonomy that is typically associated with the United States constitution.[475] Unlike more recent constitutions, it does not account for 'communal purposes' such as for example group rights or guarantees of a decent standard of living.[476] Democracy – beyond its institutional and procedural dimension – and animal welfare, could also be

474 Ibid., 59.

475 Graber, Mark, A New Introduction to American Constitutionalism (New York: Oxford University Press 2013), 183 f.; Kommers, Donald P., The Grundgesetz, An American Perspective, in: Knud Krakau, Franz Streng (eds.), Konflikt der Rechtskulturen?, Die USA und Deutschland im Vergleich (Heidelberg: Universitätsverlag Winter Heidelberg 2003), 37–47, 40.

476 Graber 2013, 183 f.

considered such 'communal purposes' which are less prevalent in constitutional law debate in the United States.

In addition, US Courts are generally reluctant to address political questions. Doing so risks a conflict with the so-called 'political question doctrine,' an arguably rather vague concept according to which federal Courts do not address questions that fall into the political, rather than the legal, realm.[477] This doctrine, albeit vague, does influence the United States legal culture.[478] As such, it may contribute to the reluctance to engage with democracy, especially in relation to political groups (such as animal activists).

Future cases will show how different the situation is in Australia. Just recently, a case was brought at High Court of Australia, arguing that the *NSW Surveillance Devices Act* is unconstitutional as it violates the right to political communication, which is a right implied as an indispensable part of the system of representative and responsible government enshrined in the Australian Constitution.[479] Precisely because the Australian constitution does not provide a right to freedom of expression, the case will give an opportunity to explore distinctively democratic challenges to ag-gag. This is so as a result of the fact that a clear distinction between democracy and the rights at stake will not be possible in the Australian context.

However, it remains to be seen whether, and how, the right to political communication relates to legislation operating under the paradigm of biosecurity. Biosecurity may shift the debate from one of relatively abstract values and rights towards one of more concrete interests requiring debate on a factual, rather than normative, level. Biosecurity is doubtlessly a legitimate aim. As such, it is widely accepted as a reason for far reaching

477 The doctrine was first established in *Marbury v. Madison*, 5 U.S. 137 (1803). The decision is also publicly available at: https://supreme.justia.com/cases/federal/us/5/137/ (last accessed 13 September 2021).

478 Flümann, Gereon, Streitbare Demokratie in Deutschland und in den Vereinigten Staaten im Vergleich. Der staatliche Umgang mit nicht gewalttätigem politischem Extremismus im Vergleich (Wiesbaden: Springer 2015), 143.

479 Knaus, Christopher, High Court to hear bid to overturn New South Wales hidden camera law, the Guardian, 23 June 2021, available at: https://www.theguardian.com/australia-news/2021/jun/29/high-court-to-hear-bid-to-overturn-new-south-wales-ag-gag-laws (last accessed 7 September 2021) (last accessed 7 September 2021). On the right to political communication in Australia see High Court of Australia, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; High Court of Australia, *Australian Capital Television Pty LtD v the Commonwealth* (1992) 177 CLR 106. The decisions are not publicly available online.

governmental regulation, especially in Australia, which is home to rich and sensitive ecosystems, the protection of which is placed high on the national priority list. Against this backdrop, the discussion of the legislation requires examining the risks to biosecurity posed by the conduct prohibited in these laws, and perhaps animal activism more generally. In this context, taking recourse to democracy and fundamental rights is less productive, and may hamper constitutional challenges of laws operating under the paradigm of biosecurity.

12.3.3.3 The Role of Courts

Additionally, in search of explanations for different legal responses to undercover footage in Germany and in the United States, one can turn to the debate on the role of Courts and deliberative democracy. The most comprehensive account of the role of Courts in a deliberative democracy has been written by Christopher Zurn.[480] Zurn's work is primarily associated with judicial review and its compatibility with democracy, but Zurn also critically examines the view that judicial reasoning is a form of principled, rational reasoning on moral questions.[481] As explored in Chapter 2 regarding the methods and theoretical underpinnings guiding the present dissertation, the view that judicial reasoning is a form of principled and rational reasoning is endorsed here, and forms the basis on which I analyzed and normatively reconstructed Court decisions. However, it is possible that this conception of legal, and in particular judicial, reasoning as rational discourse is more suited to the German context than to the United States context.

Zurn criticizes Rawls and others who advocate a close connection between the rational principled argument and legal reasoning.[482] He employes examples from the jurisprudence of the United States Supreme Court to show that significant 'disanalogies' exist between judicial reasoning and what he refers to as 'principled moral discourse.'[483] He found that decisions of Appeals Courts, and even the United States Supreme

480 Zurn, Christopher, Deliberative Democracy and the Institutions of Judicial Review (Cambridge: Cambridge University Press 2009).
481 Ibid., 163 ff.
482 Ibid.
483 Ibid., 163, 187 f.

Court, 'are not, in the main, concentrated on the principled moral-political reasoning [...] but, rather, on the *technicalia* of legal argument: jurisdiction, precedent, consistency, authorization, distinguishability, separation of doctrine from dicta, justiciability, canons of construction, and so on.'[484] This corresponds to the observations made in this dissertation. Court decisions from the United States were ill-suited for normative, rational reconstruction through the lens of (deliberative) democracy. Even the *ALDF v. Wasden* and *ALDF v. Otter* decisions, which explicitly employed an extra-legal reference of high relevance to democracy being namely the 'court of public opinion,' barely provided resources for normative reconstruction as this extra-legal notion played a marginal role for the outcome of the case.

