

## Part I: Groundwork

### 1. Introduction

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

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

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- 1 Opening Statement of Senator Herb Kohl, Hallmark/Westland Meat Recall: hearing before a subcommittee of the committee on appropriations United States Senate 110 Congress, Senate Hearing 110–693, 28 February 2008, available at: <https://www.govinfo.gov/content/pkg/CHRG-110shrg44333/html/CHRG-110shrg44333.htm> (last accessed 31 March 2022).
  - 2 Martin, Andrew, Largest Recall of Ground Beef is Ordered, *The New York Times*, 18 February 2008, available at: <https://www.nytimes.com/2008/02/18/business/18recall.html> (last accessed 30 March 2022).
  - 3 The Food Industry Center University of Minnesota, National Center for Food Protection and Defense, Westland/Hallmark: 2008 Beef Recall. A Case Study by The Food Industry Center, January 2010, 6 f., available at: <https://ageconsearch.umn.edu/record/58145/> (last accessed 30 March 2022).
  - 4 Hallmark/Westland Meat Recall: hearing before a subcommittee of the committee on appropriations United States Senate 110 Congress, Senate Hearing 110–693, 28 February 2008.
  - 5 According to the Humane Society, other organizations had previously brought the animal abuse at Hallmark/Westland to the United States Department of Agriculture’s attention, ‘yet the mistreatment persisted.’ Statement of Wayne Pacelle (Humane Society of the United States), Hallmark/Westland Meat Recall: hearing before a subcommittee of the committee on appropriations United States Senate 110 Congress, Senate Hearing 110–693, 28 February 2008.

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

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

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

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

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

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

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

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6 See Chapters 7 and 8.

7 On ag-gag see Chapters 10 and 11. The term ag-gag was popularized by journalist Mark Bittman. Bittman, Mark, Who Protects the Animals? *The New York Times*, 26 April 2011, available at: <https://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/> (last accessed 3 August 2021).

8 See Chapter 9.

9 See Chapter 10.

10 See Chapter 6.

11 See Chapters 5 and 6.

12 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018; see Chapter 6.

13 ECtHR, *Tierbefreier e.V. v. Germany*, App. no. 45192/09, 16 January 2014; see Chapter 5.

14 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017; see Chapter 8.

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

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

## 1.1 Placing the Dissertation in the Field of Animal Studies

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

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

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

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15 See Chapter 3.

16 See Chapter 2.

17 See Chapter 2.

18 Singer, Peter, *Animal Liberation* (New York: HarperCollins 2009 ed.).

19 Regan, Tom, *The Case for Animal Rights* (Berkeley: University of California Press 2004 ed.); Korsgaard, Christine M., *Fellow Creatures: Our Obligations to the Other Animals* (Oxford: Oxford University Press 2018).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 1.2 Research Questions and Claims

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

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

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

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

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

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

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

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

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

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

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

37 See Chapter 2.

38 Lepsius, Oliver, *Rechtswissenschaft in der Demokratie*, *Der Staat* 52 (2013), 157–186.

39 See Chapters 5 and 6.

40 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 117), reasoning that if it was to allow activists to pursue political aim through illegal means, anarchy would replace democracy.

41 See e.g., in the literature criticizing ag-gag laws Gelber/ O'Sullivan Siobhan 2021.

42 For a comprehensive and compelling account on the relationship between democracy and civil disobedience see Smith, William, *Civil Disobedience and Deliberative Democracy* (Abingdon: Routledge 2013). See also Chapters 7 and 8.

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

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

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

### 1.3 Plan of the Dissertation

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

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43 See Chapter 10.

44 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065); BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018.

45 See Chapter 12.

46 See Chapters 3, 5, and 6.

47 Mouffe, Chantal, *By Way of a Postscript*, *Parallax* 20:2 (2014), 149–157.

48 See Chapter 12.

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

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

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

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

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

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

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

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

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

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

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

52 Smith 2013.

53 Smith 2013.

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

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

## 2. Methods and Theoretical Underpinnings

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

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

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54 Mouffe 2014.

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

56 On deliberative democracy see Chapter 3.

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

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

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

## 2.1 Definitions

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

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57 Twining, William, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009), 122.

