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 Tierbefreier 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.

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.

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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.

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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 Öffentlickeit 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.