Zurn further argued that:

> 'juristic discourse, at least in the United States, is a language of reasons tailored to maintaining the rule of law in a complex Court system with constitutional review performed throughout the regular appellate Court hierarchy, not a language of reasons well suited to public political disagreements about which collective decisions should become binding for fellow citizens and the basic terms of our political consociation.'[485]

The above finding is relevant in two distinct ways. First, it requires critically questioning the methodological choices made in the decisions of the Courts, and the reasons underlying them. The risk associated with comparative law is not just that associated with the lack of knowledge of a legal system that the author is less familiar with. There is also a risk of being influenced by a particular legal culture – in this case a culture of legal reasoning – that the author has been educated in: the theoretical underpinnings of this dissertation stem from a continental European civil law context.

Does this imply then that the method of normative reconstruction was futile in the Chapter on ag-gag laws? After all, it reached its limits due to the prevalence of '*technicalia* of legal argument'[486] which Zurn so compellingly identified. Nevertheless, I do not consider it to have been futile. Rather, it highlighted a paramount difference between the legal systems of Germany and the United States, including, but not limited to, legal responses to animal activism and undercover footage.

484 Ibid., 184.
485 Ibid.
486 Ibid.

This brings me to the second way in which the above quote is relevant: the role of Courts in shaping legal responses to undercover footage differs between Germany and in the United States. At least in the decisions featured in this dissertation, namely those pertaining to undercover footage from animal facilities, Courts employed arguments that alluded to, and could be explained and examined through, the lens of deliberative democracy. The Courts play a proactive role in determining the legal responses to undercover footage. The same cannot be said about US Courts, which, although they have considered some ag-gag laws to be in part unconstitutional, remained within the boundaries of legalistic argument by centering individual rights. This finding has important implications for the future of ag-gag in the United States. For example, it seems highly unlikely that Courts would take issue with more carefully crafted ag-gag laws that do not raise the same doctrinal challenges. This lack of scrutiny concerns, for example, legislation on employment fraud, civil damages, and rapid reporting. Thus, a paradigm shift in response to undercover footage cannot be expected to occur in the courtroom, as it arguably did in Germany in the decision of the Naumburg Court. In the United States, Courts have made no attempt to interfere in this politicized realm.

12.3.3.4 Animal Activism in Comparison to (Other) Non-Violent Political Extremism

The explanations advanced above (support for deliberative democracy; relationship between democracy and fundamental rights; the role of Courts) are not specific to animal rights activism and undercover footage. This raises the question of to what extent the strikingly different legal responses to animal activism and undercover footage are but a product of different legal cultures. In other words, one might question what is special about undercover footage and animal rights activism as compared to other contentious causes and strategies of political activism.

Gereon Flümann compares the responses to non-violent political extremism in Germany and in the United States.[487] A short summary cannot do justice to the nuanced and detailed findings of the study. However, Flümann finds that compared to Germany, the United States system pro-

487 Flümann 2015.

vides fewer legal resources to counter political extremism.[488] For example, in Germany it is possible to prohibit associations and even political parties (although only after a strict procedure including a decision of the Federal Constitutional Court), which is not an option in the United States.[489] Limitations on the right to freedom of assembly are also more common in Germany than they are in the United States, according to Flümann.[490] In Germany, the criminal law is employed more to counter not physically violent political extremism, than in the Untied States.[491] The most prominent example is § 130 of the Criminal Code (incitement of hatred [Volksverhetzung]).[492] In the United States, political extremism from the Left was subject to criminal law measures during the early years of the Cold War.[493] However, Flümann argues that, since then, the United States has moved away from criminal law sanctions for political extremism so long as the actions remain non-violent.[494] Overall, Flümann identified Germany as the more repressive system and attests to the greater degree of tolerance in the United States towards political extremism.[495]

This dissertation illustrates that, in the United States, criminal law in the form of ag-gag is deployed against animal activists and journalist who engage in the non-violent practice of creating undercover footage. The legal responses to undercover footage, when a comparison is conducted between Germany and the United States, are not synchronized with legal responses to (other) forms of political extremism, in particular those forms of extremism from the left and from the right.

Consequently, the case of animal activists and undercover footage remains somewhat extraordinary. The general explanations for this, drawn from the political context given above, are important, and yet they should not conceal the fact that legal responses to animal activism in the United States are distinct from legal responses to other non-violent extremist protest movements. To explain these differences comprehensively, one must include the legal and socio-legal factors outlined above in the analysis.

488 Ibid., 403.
489 Ibid.
490 Ibid.
491 Ibid., 404.
492 Ibid., 405.
493 Ibid., 404.
494 Ibid.
495 Ibid., 406.

12.4 Future Developments

Above I compared the legal responses to undercover footage in Germany, the United States and – to a lesser extent – Australia and Canada. Is there a potential for these different approaches to inform each other? Is ag-gag a concept that might inspire future legislation in Germany? Or could Courts in the United States adopt some of the arguments made in the German context?