58 Alexy, Robert, *The Special Case Thesis*, *Ratio Juris* 12:4 (1999), 374–384.

59 Twining 2009, 122.

60 Alexy 1999.

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

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

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

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

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

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

## 2.2 Normative Jurisprudence

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

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

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

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

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63 Twining 2009, 122.

64 Ibid.

65 On value-judgements see also Alexy, Robert, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Oxford: Clarendon Press 1989), 6 f. with further references.

66 Alexy 1989, 9.

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

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

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

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

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67 Ibid., 8.

68 See especially Chapter 12.2.7.

69 Alexy 1989, 6 f.

70 See Chapter 3.

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

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

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

### 2.3 Discourse Theory and Discourse Analysis

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

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

72 Alexy 1999, 374.

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

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

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

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73 Ibid.

74 Ibid., 377.

75 Alexy 1989, 213 f.

76 Ibid., 212.

77 Rawls, John, *Political Liberalism* (New York: Columbia University Press 1999), 231; Eisgruber, Christopher, *Constitutional Self-Government* (Cambridge, MA: Harvard University Press), 3 f. For a critical analysis of this position see Zurn, Christopher, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge: Cambridge University Press 2009), 168 f.

78 Baer, Susanne, *Rechtssoziologie: Eine Einführung in die interdisziplinäre Rechtsforschung* (Baden-Baden: Nomos 3<sup>rd</sup> ed. 2017), 75. The first kind of discourse analysis traces back to Foucault and there are doubts whether it can even be applied to the law; see Schweitzer, Doris, *Diskursanalyse, Wahrheit und Recht: Methodologis-*

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

## 2.4 Critical Legal Theory

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

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

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

79 See also Baer 2017, 76.

## 2.5 Comparative Law

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

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

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

81 High Court of Australia, *Farm Transparency International Ltd & Anor v State of New South Wales* (ongoing) file number S83/2021, filings available at: [https://www.hcourt.gov.au/cases/case\\_s83-2021](https://www.hcourt.gov.au/cases/case_s83-2021) (last accessed 18 March 2022).

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

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

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

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

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

84 Ibid.

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

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

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

## 2.6 The Role of Political Philosophy: Normative Reconstruction

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

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86 See Chapters 10 and 11.

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

88 Coalition Treaty: *Koalitionsvertrag zwischen CDU, CSU und SPD*, 19<sup>th</sup> Legislative Period, 2018, 86.

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

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

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

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

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

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

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

### 3. Deliberative Democracy as Key Concept

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

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

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

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90 Lepsius, Oliver, *Rechtswissenschaft in der Demokratie* 52, Der Staat (2013), 157–186.

91 *Ibid.*, 168.

92 *Ibid.*

93 Lepsius suggest politicizing controversial issues as a way to address conflicts in democracy through law. *Ibid.*, 173.

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

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

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

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

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

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

### 3.1 Defining Deliberative Democracy

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

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

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

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

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

98 Gutmann/ Thompson 2004, 13.

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

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

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99 Ibid., 16.

100 Ibid.

101 Ibid., 17.

102 della Porta, Donnatella, *How Social Movements Can Save Democracy: Democratic Innovations from Below* (Cambridge, MA: Polity 2020), 4.

103 Gutmann/ Thompson 2004, 8; Florida, Antonio, *The Origins of the Deliberative Turn*, in: Andre Bächtiger, John S. Dryzek, Jane Mansbridge, Mark E. Warren (eds.), *The Oxford Handbook on Deliberative Democracy* (Oxford: Oxford University Press 2018), 35–54, 36.

104 Gutmann/ Thompson 2004, 9.

105 Ibid.

106 Bessette 1994.

107 Florida 2018, 36.

108 Florida 2018, 36; Gutmann/ Thompson 2004, 9; referring in particular to Habermas, Jürgen Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats (Frankfurt a. M.: Suhrkamp 2<sup>nd</sup> ed., 1992).

109 Dryzek, John, *Deliberative Democracy and Beyond* (Oxford: Oxford University Press 2000); Dryzek, John, *Discursive Democracy: Politics, Policy, and Political Science* (Cambridge: Cambridge University Press 1990).

Fishkin,<sup>110</sup> Joshua Cohen,<sup>111</sup> and Amy Gutmann and Dennis Thompson,<sup>112</sup> refined accounts of deliberative democracy leading it to become arguably the most prominent and promising model of democracy today.

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

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

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

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110 Fishkin, James, *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford: Oxford University Press 2009).

