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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 Weltman 2021, 7.

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

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

7. Beyond Deliberation? Trespass as Civil Disobedience

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

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

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

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

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

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

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

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

17 Ibid.

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

7.1 Why Civil Disobedience Matters

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.2 Considering Trespass as Civil Disobedience

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

28 See also Chapter 2.

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

30 Rawls 1971 (reprint 2005), 364.

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

As mentioned earlier, Rawls defined civil disobedience as 'a public, non-violent conscientious yet political act contrary to law usually done with the aim of bringing about a change in law or policies of the government.'[31] Rawls' theory of civil disobedience is designed for a democratic and 'nearly just society,' in which those acting in civil disobedience address the majority in order to make them aware that, in the opinion of the activists, the principles of justice are disrespected by a certain policy or law.[32] These features distinguish civil disobedience from both 'ordinary offences' and from other forms of protest.

Rawls' definition is increasingly understood as representative of a traditional, liberal understanding of civil disobedience, and it is now being challenged by the so-called republican or democratic approaches.[33] This Chapter follows the language used in existing literature and thus refers to 'liberal' approaches in the tradition of Rawls, as well as 'democratic' approaches.[34] Proponents of these latter approaches tend to employ broader definitions. Robin Celikates, for example, proposes a minimalist definition of civil disobedience 'as an intentionally unlawful and principled collective act of protest […] with which citizens […] pursue the political aim of changing specific laws, policies or institutions.'[35] Celikates argues that the remaining features of Rawls definition, such as non-violence, conscientiousness, and appealing to the majority's sense of justice, give rise to substantial normative issues that are better dealt with during the consideration of justification, and not when considering the definition of an act of civil disobedience.[36]

In a nutshell, liberal approaches consider it the role of civil disobedience to realize justice, whereby justice is usually understood, in a Rawlsian sense, as encompassing the fundamental rights of free and equal citizens.[37] Demo-

31 Ibid.
32 Ibid., 363.
33 See e.g., Markovits 2005; Celikates, Robin, Democratizing Civil Disobedience, Philosophy and Social Criticism 24 (2016), 982–994; Celikates, Robin, Rethinking Civil Disobedience as a Practice of Contestation – Beyond the Liberal Paradigm, Constellations 23:1 (2016), 37–45.
34 See e.g., Smith 2013, 8.
35 Celikates, Rethinking Civil Disobedience, 2016, 39.
36 Ibid.
37 Smith 2013, 8.

cratic approaches, on the other hand, emphasize democracy as a framework with procedures that enable citizens to exercise collective governance.[38] I will come back to the distinction between liberal and democratic approaches later. However, for now, this Chapter will follow the liberal approach. It should also be mentioned that the definition in the following does not speak to the justifiability of civil disobedience; this issue will be considered subsequently. With this in mind, we can now take a closer look the features of civil disobedience and test their applicability to animal activists' trespassing on animal facilities for the purpose of creating undercover footage for public dissemination.

Traditionally, characteristic features of civil disobedience are considered to be conscientiousness, communication, publicity, non-violence, acceptance of legal consequences, and fidelity to the law.[39] First, civil disobedience must be *conscientious*, which is understood to mean principled, deliberate and based on serious convictions.[40] Is this feature shared by animal activists who trespass on animal facilities to create footage? At a minimum, it seems reasonable to assume that these acts are based on a moral conviction that intensive animal farming for human consumption is morally wrong. Activists may also believe that they act in the interests of society, if they consider that consumers should be made aware of the origins of food. Thus, as a rule, one can say that animal activist who trespass to create footage act conscientiously.[41]

The second feature of civil disobedience is *publicity*. According to Rawls, civil disobedience can never be covert or secretive.[42] It is essential that civil disobedience is conduced publicly, and may even involve prior notice to the authorities.[43] However, contrary to this view, it can be argued that sometimes covertness is essential to acts of civil disobedience.[44] Kimberly Brownlee names covert animal rescue as an example of this category.[45] In

38 Ibid.
39 See e.g., Delmas/ Brownlee 2021.
40 Ibid.
41 Celikates voices doubts in this regard and suggests a category of 'advocatory civil disobedience' Celikates, Rethinking Civil Disobedience, 2016, 38. However, other authors do not make this distinction and consider the conscientiousness criterion to be fulfilled in the case of animal activism. McCausland/ O'Sullivan/ Brenton 2013.
42 Rawls 1971 (reprint 2005), 366.
43 Ibid.
44 For an overview of the disputes on this issue see Delmas/ Brownlee 2021.
45 Brownlee 2017.

this case, she argues, prior warning to the authorities would prevent the communicative purpose of the act.[46] The same applies, even more so in fact, to trespassing to create footage: while the initial act needs to be covered to be successful, covertness serves a communicative purpose through the subsequent dissemination of footage.[47] Although covertness may sometimes be necessary, some suggest that the publicity requirement of civil disobedience can be met by claiming responsibility after the act.[48] The paradigmatic case of subsequent publicity is that of the activists themselves calling the police and admitting to trespass. Having said this, as regards civil disobedience, any effort made to stay anonymous, even after the act (e.g., wearing masks), clearly conflicts with the publicity requirement.

The third feature is *communication*. Those acting in civil disobedience would typically seek to communicate their disagreement with a law or policy and, at the same time, instigate a change of law or policy. This feature is closely related to the notion that those acting in civil disobedience seek to convince others and contribute to the formation of opinion.[49]

At first sight, this feature is clearly shared by animal activists, for the dissemination of footage has a communicative aspect. However, there are two problems in this regard. The first relates to the distinction between the private sector on the one hand, and policy or law on the other. If animal activists use the footage for a campaign against a specific company or farming collective, it is questionable whether they communicate a disagreement with the lenient animal protection law that allows for such conditions, or whether they are communicating a disagreement with the decisions of the animal facility operator as a private actor. Joseph Raz argued that actions taken to communicate disagreement with the decisions of private actors do not qualify as civil disobedience.[50] This would be problematic in animal law, where industry standards and the law are intertwined. Pursuant to Raz' view, communicating disagreement with the decision of an animal facility operator, for example the decision to provide animals with only the very

46 Note that in the current version of the above encyclopedia entry, covert animal rescue is considered uncivil: Delmas/ Brownlee 2021.

47 Ladwig, Bernd, Politische Philosophie der Tierrechte, (Berlin: Suhrkamp 2020), 398; McCausland/ O'Sullivan/ Brenton 2013, 210. With further references on the compatibility of secrecy and civil disobedience.