12.4.1 Future Legal Responses to Undercover Footage in Germany

Could legal measures resembling US ag-gag legislation be adopted in Germany, as has already been seen in Australia and Canada? From 2018 to 2021 it seemed possible, as the government coalition between the conservative CDU/CSU and the social democratic SPD addressed the issue in their coalition treaty which stated: '[w]e want to effectively penalize break-ins in animal agriculture facilities as a criminal offence' ['Wir wollen Einbrüche in Tierställe als Straftatbestand effektiv ahnden'].[496] However, there have not been any attempts to pass new legislation in this regard. Considering the frequent uncovering of animal welfare violations at German animal facilities and slaughterhouses through undercover footage, as well as the spotlight put on working conditions in these facilities, introducing legislation further criminalizing undercover investigations does not seem politically viable. Nevertheless, the issue remains pertinent as tensions between representatives of animal agriculture on the one hand and animal activists on the other continue to boil high.

Chapters 7–9 on civil disobedience pointed to several reasons speaking against further criminalizing the creation of undercover footage. This Chapter will avoid repeating these normative arguments to promote a forward-looking perspective. This Section draws on the findings of this Chapter to ask, not whether the further criminalization of the creation of undercover footage in the form of ag-gag law is desirable, but whether it would be possible in Germany. In so doing, it systematically explores the

496 Coalition Treaty: Koalitionsvertrag zwischen CDU, CSU und SPD. Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt für unser Land, 19th Legislative Period, 2018, 86, available at: https://www.bundesregierung.de/resource/blob/974430/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1 (last accessed 10 February 2022).

explanations for the differences between the German and the United States ag-gag approach.

First, the socio-legal factors explored above would not prevent implementing legislative measures comparable to ag-gag in Germany. The tentative comparison conducted above indicated that agriculture may be considered economically less important on the federal level in Germany than it is in those US states like Idaho and Kansas with ag-gag laws. Accordingly, the agriculture lobby may have less influence on federal politics in Germany than in those states. However, this factor should not be overestimated. After all, other economic sectors, and especially food security, depend on agriculture in Germany too. Further, Europol documents suggest that animal activism is a terrorism threat, similar to the appraisal of US authorities. However, this view is not necessarily shared by authorities in member states of the EU. In Germany, animal activists are not commonly referred to as terrorists in public or legal discourse, providing support for legislation targeting them specifically. Nevertheless, the tone in public debates on animal activism and undercover footage is harsh and may also penetrate legal discourse. In a nutshell, one can say that factors, such as the importance of agriculture and the tradition of the animal rights movement, do display relevant differences. However, these differences are not sufficiently strong to render the possibility of introduction of ag-gag like legislative measures in Germany inconceivable.

Second, legal doctrine provides the most robust safeguards against the introduction of legislation that hinders the creation of undercover footage in Germany. Here, criminal law doctrine and Article 20a of the Basic Law warrant a mention. Yet, both come with certain caveats. The animal protection state objective enshrined in Article 20a of the Basic Law speaks against taking legislative steps against undercover footage. Doing so could be conceived as further increasing the enforcement gap in animal welfare law which would be difficult to reconcile with the objective of protecting animals. However, the state objective does not confer individual rights, and it is difficult to hold the legislator legally accountable for not sufficiently taking the state objective into account. Article 20a of the Basic Law provides a strong ground for favorable decisions about undercover footage. But the fact that, for example, the Naumburg Court understood the state objective as speaking in favor of letting activist go unpunished is not binding upon the legislator. Concerns about animal welfare could be mitigated if other measures increasing animal welfare and closing the enforcement gap would

be passed simultaneously. For example, the frequency of mandatory checks by veterinary authorities could be increased.

A more robust protection against ag-gag laws lies in the structure of the German criminal code through the necessity justification. The necessity justification, like other defenses, is enshrined in the general part of the German Criminal Code. Criminal offenses are listed in the non-general part of the Criminal Code. The justifications and excuses enshrined in this general part apply to all offenses captured in the non-general part equally. In other words, the legislator may pass a law making it a criminal offense to trespass on animal facilities, but the necessity justification could still apply as illustrated in the decision of the Naumburg Court. Within this structure, introducing a new criminal offense and saying that the necessity justification would not be applicable would break with established criminal law doctrine.[497] As such, it would be undesirable even from a purely legal perspective.

On the other end of the spectrum, some may advocate for legislation to minimize the risk of criminal prosecution for animal activists. Tobias Reinbacher suggests discussing the introduction of a § 32a of the Criminal Code, a specialized justification for defense of animals, applicable if, and only if, the conditions in the facility are in violation of § 17 of the Animal Protection Act.[498] This reform would lead to more legal certainty for animal activists. However, so far, it has not been taken up by major political actors.

Finally, explanations from democracy can be considered. Here it is essential to note that while deliberative democracy is reflected in established jurisprudence of German Courts, most importantly in assessing the contribution of undercover footage to public debate, it remains an extra-legal framework. As such, it is a weak safeguard against ag-gag legislation. While it may explain the current state of legal responses to undercover footage, it might not be able to prevent the legislator from imposing higher sentences for trespass on animal facilities.

In a nutshell, one can say that there are fewer safeguards against possible ag-gag legislation in Germany than existing legal responses might lead one

497 This assessment is in line with the position of the research service of the German parliament. Deutscher Bundestag, wissenschaftliche Dienste, Sachstand: Strafbarkeit sogenannter „Stalleinbrüche," WD 7 – 3000 – 206/180, 20 September 2018, p. 11, available at: https://www.bundestag.de/resource/blob/581224/b3e8432c09685c55877ec2085daba37e/WD-7-206-18-pdf-data.pdf (last accessed 22 September 2021).