111 Cohen, Joshua, *Democracy and Liberty*, in: Jon Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press 1998), 185–231.

112 Gutmann/ Thompson 2004, 9.

113 Mouffe, Chantal, *Deliberative Democracy or Agonistic Pluralism?*, *Social Research* 66:3 (1999), 745–758, 757.

114 Brennan, Jason, *Against Democracy* (Princeton: Princeton University Press 2016).

115 Gutmann/ Thompson 2004, 3.

116 *Ibid.*

117 *Ibid.*

118 *Ibid.*, 3 f.

119 *Ibid.*, 4.

ity.<sup>120</sup> The requirement of accessibility is also known from the law, which must too be public and accessible.

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

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

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120 Ibid., 4 f.

121 Ibid., 5 f.

122 Ibid., 6.

123 Ibid., 7.

124 Ibid.

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

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

127 For an overview and further references of how this position relates to other streams of democratic theories see Dryzek 2000, 57 ff.

128 Young, Iris Marion, *Activist Challenges to Deliberative Democracy*, *Political Theory* 29:5 (2001), 670–690, 672. On the works of Iris Marion Young and animals, in particular animal oppression see Gruen, Lori, *The Faces of Animal Oppression*,

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

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

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

129 Young 2001, 672.

130 *Ibid.*, 673.

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

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

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

134 Young 2001, 673.

135 Smith 2013.

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

### 3.2 Chances and Limits of Considering Deliberative Democracy in Animal Studies

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

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

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

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136 Ibid.

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

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

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137 Driessen, Clemens, *Animal Deliberation: Co-evolution of Technology and Ethics on the Farm*, PhD thesis, Wageningen University (2014), 143, available at: <https://edpot.wur.nl/318665> (last accessed 4 March 2022).

138 *Ibid.*, 139 ff.

139 *Ibid.*, 145.

140 *Ibid.*

141 *Ibid.*

142 On this criticism see also Ladwig, Bernd, *Politische Philosophie der Tierrechte* (Berlin: Suhrkamp 2020), 320; arguing that deliberation requires making use of the ‘medium of public use of reason’ [‘Medium des öffentlichen Vernunftgebrauchs’].

143 Meijer, Eva, *When Animals Speak. Toward an Interspecies Democracy* (New York: New York University Press 2019), 217 ff.

144 *Ibid.*, 224.

145 *Ibid.*, 225.

al conditions.<sup>146</sup> Her work provides promise for a theory of deliberative democracy that includes animals.

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

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

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

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146 *Ibid.*, 226 ff.

147 Dryzek 2000, 140 ff.

148 *Ibid.*

149 *Ibid.*, 153 ff.

150 Curato, Nicole/ Hammond, Marit/ Min, John, *Power in Deliberative Democracy: Norms, Forums, Systems* (Cham: Palgrave Macmillan 2019), 1.

151 Gutmann/ Thompson 2004, 37.

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

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

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

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

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

153 *Ibid.*, 309.

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

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

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

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

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

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

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

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

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

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

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

161 *Ibid.*, 1 f.

162 Garner 2019; Parry 2017.

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

164 Dryzek 2000, 2.

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

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

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

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

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165 Ibid.

166 Gutmann/ Thompson 2004, 51.

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

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

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

### 3.4 Deliberative Democracy and the Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

177 Habermas 1992, 50.

178 *Ibid.*, 137.

179 *Ibid.*

180 *Ibid.*, 138.

181 Gutmann/Thompson 2004, 27.

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

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

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

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

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

184 *Ibid.*

185 *Ibid.*, 54.

186 *Ibid.*

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

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

189 *Ibid.*, 58.

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

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

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

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

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191 Habermas 1992; Alexy 1989.

192 Hübner Mendes 2013, 58.

193 Ibid.

194 Ibid., 59.

195 Levy, Ron/ Kong, Hoi, Introduction: Fusion and Creation, in: Ron Levy, Hoi Kong, Orr Graeme, Jeff King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: Cambridge University Press 2018), 1–14.

196 Ibid., 3 f.

197 Ibid.

198 Baber/ Bartlett 2015; Rotolo, Giuseppe, *Deliberative Democracy and Environmental Law Enforcement*, in: Toine Spapens, Rob White, Wim Huisman (eds.), *Environmental Crime in Transitional Context* (London: Routledge 2016), 157–192.