48 See Delmas/ Brownlee 2021 with further references.

49 See also Ladwig 2020, 392.

50 Raz, Joseph, The Authority of Law: Essays on Law and Morality (New York: Oxford University Press 1979), 264.

minimum of space legally required, would not qualify as civil disobedience. This seems very restrictive considering that a disagreement with the decision of a private actor who is acting within the law is simultaneously a disagreement with the law that sets those low minimum standards.

German animal law follows a multilayered approach whereby, rather than the ambitious wording of the Animal Protection Act, the Farm Animal Protection Regulation [Tierschutz-Nutztierhaltungsverordnung] is decisive. Further, as we have seen in Chapter 6 in the legal analysis of the decision of the lower Court in the organic chicken case, the industry norm plays a significant role, too. In this system, the lines between industry standards, policy and law are blurred. In light of this, the exclusion of any communication of disagreement with industry standards or decisions of private actors from the classification of civil disobedience as a default appears to be arbitrary. It is, however, appropriate to apply stricter scrutiny when footage is primarily used to communicate disagreement with the conduct of a specific private actor.

The second problem with communication as it relates to the case at hand is the meaning of 'policy.' What if animal activists seek footage to prove that an actor does not comply with the law, and that an enforcement gap exists? It seems questionable whether a failure of the authorities to remedy animal welfare violations can be considered policy. On the other hand, it would be counterintuitive to exclude the case of activists who seek to prove non-compliance with existing law from the moral justification provided by the concept of civil disobedience. After all, activists who focus on the enforcement gap display increased fidelity to the legal order (see below), which makes their case for civil disobedience stronger. In addition, in most scenarios, the aim to reveal an enforcement gap seems sufficiently policy-related: In the Naumburg Regional Court[51] case, which will be discussed in Chapter 8, the defense presented by the activists was, in part, based on the claim that the authorities knew of the unlawful conditions in an animal facility, and yet did not take action. If authorities chose not to initiate appropriate proceedings in response to unlawful conditions, and if this choice can be illustrated across a long period of time, this is in effect a policy, as opposed to a mere oversight.

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

Possibly the best-known feature of civil disobedience is that of *non-violence, or peacefulness*. Some authors question both what this feature entails and whether it is necessary.[52] They do so, *inter alia*, based on controversies – both in law and in philosophy – about the definition of violence.[53] Reciting all relevant positions on this issue would go beyond the scope of this Chapter, since they are of limited importance for the case of animal activists. It is, however, important to be aware of how the notion of violence can be legally redefined in counterintuitive ways.

In the wake of the peace movement ['Friedensbewegung'] in the 1960s, the FCJ considered protesters who sat down on train tracks to be deploying violence ['Gewalt'] in the sense of § 240 of the Criminal Code (coercion ['Nötigung']).[54] The traditional definition of violence in coercion cases required the influencing of another person though the use of physical (bodily) force, in order to redress resistance that was either actually given, or expected with certainty ['die unter Anwendung von physischer (körperlicher) Kraft erfolgende Einwirkung auf einen anderen zur Beseitigung eines tatsächlich geleisteten oder bestimmt erwarteten Widerstandes'].[55] In both the aforementioned and similar decisions, the German Courts substantially lowered the requirements for physical force, extending the definition to include sitting blockades and other means of protest deployed by the 'peace movement.' This development was halted in 1995, when the FCC found that the extensive interpretation of 'violence' as including situations where the accused was merely physically present and where the force was merely psychological, did not satisfy the principle of legal certainty [Bestimmtheitsgebot] enshrined in Article 130 (2) of the Basic Law.[56] That case also concerned a sitting blockade this time occurring in front of an ammunition depot of the German military.[57] Legal scholars now consider

52 See e.g., Celikates, Rethinking Civil Disobedience, 2016, 41 f.

53 Another common challenge to the non-violence feature that non-violent acts can lead to greater harm than violent acts. Raz made the example of possible effects of a strike by ambulance drivers Raz, Joseph, The Authority of Law: Essays on Law and Morality (New York: Oxford University Press 1979), 267.

54 BGH [Federal Court of Justice] 8 August 1969, 2 StR 171/69, NJW 1770, 1969 (often referred to as 'Läpple-Urteil').

55 See e.g., Heger, Martin, § 240 Nötigung, in: Karl Lackner, Christian Kühl (eds.), Strafgesetzbuch Kommentar (München: C.H. Beck 29th ed., 2018), para. 5.

56 BVerfG [Federal Constitutional Court] 10 January1995, 1 BvR 718/89, 719/89, 722/89, 723/89, NJW 1141, 1995 (1142).

57 Ibid., 1141.

the cases to which the broader definition of violence was applied until 1995 to have been acts of civil disobedience.[58]

Nevertheless, one should distinguish between legal definitions of violence and the non-violence feature of civil disobedience. Even within German criminal law, there is no uniform definition of violence.[59] § 113 of the Criminal Code (Resistance to enforcement officers ['Widerstand gegen Vollstreckungsbeamte']) relies on a notion of violence different from that of § 240 of the Criminal Code.[60] But then again, scholars and Courts also disagree on the notion of violence in the context of § 113 of the Criminal Code. In a case that could also be discussed in the context of civil disobedience – protesters chaining themselves to trees on the issue of the building of a new train station ('Stuttgart 21') – the Stuttgart Regional Court relied on a broad notion of violence reminiscent of § 240 of the Criminal Code in upholding the conviction of activists under a different provision, § 113 of the Criminal Code.[61]

Further, none of the criminal law definitions of violence are identical to the constitutional law definition of non-peacefulness ['Unfriedlichkeit'].[62] In constitutional law, peacefulness is a relevant criterion for the right to assembly enshrined in Article 8 of the Basic Law. In this context, the FCJ considers an assembly to be non-peaceful 'if acts of some danger, such as aggressive riots against persons or things or other acts of violence occur' ['wenn Handlungen von einiger Gefährlichkeit wie etwa aggressive Ausschreitungen gegen Personen oder Sachen oder sonstige Gewalttätigkeiten stattfinden'].[63]

58 See e.g., Magnus, Dorothea, Der Gewaltbegriff der Nötigung (§ 240 StGB) im Lichte der neusten BVerfG-Rechtsprechung, NStZ (2012), 538–543, 539.

59 See Eser, Albin, § 113 Widerstand gegen Vollstreckungsbeamte, in: Adolf Schönke, Horst Schröder (founders), Albin Eser (ed.), Strafgesetzbuch (München: C.H. Beck Verlag 30st ed., 2019), para. 42.