498 Reinbacher, Tobias, Nothilfe bei Tierquälerei?, Zeitschrift für internationale Strafrechtsdogmatik 11 (2019), 509 -116, 516.

to believe. A shift in social factors, first and foremost a polarization of the debate on animal activism, should be considered warning signs, as they could pave the way for harsher legal responses to undercover footage.

12.4.2 Future Legal Responses to Undercover Footage in the United States

Whether ag-gag laws continue to exist in the United States in some form is a matter of politics. Legal challenges may have been successful or partly successful, but they would likely be futile in the face of more carefully drafted ag-gag laws that do not raise the same First Amendment concerns. Opponents of ag-gag often argue that ag-gag laws are politically unpopular. However, this could change if jurisdictions in the United States learn from the Canadian and Australian example and add biosecurity to the rationales behind ag-gag; supplementing or replacing the rationales of privacy and property.

However, the existence of ag-gag laws as such does not preclude the possibility of innovative legal responses to undercover footage. For example, one might ask whether activists in the United States could invoke a necessity defense against trespass charges. This matter was briefly considered in Chapter 9. Although there may be compelling legal arguments in favor of it, a necessity defense would likely be unsuccessful. One reason for this assessment, in comparison to Germany, is that neither animal protection nor any other value that could be made fertile for the protection of animals such as environmental protection, is enshrined in the United States constitution. As we have seen in the comparison above, the animal protection state objective in the German Basic Law featured prominently in the decisions considering trespass to create undercover footage justified. Without Article 20a of the Basic Law, these decisions would be difficult to sustain. In the United States, the absence of a comparable provision makes more favorable responses to the creation of undercover footage – even in absence of ag-gag laws – rather unlikely.

Further, as we have seen above, the role of Courts is conceived of differently in the United States legal system as compared to that of Germany. They are more reluctant to engage with (deliberative) democracy as an evaluative framework for undercover footage from animal facilities. Favorable decisions on the dissemination of undercover footage in Germany reflected defining features of deliberative democracy. Although elements of deliberative democracy were not found to be decisive in most of the cases

analyzed here, they are clearly informative for the standards that the Courts apply, and their overall approach. They make room for arguments from democracy in favor of undercover footage. This is not the case, at least not to the same extent, in cases from the United States; presumably due to the fact that deliberative democracy is less prominent in the United States, and because Courts in the Anglo-American system are less receptive to deliberative democracy. This further hinders the line of reasoning that led to favorable decisions in Germany from being used in United States Courts.

12.4.3 Future Legal Responses to Undercover Footage in Australia and in Canada

Activists are only now beginning to challenge ag-gag laws in Canada and Australia. As such, it is too early to speculate about the future of these laws. This task must be left instead to legal scholars situated in those respective systems who are better placed to speak to the distinctive legal challenges that can be made against ag-gag in those contexts. Neither of the jurisdictions in question have a constitutional law provision raising animal welfare to a value of constitutional rank. Agriculture may be prevalent in rural areas in Australia and Canada as well.

In the case of Australia, the right to political communication, which is implied as an indispensable part of the system of representative and responsible government enshrined in the Australian constitution as well as the compelling reasoning of the High Court in *ABC v Lenah Game Meats*,[499] may put animal activists in a favorable position. If the High Court decides the case currently being brought by activists in New South Wales, this could become the site for deciding the future of Australian ag-gag laws. Finally, one should not underestimate the culture of animal activism. As Gelber and O'Sullivan argued, the animal rights movement in Australia is embedded in a non-violent tradition, distinguishing it from the United States counterpart.[500] In this context, legitimizing ag-gag by framing activists as terrorists is less convincing.[501] If one ascribes weight to the socio-legal explanations for differing legal responses to undercover footage, it seems likely that the future of ag-gag in Australia will be distinct from that of United States.

499 *ABC v Lenah Game Meats*, (2001) 208 CLR 199.
500 Gelber/ O'Sullivan 2021, 29.
501 Ibid.

13. Conclusion

13.1 Main Findings

This dissertation has analyzed, explained, and evaluated a carefully selected number of cases concerning animal activists in Germany and the United States. The following presents the main findings of the dissertation based on the central research questions set out in the Introduction (Chapter 1): first, how do freedom of expression, democracy, and animal law interact in cases arising from the creation and dissemination of undercover footage; second, how does democracy conceptually relate to the Courts' reasoning in cases concerning undercover footage; and third, what are the differences between legal responses to undercover footage in Germany and in the United States, and how can they be explained?

13.1.1 Interactions Between Freedom of Expression, Democracy, and Animal Law

Animal activists' enjoyment of freedom of expression is limited by existing animal welfare law. In the cases discussed in this dissertation, both the legality of the creation of undercover footage and its dissemination hinged, to quite a large extent, on the question of whether the conditions displayed in the footage were legal or illegal.[502] This distinction has challenging consequences.

13.1.1.1 Animal Activists' Enjoyment of Freedom of Expression

The distinction between legal and illegal conditions depicted by undercover footage inevitably impacts on animal activists' enjoyment of the right to freedom of expression. The decision on whether undercover footage is lawful depends, *inter alia*, on whether it uncovers unlawful conditions or conduct.[503] If it does not, the assumption is that public interest in the

502 See e.g., the discussion of OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065) in Chapter 8.

503 See e.g., the discussion of the *Tierbefreier* case, especially OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005, in Chapter 5.

footage is lacking. Thus, in those cases, the interests of animal facility operators may prevail over animal activists' right to freedom of expression.