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

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

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

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

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

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

#### 4. Animal Activism as a Key Concept

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

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

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

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

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

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

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

#### 4.1 Why? The Theories Behind Animal Activism

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

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

necessarily limited to, animal welfare, animal rights, and animal liberation activists.<sup>202</sup>

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

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

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

203 *Ibid.*, 95 ff.

204 *Ibid.*, 95.

205 *Ibid.*, 97 ff.

206 *Ibid.*, 98.

207 *Ibid.*, 99 ff.

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

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

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

## 4.2 How? The Strategies of Animal Activists

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

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

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

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

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

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

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

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

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

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

215 Schmitz 2019, 208.

216 Ibid.

217 Ibid., 214.

218 Ibid., 217.

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

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

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

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219 Becker, Markus/ Müller, Peter, Wie ein Ex-NPD Funktionär zur Tierschutzpartei kam, *Der Spiegel*, 28 January 2020, available at: <https://www.spiegel.de/politik/deutschland/tierschutzpartei-eu-abgeordneter-martin-buschmann-war-bei-der-npd-a-d44aa257-0b15-4cd8-add8-455e52dd7662> (last accessed 23 February 2022).

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

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

222 Munro 2012, 174.

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

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

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

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

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

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

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

226 See Chapter 7.

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

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

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

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

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

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

228 Sebo/ Singer 2018, 38.

229 Oberster Gerichtshof [Highest Court] 12 October 2006, 6 Ob 321/04f, available at: [https://rdb.manz.at/document/ris.just.JJT\\_20061012\\_OGH0002\\_0060OB00321\\_04F0000\\_000](https://rdb.manz.at/document/ris.just.JJT_20061012_OGH0002_0060OB00321_04F0000_000) (last accessed 25 February 2022).

associated both with lawful campaigns and with the creation of undercover footage.<sup>230</sup>

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

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

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

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

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

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

233 Sebo/ Singer 2018, 43 f.

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

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

### 4.3 The Case of Undercover Footage

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

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

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235 Fernández, Laura, Images That Liberate: Moral Shock and Strategic Visual Communication in Animal Liberation Activism, *Journal of Communication Theory* 45:2 (2021), 138–158.

236 *Ibid.*, e.g., 142 f., 151.

237 *Ibid.*, 142 f. Fernández interviewed activists in Denmark, Sweden, and Spain.

238 *Ibid.*, 143.

239 O'Sullivan, Siobhan, *Animals, Equality and Democracy* (Basingstoke, UK: Palgrave Macmillan 2011), 2 f.

240 *Ibid.*, 60 f.

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

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

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

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

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241 Moral shock is the key focus of the inquiry by Fernández. Fernández 2021, 139.

242 Ibid.,147.

243 Colb, Sherry/ Dorf, Michael, *Beating Hearts: Abortion and Animal Rights* (New York: Columbia University Press 2016), 163.

244 Ibid., 161.

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

#### 4.4 Why not Whistleblowing?

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

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

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

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

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

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

247 See also *ibid.*

## 4.5 Gaps in the Existing Research

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

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

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

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248 Hereth, Blake, *Animal Rights Pacifism*, *Philosophical Studies* 178 (2021), 4053–4082; see also Hadley, John, *Animal Rights and Self-Defense Theory*, *The Journal of Value Inquiry* 43 (2009), 165–177.

249 *Ibid.*

250 Hereth 2021.

251 *Ibid.*

252 Hardman 2021, 1.

253 *Ibid.*, 15.

254 *Ibid.*, 13 (F8), 15 (Elkton example).

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

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

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

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

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255 Ibid.

256 Ibid., 16 f.

257 Ibid., 19 f.

258 Ibid., 22 ft. 41.

259 Ibid.

260 Josse, Melvin, *Repression and Animal Advocacy*, PhD thesis submitted at the University of Leicester, School of History, Politics, and International Relations, 2021, 127, available at: [https://leicester.figshare.com/articles/thesis/Repression\\_and\\_Animal\\_Advocacy/18319376](https://leicester.figshare.com/articles/thesis/Repression_and_Animal_Advocacy/18319376) (last accessed 6 April 2022).

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

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

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

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

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

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

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

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

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

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

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

267 O’Sullivan 2011, 8.

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

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

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

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