60 Eser 2019, para. 42; Bosch, Nikolaus, § 113 Widerstand gegen Vollstreckungsbeamte, in: Volker Erb, Jürgen Schäfer (eds.), Münchner Kommentar zum Strafgesetzbuch (München: C.H. Beck 4th ed., 2021), para. 18.

61 OLG Stuttgart [Stuttgart Regional Court], 30 July 2015, 2 Ss 9/15. For a broad interpretation see also BVerfG [Federal Constitutional Court], 23 August 2005, 2 BvR 1066/05, NJW 136, 2006. Critical of both decisions Bosch 2021, para. 20.

62 See also BVerfG [Federal Constitutional Court] 11 November 1986, 1 BvR 713/83 u. a., NJW 43, 1987 (47) ['Der verfassungsrechtliche Begriff der Unfriedlichkeit kann aber nicht mit dem von der Rechtsprechung entwickelten weiten Gewaltbegriff des Strafrechts gleichgesetzt werden'].

63 BVerfG [Federal Constitutional Court] 24 October 2001, 1 BvR 1190/90 u. a., NJW 1031, 2002 (1033).

Civil disobedience does, and should, have a definition of non-violence that is distinct from the law.[64] The legal theorist Ralf Dreier supported this view, and submitted that violence in the context of civil disobedience should include violence against persons and destruction of property and expressly left open the question of whether that definition should include the destruction of things the value of which is relatively low in relation to the aim pursued.[65] In philosophy and political science literature on civil disobedience, minor damage to property, such as broken locks, are usually not considered to constitute violence or non-peacefulness.[66] Tony Milligan defends the destruction of property as civil disobedience in some cases, based on the notions of civility and respect.[67] It is possible to disrespect someone as owner of an animal facility, without disrespecting her as a person.[68] As a result, entering animal facilities in order to create footage should not be categorically excluded from civil disobedience based on this feature,[69] though it remains contingent and close scrutiny is warranted.

Some scholars argue that those acting in disobedience must be *willing to accept legal consequences*, including punishment.[70] Later I will argue – against the view of the German Federal Constitutional Court – that this requirement does not mean that those engaging in civil disobedience cannot defend themselves against criminal charges in a court of law.[71]

64 See also Schüler-Springorum, Horst, Strafrechtliche Aspekte zivilen Ungehorsams, in: Peter Glotz (ed.), Ziviler Ungehorsam im Rechtsstaat, (Frankfurt a.M.: Suhrkamp 1983), 76–98, 83.

65 Dreier, Ralf, Widerstandsrecht und ziviler Ungehorsam im Rechtsstaat, in: Peter Glotz (ed.), Ziviler Ungehorsam im Rechtsstaat (Frankfurt a.M.: Suhrkamp 1983), 54–75, 62 f.

66 McCausland et al. consider trespass to be of a non-violent nature McCausland/ O'Sullivan/ Brenton 2013, 207.

67 Milligan, Tony, Civil Disobedience: Protest, Justification, and the Law (New York: Bloomsbury Academic 2013), 117–126.

68 Ibid., 17 f.

69 Which does not imply that it is justified – see below.

70 See e.g., Cohen, Marshall, Civil Disobedience in a Constitutional Democracy, The Massachusetts Law Review 10:2 (1969), 211–226, 214. For a compelling argument against the willingness to accept punishment criterion see Arendt, Hannah, Crises of the Republic (New York: Harcourt Brace Jovanovich, Inc. 1969), 67: 'It is most unfortunate that, in the eyes of many, a "self-sacrificial element" is best proof of […] "the disobedient's seriousness and his fidelity to the law", for single-minded fanaticism is usually the hallmark of the crackpot and, in any case, makes impossible a rational discussion of the issues at stake.'

71 For this view see Dreier 1983, 61 f. The German Constitutional Court stated the opposite view in 1986, when deciding about a legal justification of a sitting blockade;

The above is closely linked to the final feature of civil disobedience, which is *fidelity to the law*. This does not require fidelity to the specific law that the activists seek to change, but to the rule of law, and especially the constitution.

Bernd Ladwig points out that this requirement conflicts with the self-perception of activists and historic examples of civil disobedience.[72] Ladwig argued that Mahatma Gandhi sought to end colonial rule in India and thus did not endorse the constitutional order.[73] Martin Luther King invoked the United States Constitution, but at the same time he did so with the qualifier that the way it was understood and applied – discriminating against African Americans – was far from 'nearly just.'[74] In light of this example, Ladwig suggests a distinction between the written constitution and the way it is applied, and takes this difference into account the case of animal activism.[75]

The pitfall of the fidelity to the law requirement, as well as of the idea of a lived or applied constitution, is that it makes the case for civil disobedience highly dependent on positive law and constitutional interpretation. In some jurisdictions, where the constitution reflects a commitment to the wellbeing of animals and where human interests are not interpreted as trumping animal welfare concerns, an argument along those lines can be made. In any case, the question of to what extent an account of civil disobedience should hinge on (constitutional) law, might be underestimated in the literature.

To concretize the fidelity to the law requirement, I suggest limiting the involvement of the law itself by instead focusing on the attitude of activists towards the law. Importantly, what should matter is less the 'self-perception' of activists, and more the attitude that manifests in the alleged act of civil disobedience. In the case of trespass to create undercover footage, a strong argument can be made in favor of fidelity to the law. Publicity and non-violence can be indicative of fidelity to the legal order. In the words of Rawls: '[t]he law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act, by the willingness to accept the legal consequences of one's conduct.'[76] Similarly, if animal activists create footage of animal welfare law violations and submit it to the authorities,

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BVerfG [Federal Constitutional Court] 11 November 1986, 1 BvR 713/83, NJW 43, 1987 (48). See Chapter 9 for further details.

72 Ladwig 2020, 390 ff.; see also Celikates, Democratizing Civil Disobedience, 2016, 984.

73 Ladwig 2020, 390.

74 Ibid., 391.

75 Ibid., 391 f.

76 Rawls 1971 (reprint 2005), 366.

they indicate respect for, and belief in, the ability and willingness of official authorities to enforce the law. The issue can also be looked at by means of comparison; namely between activists who remove individual animals from facilities ('animal rescue'); and the activist who create footage. The activists who create footage show fidelity to democracy and the legislative process as they seek legal change through these channels.

In sum, one can say that trespassing to create undercover footage can be discussed under the headline of civil disobedience. However, it is important to keep in mind the limited scope of this finding: not every individual case would meet the features above. More importantly, the moral justification and legal relevance of these acts remain separate matters, which I am going to explore in the following.