The FCJ has recently problematized the above standard: in the organic chicken case, the Court emphasized that the illegality of conditions in a facility is not always a necessary precondition to the legality of the dissemination of footage depicting them.[504] Following the example of the FCJ in that case, Courts should consider ways to temper the dependence of animal activists' enjoyment of free speech on existing animal welfare law. This dissertation offered some guidance on how Courts might achieve this: rather than taking the illegality of the uncovered conditions as a requirement, Courts should critically question whether the applicable animal protection law may be in need of reform, and whether democratic engagement leading to such reform can be instigated by the footage in question.

13.1.1.2 Criminal Sanctions

The distinction between illegal and legal animal welfare conditions can determine whether activists are convicted as criminals or vindicated as guardians of the law. Significantly, the German Courts' progressive application of the necessity defense in cases against activists who trespass to create undercover footage[505] does not seem to apply if the conditions in an animal facility are considered legal, regardless, it seems, of how unethical they may be.

Consequently, advocates should not only rely on the necessity defense, but should also explore other legal avenues to defend animal activists against criminal charges. Prosecutorial discretion and the application of lower sentences should be explored as they are less reliant on the distinction between illegal and unethical conditions in animal facilities. An avoidable error of law (caused by the ethical dimension of the subject, diverging jurisprudence and the multilayered structure of animal protection law) may also achieve an appropriate mitigation of the sentence.[506]

504 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018.
505 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065).
506 See Chapter 9.

13.1.1.3 Democratic Engagement

The distinction between legal and illegal conditions hampers democratic engagement with animal law and with industry standards. Activists may effectively target the enforcement gap in animal law, but rarely criticize existing legal standards as unethical.

The law rarely approves of transgressions by appealing to extra-legal – in this case, moral – norms on animal ethics, but it may protect those who transgress *in the same way* to improve the enforcement of existing law. As such, the law distinguishes between transgressions aiming at legal change, and transgressions aiming at improved enforcement of existing law. The latter transgressions are more likely to be vindicated.

This distinction is problematic in the special case of animal activists. Due to the multilayered nature of animal law, it may not always be clear where the boundary lies between law and industry standards. Further, what activists find incompatible with Article 20a of the Basic Law is not necessarily incompatible with lower norms.

The distinction between legal and illegal standards is further complicated by the idiosyncrasies of democratic discourse and lawmaking on animal issues. When Courts rely on the legality of conditions in animal facilities to determine the public interest in revealing them, they do not question the relationship between legality and democratic legitimacy.[507] The standards set by animal welfare laws and industry practice may not always enjoy continuing democratic legitimacy. Especially as societal attitudes to the matter change, not least due to animal agriculture's contribution to the growing threat of climate change, the way we relate to animals in agriculture requires further public debate.

13.1.2 Democratic Cultures and Practices in Cases Against Animal Activists

Democratic cultures and practices significantly shape legal responses to undercover footage. Deliberative democracy helps to explain and evaluate civil cases against animal activists concerning the dissemination of undercover footage, while the democratic approaches to civil disobedience can help to explain and evaluate cases concerning criminal charges related to the creation of undercover footage.

507 See in particular LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017, discussed in Chapter 8.

13.1.2.1 The Value of Employing Democratic Theory to Explain and Evaluate Legal Responses to Animal Activism

Animal activism can be assessed through the lens of democratic theory. In particular, deliberative democracy can usefully explain, evaluate, and further develop legal thought on the issue of animal activism and the creation and dissemination of undercover footage.[508] More precisely, deliberative democracy offers a compelling political, rather than moral, theory that can give guidance on how to argue about animal ethics and to address disagreement on this issue which is to be taken seriously. Further, deliberative democracy has a close relationship with the law, as it is also a theory on the legitimacy of legal norms and arguments.

Animal activists who create and disseminate undercover footage exhibit an ambivalent relationship with law and democracy: to create footage, activists break the law and, thus, the democratically sanctioned norms that those laws represent. And yet, they also rely on footage for bringing about legal change via democratic procedures.

13.1.2.2 Insights from Deliberative Democracy

In the jurisprudence of German Courts, animal activists' enjoyment of freedom of expression is shaped by references to democracy; most significantly in the form of a general public interest assessment that is carried out in the balancing of rights, but also in the form of extralegal notions such as 'the intellectual battle of ideas'[509] and 'public watchdog'[510] in the Courts' reasoning.

508 See Chapters 2 and 3.

509 See Chapter 5 *Tierbefreier* case OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005.

510 See Chapter 6 organic chicken case, BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2880).

13.1.2.2.1 Going Beyond the Traditional Conception of Deliberative Democracy

References to democracy in the reasoning of German Courts are indicative of a traditional account of deliberative democracy. As shown in the *Tierbefreier* case, in the jurisprudence of German Courts and of the ECtHR, the speech of militant animal activists is less protected than that of other citizens.[511] A traditional theory of deliberative democracy can support this approach, as it prescribes rational, detached discourse. The 'rules' of this stream of deliberative democracy provide an obstacle for animal activists.[512]

Courts should be more attentive to arguments from more inclusive streams of deliberative democracy. Political minorities should not be deterred from taking part in the public debate. Further, undercover footage, even if it is obtained by non-deliberative means, may lead to improved public deliberation on animal welfare in the long term.[513] Legal responses to undercover footage must balance any repercussions of the undemocratic means of animal activists against inclusiveness and any democratic potential which may be realized downstream. However, caution is warranted when activists are more committed to animal protection than to democratic principles.