7.3 Justifying Civil Disobedience for Animals Morally

As we have seen above, many features of civil disobedience are contested, as is the moral justification of civil disobedience.[77] Indeed, the question of justification is typically where the conflict between the different approaches to civil disobedience is most salient, and where the specific problems of animal activism as civil disobedience rise to the surface. The question of justification is crucial: not only do those performing civil disobedience breach the law, they also fail to comply with decisions made by a democratic authority and they impose costs on others. In the case at hand, for example, they impose costs on the operators of animal facilities.[78] Against this backdrop, the question of justification is pertinent, not only legally, but morally.

The main issue with civil disobedience on behalf of animals lies in the expectation that those performing civil disobedience *appeal to a sense of justice shared with the majority of a given society*. McClausand et. al. identify this feature as problematic for animal activism, since the sense of justice held by animal activists is not shared by the majority.[79] This feature of Rawls' account of what constitutes civil disobedience is also widely criticized by other authors. Peter Singer argues that the limitation

77 There is no uniform template as to if and where a line is to be drawn between the defining features and the moral justification of civil disobedience.
78 Smith 2013, 3.
79 McCausland/ O'Sullivan/ Brenton 2013, 208.

of civil disobedience to shared principles of justice is unreasonable: '[w]hy could one not be justified in disobeying in order to ask the majority to alter or extend the shared conception of justice?'[80] Consequently, it is not surprising that here the Rawlsian approaches, those that I call extended liberal approaches, and the democratic approaches disagree on the case of animal activists.

7.3.1 Extending the Rawlsian-Liberal Approach

In the strictly Rawlsian sense, only acts regarding matters of justice can be justifiable as civil disobedience. Trespass to create footage from animal facilities cannot be justifiable as civil disobedience, for in Rawls' view, the wellbeing of animals is not a matter of justice:

> 'Certainly it is wrong to be cruel to animals and the destruction of a whole species can be a great evil. The capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly imposes duties of compassion and humanity in their case. I shall not attempt to explain these considered beliefs. They are outside the scope of the theory of justice, and it does not seem possible to extend the contract doctrine so as to include them in a natural way.'[81]

As a result, civil disobedience is only permissible to protest a violation of policies or laws that infringe upon the rights of humans. Thus, the Rawlsian approach does not accommodate for actions taken against, for example, economic inequality or the wellbeing of animals.[82]

Now, there are at least two ways in which this view can be challenged. One pertains to Rawls' concept of justice, and the other on the 'matter of justice' requirement and consequently – as indicated above – Rawls' entire approach to civil disobedience. For example, proponents of the latter view, relating to a 'matter of justice,' would typically stress issues of democracy over those of justice.

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80 Singer, Peter, Disobedience as a plea for reconsideration, in: Hugo A. Bedau (ed.), Civil disobedience in focus (London: Routledge 1991), 122–129, 125.

81 Rawls 1971 (reprint 2005), 512.

82 See also Delmas/ Brownlee 2021. Specifically for environmental issues see also von Essen, Erica, Environmental disobedience and the dialogic dimension of dissent, Democratization 24:2 (2017), 305–324.

While Rawls' notion of justice and his definition of civil disobedience exclude animals, other approaches to civil disobedience that are rooted in the liberal tradition may be more promising. As public opinion continues to shift further towards an increased concern for the wellbeing of animals, it could be argued that animal activists appeal to certain normative demands of society. Society does not have to recognize animal *rights* – rather, a consensus that animal suffering in the food industry should be reduced could suffice. In an official statement, the German Ethics Council cited a representative study showing that 94 % of the population subscribe to the view that, if we are using animals, we should enable them to have a good life.[83] In so far as this element is concerned, animal activists do appeal to a sense of right and wrong that is shared by the majority of society. Although few may frame this as a matter of justice, there seems to be a shared moral sense in society that animal activists can appeal to.

A comprehensive, and distinctively liberal, approach to civil disobedience that extends to animals is yet to be developed. Resources for such an 'extended' liberal approach may be found in the works of scholars who argue that Rawlsian theory provides room for animals. Kimberly Smith, for example, argues that social contract theory can include animals.[84] Similarly, Mark Rowlands argues that Rawls' theory can be read in a way that includes animals in the realm of justice, namely by 'thickening' the veil of ignorance to hide species membership.[85] However, attempts to include animals in a Rawlsian theory of justice have also been subject to criticism.[86] As a response, instead of thickening the veil of ignorance, it might be possible to include animals in Rawls' theory indirectly, as many humans deeply care about animals. In any case, an extended liberal approach to civil disobedience based on the Rawlsian definition of civil disobedience must grapple

83 Deutscher Ethikrat, Tierwohlachtung – Zum verantwortlichen Umgang mit Nutztieren, Stellungnahme, 16 June 2020, available at: https://www.ethikrat.org/publikationen/publikationsdetail/?tx_wwt3shop_detail%5Bproduct%5D=140&tx_wwt3shop_detail%5Baction%5D=index&tx_wwt3shop_detail%5Bcontroller%5D=Products&cHash=7ed5e4c787e389129366a34deaa86416 (last accessed 22 February 2022) 6.

84 Smith, Kimberly K., Animals and the Social Contract: A Reply to Nussbaum, Environmental Ethics 30:2 (2008), 195–207.

85 Rowlands, Mark, Contractarianism and Animal Rights, Journal of Applied Ethics 14 (1997), 235–247; Rowlands, Mark, Animal Rights: Moral Theory and Practice (New York: Palgrave Macmillan 2009), 118.

86 See Garner, Robert, Rawls, Animals and Justice: New Literature, Same Responses, Res Publica 18 (2012), 159–172, 169; Svolba, David, Is there a Rawlsian Argument for Animal Rights?, Ethical Theory and Moral Practice 19 (2016), 973–984.

with the contractarianism and constructivism that are prevalent both in Rawls' theory, and in liberal theory generally.

Theories of animal rights, such as, for example, Tom Regan's[87] or Alasdair Cochrane's,[88] may provide alternative starting points for an approach to civil disobedience that is more promising for animals. Having said that, an extended liberal approach to civil disobedience will always be at risk of overbroad application. Some may argue that a broader definition of civil disobedience would be appropriate, but at the risk of the term losing its normative force. In the words of Daniel Weltmann, a critic of the application of the term civil disobedience to animal activists: if all forms of protest and resistance are referred to as civil disobedience, the term is no longer 'seen to merit the respect that civil disobedience is currently afforded.'[89]

In conclusion, reconciling the 'matter of justice' requirement in civil disobedience with animal rights requires further study in the field of moral and political philosophy. A moral justification of civil disobedience on behalf of animals and pursuant to an extended liberal approach remains contingent upon these issues. In the following, I will refer to approaches to civil disobedience that could be derived from liberal animal rights positions as 'extended liberal approaches' and contrast them against the so-called 'democratic approaches.'

7.3.2 Democratic Approaches

There is another way to challenge Rawls' narrow view of civil disobedience and his 'matter of justice' requirement. That approach has to do with democracy. In a nutshell, one can say that the first challenge to the Rawlsian liberal approach presented above was *substantive* in that it challenged the exclusion of animals from the scope of justice. The democratic approaches to civil disobedience presented in the following instead challenge the Rawlsian approach on *procedural* grounds.

87 Regan, Tom, The Case for Animal Rights (Berkley: University of California Press 2004).

88 Cochrane, Alasdair, Animal Rights Without Liberation (New York: Columbia University Press 2012).

89 Weltman, Daniel, Covert Animal Rescue: Civil Disobedience or Subrevolution?, Environmental Ethics, published online December 2021, 5 (in online publication).

Democratic approaches submit that civil disobedience is a form of political participation and can be an appropriate response in cases of democratic deficits or shortcomings in law and policy making.[90] Advocates of the so-called democratic approaches often argue that liberal accounts in general, and the Rawlsian account in particular, are too narrow because they make it difficult, if not impossible, to justify civil disobedience on behalf of the environment, animals, or other causes that are not clearly linked to the rights of citizens.[91]

In turn, defenders of liberal approaches argue that democratic approaches allow civil disobedience for too many causes. Ironically, democratic approaches are vulnerable to the accusation of being undemocratic because of their justification of civil disobedience in cases where the democratic majority's decisions should be accepted.[92] The following normative reconstruction of recent cases in Chapter 8 will provide a closer look at these arguments.

Democratic approaches to civil disobedience are advanced by Daniel Markovits,[93] Robin Celikates,[94] and William Smith.[95] Some elements of these approaches were present in the discourse surrounding civil disobedience much earlier, tracing back to the works of Hannah Arendt.[96] This Section will take a closer look at Markovits' and Smith's accounts of civil disobedience and apply each to the case of animal activists. The crucial question is: can civil disobedience on behalf of animals be morally justified pursuant to these accounts?

90 Smith 2013, 8.
91 Ibid.
92 Ibid., 9.
93 Markovits 2005.
94 Celikates, Democratizing Civil Disobedience, 2016; Celikates, Rethinking Civil Disobedience, 2016.
95 Smith 2013, although Smith's account also contains elements of liberal approaches.
96 Although Arendt's approach shows elements of both liberal and democratic approaches: 'Civil disobedience arises when a significant number of citizens have become convinced either than the normal channels of change no longer function, and grievances will not be heard or acted upon, or that, on the contrary, the government is about to change and has embarked upon and persists in modes of action whose legality and constitutionality are open to grave doubt.' Arendt 1969, 74.

7.3.2.1 Daniel Markovits: Democratic Disobedience

Markovits argues that the liberal approach to civil disobedience is ill-equipped to capture political protests such as, for example, the opposition to nuclear missiles that was prevalent in Europe in the 80s.[97] He re-conceptualizes civil disobedience as democratic disobedience. Thus, rather than defending civil disobedience against allegations of being anti-democratic, he argues from within democratic theory, saying that civil disobedience can function to remedy democratic deficits in law and policy.[98]

There are multiple ways in which a policy or law can lack democratic authority; for instance, in cases where the preference of citizens has significantly changed over time, such that they would no longer approve of a dated law or policy which was enacted in a different political environment.[99] However, not all cases will be legitimate under democratic civil disobedience. It is important to note that the threshold for justified democratic civil disobedience according to Markovits is quite high. It requires that there is an actual democratic deficit, rather than just a 'political defeat.'[100] Significantly, the finding that a majority of the society opposes a certain policy is not sufficient to prove a democratic deficit. Instead, a democratic deficit exists in the case of a 'failure of democratic engagement in the process that produced this outcome.'[101] Typically there is room for democratic disobedience:

> 'when the internal institutions or democratic policies combine to keep a policy option that commands significant support among the citizens of the political agenda entirely – when no major political party adopts the policy the mainstream press ignores it, and this state of affairs does not respond to the legal forms of protest.'[102]

Democratic disobedience does not seek to impose a particular policy, it instead seeks to initiate a process of reengagement with an issue the consideration of which suffers a democratic deficit.[103] In reality, activists will likely seek change above democratic debate. However, what is crucial is

97 Markovits 2005, 1901.
98 Ibid., 1902.
99 Ibid., 1933.
100 Ibid., 1938.
101 Ibid.
102 Ibid., 1938 f.
103 Ibid., 1939 f.

that they may never coerce the outcome of a democratic process.[104] They may only use coercive methods to secure a 'sovereign reengagement' with a certain issue; they may seek to create room for political discourse.[105] Thus, democratic disobedience does not seek to 'force a sovereign to *change course,*' but it seeks to 'force the sovereign to *reconsider*.'[106]

Markovits submitted that civil disobedience can be justified as an objection to the way laws and policies are made. Now, what does that mean for animal activists? Trespassing to create footage of animal facilities *can* be morally justified pursuant to democratic approaches to civil disobedience. Whether it *is* morally justified – not only in a specific scenario, but also, more broadly speaking, in a given jurisdiction at a given point in time – depends on empirical factors. It depends on whether Markovits' threshold for justification of democratic disobedience is met: with regard to factory farming, is there an epistemic gap preventing citizens from making informed decisions? How grave does this epistemic gap have to be, to justify civil disobedience? And, how many films of how many different facilities are needed to close the epistemic gap? What if the majority of society prefers not to know about the details of animal farming? Is this relevant? And, considering the increasing public awareness of animal issues, including in the media, can it still be argued that these issues are not represented? These questions must inform any justification based on Markovits' democratic approach to civil disobedience.

At this point in time, in Germany for example, the requirements are not met – or, rather, are no longer met. Animal welfare is on the agenda of most political parties, and it receives broad societal support. As already mentioned above, a representative study showed that 94 % of the population subscribe to the view that, if we are using animals, we should enable them to have a good life.[107] The media report on animal issues, and the topic is clearly a matter of public discourse. The problem is rather that these commitments and declared preferences do not translate into policy and law. This problem is not reflected in Markovits' account. The republican-democratic approach to civil disobedience does not sufficiently accommodate for features of democracy beyond voting.[108]

104 Ibid., 1941.
105 Ibid.
106 Ibid., 1942.
107 Deutscher Ethikrat 2020, 6.
108 For an overview of other shortcomings of this approach see Smith 2013, 62 f.