13.1.2.2.2 Mitigating Distinctions Between Journalists and Activists

The jurisprudence of German Courts indicates a divide between the public watchdog role of journalists, and the role of activists. This became clear in the 2018 decision of the FCJ in the organic chicken case.[514] It seems that this beneficial decision could favor only established media outlets and may not extend to animal activists, as the Court relied on the function of the press as public watchdog.[515] Unlike the ECtHR, German Courts do not apply this

511 See Chapter 5.
512 Humphrey, Mathew/ Stears, Marc, Animal Rights Protest and the Challenge to Deliberative Democracy, Economy and Society 35:3 (2006), 400–422; for activists generally see Young, Iris Marion, Activist Challenges to Deliberative Democracy, Political Theory 29:5 (2001), 670–690, 672.
513 See e.g., Chapter 5.
514 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018.
515 Ibid., 2880.

notion of public watchdog, nor the privileges that come with it, to NGOs and individuals.[516]

Animal activists who disseminate undercover footage should not be treated as categorically different from journalists. Legal decisions on the dissemination of undercover footage should not be made on the grounds of *who* disseminates it, but rather on *how* it is disseminated. Support for a distinction between established media and activists can be found in a traditional conception of deliberative democracy, as the media are expected to report more objectively than do activists. Yet, this assumption is not always justified, particularly given that in the online sphere, it is increasingly difficult to establish which news sources qualify as objective journalism. In such an indeterminate media landscape, the distinction between journalists and activists is difficult to maintain.

13.1.2.3 Insights from Democratic Approaches to Civil Disobedience

The creation of undercover footage by means of trespass can be vindicated in deliberative democracy if characterized as civil disobedience. The deliberative account of civil disobedience developed by William Smith provides some promise for animal activists, as it makes the moral status of an act of civil disobedience contingent upon democratic deficits in the deliberative process.[517] In this conception, it is crucial that the creation of undercover footage is employed to remedy democratic deficits in the debate and decision-making process on animal matters.

When Courts invoke the democratic legitimacy of practices in animal agriculture, they should critically engage with shortcomings of public debate and decision-making on animal law. When the Heilbronn District Court found animal activists guilty of trespass in 2017, it argued that factory farming was socially accepted and that the activists attempted to impose their political aim on the majority.[518] The deliberative account points out the weaknesses of this line of argument. It challenges the assumption that the existence of certain practices in animal agriculture always implies their democratic legitimacy.

516 See Chapter 6.

517 Smith, William, Civil Disobedience and Deliberative Democracy (Abingdon: Routledge 2013).

518 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 126).

13.1.2.4 Recognizing Civil Disobedience in Cases Against Animal Activists

Contrary to claims made by Courts and many legal theorists, civil disobedience can be legally justified.[519] In some cases, trespass to create undercover footage can be legally justified as necessity: the Naumburg Court's necessity justification[520] was legally sound. It further finds support in democratic approaches to civil disobedience, as a protest against the policy of non-enforcement of animal welfare standards.

However, the necessity defense is not a carte blanche for activists: it only applies where activists trespass to urge authorities to enforce existing law. It fails where activists seek to criticize unethical but legal practices. As mentioned above, there are other legal mechanisms that could be employed to let animal activists go unpunished, including the error of law, and (in some jurisdictions) the safeguarding of legitimate interests.

Moreover, arguments from civil disobedience can be considered at the sentencing stage and when exercising prosecutorial discretion. The rationales for punishment are rarely applicable in cases of civil disobedience, resulting in minimal public interest in prosecution. However, justifications for civil disobedience from constitutional law or extralegal necessity should be rejected.[521]

13.1.2.5 Addressing Tensions between Moral and Legal Evaluation through Civil Disobedience

The law can take defining features of and arguments arising from civil disobedience into account without replacing legal with moral evaluation. Legal reasoning can address factors such as the importance and urgency of causes like animal welfare, without using the notion of civil disobedience. And yet, civil disobedience matters to the law as it allows one to evaluate the law and legal decisions, and to place them in the context of societal and political change.

Decisions which harshly sentence those acting in civil disobedience should not be accepted simply because the law seemingly mandates doing

519 See Chapter 9.

520 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018.

521 See Chapter 9.

so. Nor should decisions which let activists go unpunished without sound legal reasoning be celebrated. Instead, both extremes prompt us to ask how the law and its application could be reformed to enable legal actors to reach just outcomes through the law's application. The law should not capitulate and, for example, let a jury acquit activists on extralegal grounds, as occurred in the case of Extinction Rebellion activists in the United Kingdom recently.[522] If the law seems inadequate to address these cases, we must question how it can be improved. In so doing, the findings of this dissertation can be instructive. It is not necessarily the letter of the law that requires adjusting, but its interpretation. In times of increasing concerns for animals, the environment and the climate, a broader interpretation of necessity is warranted.