7.3.2.2 William Smith: The Deliberative Account

William Smith addresses the problem described immediately above in his formulation of a deliberative, rather than republican democratic, approach to civil disobedience.[109] Smith's account of civil disobedience combines elements of both liberal and democratic approaches. This Section will focus on the more democratic elements of Smith's ideas, as these elements draw on deliberative democracy.[110]

According to Smith, civil disobedience is a breach of law 'within the limits of deliberative respect.'[111] Smith submits that civil disobedience can promote, and even contribute to, deliberation.[112] Emphasizing the communicative feature of civil disobedience (communicating vertically between citizen and state, and horizontally amongst members of civil society) regarding a law or policy that should be reconsidered, he argues that it 'can be framed as a contribution to a process of public deliberation, or can be a non-deliberative act designed to stimulate a deliberative process.'[113] This point is crucial for animal activists and their collection of undercover footage: as Smith challenges the view that civil disobedience is always at odds with deliberative democracy.[114]

According to Smith, civil disobedience can, under certain conditions, be compatible with deliberative democracy. This requires *inter alia*: that the act is 'broadly non-coercive;' that activists make sure to coordinate with other groups who protest in order to maintain social stability; and that activist engage in lawful means before resorting to civil disobedience.[115]

Smith also narrows down the situations in which civil disobedience may be justified. The first is the 'commission or toleration of serious injustices by the democratic majority, such as failure to achieve social inclusion for all citizens,'[116] which broadly resembles liberal approaches to civil disobedience discussed above. The second is the 'failure of government to debate or enact important policy options, where the discussion or enactment of those

109 Smith 2013, 2.
110 See Chapter 3.
111 Smith 2013, 32.
112 Ibid., 12.
113 Ibid., 32.
114 Ibid., 60.
115 Ibid., 9.
116 Ibid.

options is obstructed by the phenomenon of deliberative inertia.'[117] Civil disobedience can function as a means by which to contest 'discursive blockages that inhibit the proper functioning of the *public sphere* in a deliberative democracy' (emphasis in original).[118]

Thus, Smith, like Markovits, allows for the possibility that civil disobedience may be justified to remedy shortcomings in the democratic process. And yet, Smith's theory is very different from the one advanced by Markovits as it is based on a distinctively deliberative understanding of democracy.

The phenomenon of deliberative inertia, as Smith uses the term, arises due to the central role of discourses in shaping democratic decision-making.[119] Discourses are here understood as frameworks which enable individuals to understand given problems.[120] As such, they can assist political deliberation by guiding citizens in identifying problems and suggesting ways to solve them.[121] However, a given discourse can become so prevalent that it privileges some agendas over others and marginalizes alternatives.[122] In this case, deliberative inertia can inhibit important functions of deliberation in the public sphere.[123] It can reduce the likelihood of alternative perspectives make it to the center of the deliberative process.[124] When it comes to decision-making, alternative perspectives may either be 'kept off the deliberative agenda or not treated as plausible approaches to public policy.'[125] If that happens, civil disobedience may be justified to promote important and urgent discourses which were prevented from influencing the political debate, and consequently political decisions, due to deliberative inertia.[126]

Smith's approach is better equipped to capture animal activists' ambivalent relationship to democracy. In the deliberative process on animal law, 'welfarism' could be said to be a hegemonic discourse. The core assumption of welfarist discourse on animal law is the moral permissibility of using animals for human ends. Within this discourse, the view that trivial human

117 Ibid.
118 Ibid., 60.
119 Ibid., 68.
120 Ibid.
121 Ibid.
122 Ibid.
123 Ibid.
124 Ibid.
125 Ibid., 69.
126 Ibid., 70.

interests and economic considerations can trump animal welfare is prominent. Alternative discourses, such as animal rights, which would imply policies restricting the use of animals, are thus becoming marginalized.

Further, Smith argued that deliberative inertia can cause a gap between public awareness on the one hand, and law and policy on the other.[127] This occurs when the dominant discourses have established barriers that prevent public awareness from being translated into effective law and policy.[128] Smith used the example of green politics to explain this point, and it may similarly apply to animal issues. As I mentioned earlier, the shortcomings of intensive farming are a salient topic in the media, and political parties across the board declare their commitment to enhancing animal welfare. However, entrenched discourses prioritizing tradition and economic considerations over the wellbeing of animals, prevent stricter animal welfare laws from being enacted.

In both of the above examples, Markovits' approach would not justify civil disobedience, because animal issues are not kept off the political agenda entirely. Smith, on the other hand, understands civil disobedience in a way that allows one to address the gap between awareness and lip service on the one side, and enacted policies and laws on the other. To be clear, both Markovits' and Smiths' approach to civil disobedience can, in theory, morally justify trespassing on animal facilities to create footage; but Smiths' approach is better suited to address the specific problems of the democratic process with regard to animal law.

Of course, the deliberative account is not without its critics. Erica von Essen raises a number of challenges against the application of the deliberative account to 'environmental disobedience.'[129] Amongst other issues, von Essen raised a 'slippery slope' problem: if even coercive and clandestine acts of activism are endorsed by Smith's deliberative account, is it still delib-

127 Ibid., 69.

128 Ibid., 70.

129 von Essen 2017. It should be noted that von Essen includes acts such as eco sabotage or arson in her analysis of environmental disobedience, although she notes that some of the examples discussed are 'poor candidates for deliberative disobedience' (p. 310). In my interpretation, neither the defining criteria of civil disobedience nor Smith's deliberative account would allow to consider these acts morally justified as civil disobedience. Nevertheless, the questions raised by Essen speak to the essential dilemma of legitimizing the clandestine and lawbreaking elements of the creation of undercover footage as compatible with deliberative democracy.

erative?[130] Or does it rather fall into a tradition of pluralistic agonism?[131] I discuss agonism, contrasting it against deliberative democracy, in Chapter 10. In short, agonism provides an alternative model to deliberative democracy which is criticized for its presumption that finding consensus through rational deliberation is a possible and appropriate solution for political conflicts.[132] Agonists are skeptical of the possibility of democratic consensus; they embrace conflict as both inevitable and positive.

I consider the risk of a slippery slope towards agonism marginal in the case of undercover footage. The goal of publicizing undercover footage shows a strong commitment to participation in the deliberative process, challenging of dominant discourses, and finding a new consensus. The aim of activists who create such footage is expressly more than a statement of dissent – they actively seek to persuade others to alter their views. Further, acknowledging that activists contribute to, or even promote, deliberation downstream does not require defining their clandestine acts of trespass as deliberative in nature. Rather, their relationship with deliberative democracy can and must remain ambivalent; otherwise attempting to justify them as disobedience rather than regular democratic practice would be superfluous.

7.4 Summary and Conclusion

This Chapter turned from the dissemination of undercover footage to its creation. While law and deliberative democracy can allow for the dissemination of undercover footage, its creation is clearly non-deliberative in nature and crosses the boundaries of the law. As such, this Chapter argued that trespass to create undercover footage from animal facilities can be conceptualized as civil disobedience. Further, it showed that, whether these acts can be morally justified is contingent upon extended liberal and democratic approaches to civil disobedience, as well as empirical factors. An extended liberal approach to civil disobedience requires considering animals to be within the moral community in the sense that they are owed a form of justice.

130 von Essen 2017, 315.
131 Ibid.
132 Mouffe, Chantal, Democratic Politics and Conflict: An Agonistic Approach, Política Común 9 (2016) not paginated. See Chapter 10 for further references.

Democratic approaches to civil disobedience are better equipped to address animal activists' ambivalent relationship with democratic processes that crystalizes in the creation of undercover footage. Smith's deliberative approach to civil disobedience is particularly promising for animal activists, as it highlights the phenomenon of deliberative inertia[133] which provides a compelling explanation for the current state of animal law and policy. It reflects the features of democratic discourse on animal welfare that activists may struggle with, and explains the reasons why they resort to the creation of undercover footage. In short, the creation of undercover footage for public dissemination can counter deliberative inertia, thus leveling the ground between the prevailing existing discourses on animal issues (e.g., using animals for trivial human interests) and policy options that would meaningfully increase the wellbeing of animals or limit their use. Acknowledging that undercover footage can contribute to deliberation does not imply that it is deliberative in nature. Rather, it nested in an inherently tense space between fidelity to the law, democratic institutions, and practices on the one hand; and illegal, coercive forms of dissent on the other.

8. Recent Trespass Cases: Civil Disobedience for Animals on Trial?

Political theorists are not alone in grappling with the conduct of activists who trespass to create footage. These above debates may also be reflected in the courtroom when animal activists stand trial for criminal trespass. This Chapter will analyze two recent cases against animal activists, and normatively reconstruct the Courts' reasoning through the lens of civil disobedience with a special focus on its (deliberative) democratic dimensions. The two cases discussed resulted in different outcomes: in the first case (the Heilbronn case) the animal activists were convicted for trespass (§ 123 of the Criminal Code),[134] while in the other case (the Naumburg case) the Courts considered the act of trespass justified based on *inter alia* necessity (§ 34 of the Criminal Code).[135] Reconstructing the cases through the lens of civil disobedience functions to explain and to evaluate the reasoning of the Courts. Most importantly, the normative reconstruction sheds light on

133 Smith 2013, 9.

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

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

underexplored aspects of the decisions, both lending further support for the arguments made by the Courts and giving rise to criticism.

In 2017, the Heilbronn District Court denied the possibility of letting animal activists go unpunished for trespass.[136] The Court argued that intensive animal farming was socially accepted, and that trespass to create footage was but an attempt by a minority to impose their political aim on the majority.[137] The deliberative approach to civil disobedience developed by William Smith[138] points out the weaknesses of this line of argument. The Court made this finding based on the existence of certain practices, not only appealing to their legality, but also to their democratic legitimacy. The Court invoked democracy, but failed to engage with the shortcomings of public discourse and political decision-making on the topic of animal issues which were elaborated in Chapter 5.

In a different case, the Magdeburg District Court and the Naumburg Regional Court considered trespass to create undercover footage justified as defense of others and necessity, respectively.[139] In this case, activists created footage of unlawful conditions in an animal facility in order to urge authorities to enforce applicable animal welfare law. The Magdeburg Court's 'defense of others' justification may find support in extended liberal approaches to civil disobedience, as it implies that animals are at least bearers of 'welfare rights.'[140] The Naumburg Court's necessity justification, which is legally the most convincing, hinges on animal welfare as legally protected interest of society as a whole. If existing animal welfare law is considered to reflect a democratic minimum consensus on animal welfare, this line of argument can find support in democratic approaches to civil disobedience.

The insights from the political theory literature explored in Chapter 7 provide useful resources to normatively reconstruct the cases at hand. However, it should be said upfront that the cases discussed here cannot be considered to constitute civil disobedience for reasons I will explain below.

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136 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 126).

137 Ibid.

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

139 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065); LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018 (173).

140 I borrow the term 'welfare rights' from Stucki, Saskia, Towards a Theory of Legal Animal Rights, Oxford Journal of Legal Studies 40:3 (2020), 533–560.

As mentioned in Chapter 7, the mere *possibility* that trespass to create footage can be justified as civil disobedience, does not imply that it always is. What is more relevant here are salient arguments in the debate around civil disobedience in political theory.

8.1 Heilbronn District Court: Civil Disobedience as a Threat to Democracy

The 2017 Heilbronn District Court case concerned animal activists who had trespassed on a turkey farm to create footage, and were convicted.[141] A legal analysis and normative reconstruction of the trespassing charges highlights how questions of civil disobedience and animal activists' ambivalent relationship to democracy can surface in legal reasoning.

8.1.1 Legal Analysis

8.1.1.1 Background and Facts

The trespass in question occurred on a turkey fattening facility [Putenmastanlage][142] where birds of the breed 'bigsix' were kept.[143] These birds are bred to become very heavy, resulting in some being unable to stand.[144] The birds' beaks are shortened to counter the problems of feather-pecking and cannibalism. Many lack parts of their plumage, or have deformed legs.[145] These conditions are not unique to the facility in question, but rather result from intensive farming and the characteristics of the breed 'bigsix.'[146]

The three defendants agreed to enter the facility to create footage.[147] Two of the defendants entered through an unlocked door and filmed inside while the third kept watch outside.[148] The defendants had decided to undertake the filming as trashcans with dead birds lead them to believe that the

141 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017.
142 Ibid., para. 16.
143 Ibid.
144 Ibid., para. 17.
145 Ibid.
146 Ibid., paras. 18 f.
147 Ibid., para. 20.
148 Ibid., paras. 25 f.

conditions in the facility were particularly poor.[149] The defendants wore protective clothing while trespassing,[150] and one of them additionally wore a ski mask to prevent his identification.[151]

The defendants believed that intensive farming always results in animal suffering, and that, in light of Article 20a of the Basic Law, it was justified to enter the facilities to create footage.[152] At the same time, they considered their actions to fall in a legal 'gray area,' and were aware that law enforcement would not consider them justified.[153] The defendants thought it was futile to inform the veterinary inspection offices ['Veterinärämter'] instead of trespassing, or to ask permission for the filming, believing that this would only lead to a cover up of the conditions.[154] The defendants believed that the farming practices would change only if the conditions of factory farming and the associated suffering of animals were made public on TV.[155] Further, the defendants were hoping to put public pressure on veterinary inspection offices to take action against factory farming.[156]

The owner of the facility became aware of unusual movements in the facility, and surprised the defendants.[157] During a physical fight between the facility operator and one of the defendants, the defendant used a chemical spray and followed the facility operator into his private home.[158] These events will not be analyzed as they relate to charges other than trespass. However, it must be noted that the wearing of a ski mask, the entering of a private home, the violence against humans and, in particular, the use of a weapon in the form of the chemical spray, rule out the possibility of characterizing this act as one of civil disobedience.