13.1.3 Differences between Germany and the United States

Legal responses to undercover footage differ significantly in Germany and in the United States. Some jurisdictions in the United States have so-called ag-gag laws on the books. These laws hinder the creation and, as a consequence, the dissemination, of undercover footage from animal facilities.[523]

The criticism advanced against ag-gag in the United States does not necessarily apply to legislation discussed under the same term in other jurisdictions. In Australia, for example, some legislation denounced as ag-gag is sensitive to public interest considerations, which could make a significant difference in practice.[524]

13.1.3.1 Explaining the Relevant Differences

Ag-gag legislation marks the defining difference between Germany and some jurisdictions in the United States.[525] Other salient differences include the reach of the criminal law, the weight assigned to animal welfare as

522 PA Media, Jury acquits Extinction Rebellion protesters despite 'no defense in law', The Guardian, 23 April 2021, available at: https://www.theguardian.com/environment/2021/apr/23/jury-acquits-extinction-rebellion-protesters-despite-no-defence-in-law (last accessed 9 January 2022).
523 See Chapter 10.
524 See Chapter 11.
525 See Chapter 12.

a matter of public interest, privileges conferred to the media, and legally protected values invoked in the debate.

Socio-legal explanations for these differences include the importance of agriculture in a given region, the influence of lobby groups on the legislative process, different strategies and traditions of animal activism, and public discourse on animal activism, which all may have a significant influence. Doctrinal explanations include the legal status of animals, the structure of the criminal code and finally, different private/public boundaries in the law.

Different approaches to democracy and political cultures are relevant, too. Varying support for deliberative democracy, different views on the relationship between fundamental rights and democracy, and the different conceptions of the role of Courts in a democracy may contribute to explaining legal responses to undercover footage. Yet, legal responses to undercover footage do not align with legal responses to (other) political extremism. With regard to extremism from the left and right, the United States has been attested a more lenient approach.

13.1.3.2 Agonism vs. Deliberative Democracy

Courts, and even scholars, in ag-gag jurisdictions approach the topic of ag-gag primarily as a matter of free speech, and rarely engage with the distinctively democratic dimension.[526] In cases on the constitutionality of ag-gag, Courts tend to focus on free speech without delving deeper into democracy as rationale for the protection of free speech, or democratic implications of ag-gag laws. Even the most theoretical contributions in the literature fall short of a fuller engagement with democracy.

The debate on undercover footage is more adversarial in the United States than it is in Germany. The notion of the 'court of public opinion,' which featured in *ALDF v. Wasden*, reflects distinctively democratic concerns around ag-gag.[527] Proponents of ag-gag argue that ag-gag is necessary to prevent activists from prosecuting law-abiding farmers in a 'court of

526 See Chapter 10.

527 *ALDF et al. v. Lawrence G. Wasden, in his official capacity as Attorney General of Idaho*, 878 F.3d 1184 (9th Cir. 2018), Ninth Circuit Appeal Decision, 4 January 2018 ('*ALDF v. Wasden*,' in the following). The decision is also available at: https://www.acluidaho.org/sites/default/files/field_documents/92._opinion.pdf (last accessed 4 August 2021).

public opinion.' On the other hand, critics insist that this is not a legitimate aim for legislation. Unlike the 'intellectual battel of ideas' on which German Courts rely, the 'court of public opinion' is adversarial and judges people rather than ideas.

Instead of deliberative democracy, agonism can help to explain and evaluate legal responses to undercover footage in the United States.[528] But even under the framework of agonism, which is more open to conflict and less focused on consensus-finding and reason-giving than deliberative democracy, ag-gag laws can be criticized. Ag-gag turns animal activists and animal facility operators from adversaries to political enemies. Agonism does not condone this, as, according to Chantal Mouffe's agonistic approach, the role of the enemy should be reserved for those who 'reject the very basic idea of pluralist democracy.'[529] This may be the appropriate response to some forms of animal activism. However, it is not suitable in the case of those activists who create and disseminate undercover footage precisely to take part in what Mouffe calls the 'agonistic struggle,'[530] to fight for their ideas through persuasion.

13.2 Outlook

Animal activism will continue to give rise to difficult legal cases in the future, which will polarize the public and legal debate alike. Undercover footage remains a popular activist strategy. It features in documentaries broadcasted by established media outlets, such as the airing in early 2022 of the BBC Panorama 'A Cow's Life: The True Cost of Milk' which led to a heated discussion, not only about animal cruelty in the dairy industry but, interestingly, also about whether the BBC should have aired the documentary in that form.[531] This debate highlights the continuing tensions in the realm of animal activism and undercover footage.

A consensus about the substantive ethical question at stake, namely how we ought to treat animals, is not in sight. Nevertheless, the law must attend

528 See Chapter 10.

529 Mouffe, Chantal, By Way of a Postscript, Parallax 20:2 (2014), 149–157, 151.

530 Ibid.

531 Grant, James, 'Don't Tar All Farmers with the Same Brush': Furry as BBC Panorama uses vegan activist's secret video of cows being abused on ONE farm in Wales to paint the whole industry as cruel, Daily Mail, 15 February 2022, available at: https://www.dailymail.co.uk/news/article-10514479/Fury-BBC-Panorama-uses-vegan-activists-secret-video-cows-abused-ONE-farm.html (last accessed 16 August 2022).

to the way in which public debate on these issues is conducted. Democratic theory can assist in this difficult task by helping to explain and to evaluate legal responses to undercover footage. Now is the time to turn to the question of how these findings could inform legal responses to undercover footage in the future. Certainly, democratic theory should not dictate how the law approaches undercover footage, but especially deliberative democracy already corresponds to nascent ideas in legal reasoning with which this dissertation engaged in more extensive exploration.

Animal activists who create and disseminate undercover footage operate at the margins of law and democracy. Their conscientious motivation and potential contribution to democratic deliberation places their actions in a point of tension between legality and legitimacy. Activists invoke animal ethics and, at times, argue that if consumers and voters could only know about the suffering involved in certain animal industries, they would oppose them. Interestingly, the tension between legality and legitimacy mirrors some typical features of animal law and its enforcement. At times, both animal law and animal activism operate in a space of tension between legality and (democratic) legitimacy. In animal law, some practices continue to exist for years after the democratic legislator has chosen to ban them, and enforcement of animal welfare standards is lacking. As such, both animal law and animal activism are nested between legality and legitimacy. This makes responding to animal activism a difficult, but crucial, task for the law.

In Germany, the most pressing legal challenges with regard of undercover footage are those associated with providing more legal certainty and addressing existing inequalities in the protection of the right to freedom of expression. The problem of legal certainty is most prominent in cases concerning the creation of undercover footage. Although the decisions of the Heilbronn Court and the Naumburg Court are not contradictory as such, they create a certain level of legal uncertainty for animal activists. New legislation is not necessarily needed to address this problem. The Naumburg Regional Court has developed convincing criteria for a restrictive application of the necessity defense in these cases.[532] If other Courts, and in particular the FCJ, were to apply the same standards in the future, much certainty could be gained. The standards developed by the Naumburg Court are not just legally sound, they can also be supported by an

532 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018.

assessment through the lens of democracy and democratic approaches to civil disobedience. Taking this dimension into account does not push aside legal standards. Rather, it offers a complimentary framework which is helpful to placing the creation of undercover footage in a social, political, and distinctively democratic context.

The second most pressing challenge, that of increasing equality, mainly concerns the dissemination of undercover footage. Activists may be disadvantaged as compared to journalists. Even within the category of animal activists, distinctions along the lines of 'rules' of the intellectual battle of ideas have been drawn. Doing so may find support in a traditional conception of deliberative democracy, but it fails to take compelling arguments of other deliberative democrats into account, particularly those who invoke the disadvantages position of political minorities and the democratic potential of non-deliberative acts such as the ones associated with undercover footage. To remedy these concerns, Courts would have to place a greater emphasis on how undercover footage is disseminated and its potential risks and effects, rather than taking the status of the individual or entity disseminating it as indicative of these more nuanced standards.

In jurisdictions with ag-gag laws, other challenges are pertinent. Most ag-gag laws are problematic from the perspective of deliberative democracy, and even from the perspective of agonistic pluralism. It the United States, it seems unlikely that ag-gag laws will cease to exist in the foreseeable future. One reason for this is that Courts, even when ultimately finding that some ag-gag provisions violate free speech, remain comparatively formalistic in their assessment of free speech. More likely, ag-gag laws will be refined in the future to temper First Amendment concerns without addressing distinctively democratic problems. In Australia on the other hand, ongoing litigation on the NSW ag-gag law provides promise: in lieu of an explicit right to free speech in the constitution, the High Court will have to grapple with distinctively democratic concerns such as the ones raised in this dissertation.[533]

In Germany, legislation comparable to ag-gag was briefly on the public agenda in 2018 when the at that time newly formed government expressed intent to punish those who break into agriculture facilities more effectively.[534] Unsurprisingly, this plan was not put into action. Any legislation of

533 See Chapter 11.

534 Coalition Treaty: Koalitionsvertrag zwischen CDU, CSU und SPD. Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt

this kind would severely affect the doctrinal coherence of the criminal code, as it would have to deem the necessity justification inapplicable.

Whether ag-gag legislation may, in some contexts, be necessary to protect farming communities, is up for debate. To be more sensitive to democratic concerns, ag-gag could include public interest exceptions. Without public interest exceptions, ag-gag further criminalizes activists and risks pushing them into the role of an 'enemy,' rather than an 'adversary,' in the public debate or 'agonistic struggle.'[535] Therefore, criminalization should be approached with the utmost caution.

A follow-up question is: to what extent are the findings of this dissertation applicable to other activists, in particular those protesting climate change and environmental destruction? Conflating the agendas and strategies of the different movements would not do their distinctiveness justice. To what extent animal and climate activists are comparable in their strategies is a question for further research. Nevertheless, the findings of this dissertation can be instructive for legal responses to other activism, in particular in the context of climate change, too. Most importantly, legal scholars should look at actions of climate activists in a democratic and political context.

Both climate and animal activists sometimes circumvent democratic procedures to instigate democratic change. In addressing these protest movements, the law can play different roles. If law criminalizes the strategies of activists and prevents their message from being heard, it can perpetuate the status quo. At the same time, those sympathetic to the goals that activists pursue might be tempted to consider the law as a powerful driver of change. And yet, both images of the law seem rather bleak. In a liberal democracy, change requires a democratic process. With regard to legal responses to animal activism and related protest movements, this means that the law should accompany change by protecting its democratic credentials and filtering those elements that are not conducive to an open and fair public debate. This role is a difficult one, particularly where activists are acting on behalf of others whose rights are not fully recognized by the law, and when they employ strategies with an ambivalent relationship to democracy. In these cases, the law's role is more complex than one of hindering or driving

für unser Land, 19th Legislative Period, 2018, 86, available at: https://www.bundesregierung.de/resource/blob/974430/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1 (last accessed 10 February 2022).

535 Mouffe 2014, 151.

societal change, because it requires reflection on democratic theory, culture, and practice. It is hoped that this dissertation succeeded in illuminating how law can fulfill this function when mobilized in response to animal activism.

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