149 Ibid., para. 23. The Court indicates that the defendants welcomed the bad conditions in the particular facility, as it was their goal to create a daunting impression ['was ihnen – um einen besonders abschreckenden Eindruck zu vermitteln [...] – gerade recht war'].
150 Ibid., para. 24.
151 Ibid.
152 Ibid., para. 106.
153 Ibid., paras. 52, 55.
154 Ibid., para. 106.
155 Ibid.
156 Ibid., para. 21.
157 Ibid., paras. 27, 80. The accuser and the defendants gave different accounts the development of the event from this point on, and the Court found the account of the accuser to be more consistent.
158 Ibid., paras. 32–43.

8.1.1.2 Procedural History

On 21 April 2016, the Schwäbisch Hall Magistrate Court found two of the three defendants guilty of trespass, and one defendant guilty of aiding and abetting trespass.[159] For the events following the trespass, one of the defendants was additionally convicted for the infliction of dangerous bodily harm (§ 224 (1) No. 2 of the Criminal Code [gefährliche Körperverletzung]) and coercion (§ 240 of the Criminal Code [Nötigung]).[160] Both the prosecution and the defense appealed the decision.[161] During the appeal, the charges of aiding and abetting were terminated pursuant to § 153a (2) of the Criminal Procedure Code.[162] The prosecution's appeal regarding one of the two remaining defendants was successful on the point of sentencing; the Heilbronn District Court sentenced him to seven months and two weeks probation.[163] The Stuttgart Regional Court upheld the decision. The defense has announced its intention to issue a constitutional complaint against the decision [Verfassungsbeschwerde] before the Federal Constitutional Court, and potentially the European Court of Human Rights.[164]

8.1.1.3 No Self Defense/ Defense of Others Justification

It is undisputed that the defendants trespassed in the sense of § 123 of the Criminal Code. However, the crucial question before the Heilbronn District Court was whether that trespass was legally justified. Amongst other justifications which will be discussed in Chapter 9, the Court considered defense of others and necessity as possible justifications.

The Court denied a justification based on self-defense/defense of others, arguing that the there was no unlawful attack against oneself or another as required by § 32 of the Criminal Code.[165] The Court noted that § 32

159 Ibid., para. 1.
160 Ibid., para. 159.
161 Ibid., paras. 4, 6.
162 Ibid., para, 7.
163 Ibid., tenor.
164 Albert Schweizer Stiftung, Tierschutzer zieht vor das Verfassungsgericht, press release of 11 October 2018, available at: https://albert-schweitzer-stiftung.de/aktuell/tierschuetzer-zieht-vor-das-verfassungsgericht (last accessed 19 October 2020).
165 For the official translations see Federal Ministry of Justice, German Criminal Code, available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0141 (last accessed 30 October 2020).

of the Criminal Code does not confer a right to defend the state's implementation of animal protection in Article 20a of the Basic Law.[166] Central to the Court's assessment was the threat this would pose to democracy: '[e]ven the slightest consideration regarding what would happen if everyone attempted to enforce their political views through criminal offences shows that then, within the shortest amount of time, anarchy instead of democracy would rule in Germany' ['Schon die kleinste Überlegung dahingehend, was passierte, wenn jeder seine politische Ansicht versuchte durch Straftaten durchzusetzen, zeigt, dass dann in kürzester Zeit nicht mehr eine Demokratie, sondern eine Anarchie in Deutschland herrschte'].[167]

The reasoning of the Court went as follows: it is generally accepted that animal factory farming is not species-appropriate ['artgerecht'] and results in pain to animals.[168] § 1 sentence 1 of the Animal Protection Act indicates that the purpose of the Act is ethical animal protection; a harmonization of ethically motivated animal protection and human interests.[169] The notion of a 'reasonable cause' [vernünftiger Grund'] is central for this purpose.[170] As a rule, it serves as the balancing tool between human interests and animal protection pursuant to the principle of proportionality.[171] The legislative history, according to the Court, indicates that intensive farming was deemed necessary for the food industry.[172] From that it followed, according to the Court, that the problems of intensive farming are *known* to society, the legislator, and veterinary inspection offices.[173] Further, in the conflict between animal protection and sufficient meat production it is up to the State to make the rules pursuant to which intensive animal farming is to be conducted[174] and, accordingly restrictions of animal protection are being accepted.[175]

166 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 116).
167 Ibid., para. 117.
168 Ibid., para. 109.
169 Ibid., para. 110.
170 Ibid., paras. 110 f.
171 Ibid., para. 111.
172 Ibid. The Court cites OVG Münster [Münster Reginal Administrative Court] 20 May 2016, 20 A 530/15 BeckRS, 46151, 2016 (para. 39).
173 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 112).
174 Ibid.
175 Ibid.

Veterinary inspection offices are not attempting to put an end to the conditions in intensive animal farming, because intensive farming is allowed despite its resulting in non-species-appropriate conditions, such as feather-pecking and deformations.[176] These conditions are considered 'socially acceptable' ['sozial-adäquat'] and, as such, veterinary inspection offices cannot intervene against these inevitable consequences of intensive animal farming, for intensive farming and its consequences occur with 'reasonable cause' and, thus, in accordance with the Animal Protection Act.[177] As such, intensive animal farming is not prohibited.[178]

In other words, the Court concluded from the societal acceptance of not species appropriate farming, that it is legal. Hans-Peter Vierhaus and Julian Arnold describe this line of argument as 'contra legem:' § 2 No. 1 of the Animal Protection Act requires animals to be kept in species appropriate conditions.[179] The Heilbronn Court finds that animals are kept in not species-appropriate conditions. However, it fails to conclude that this constitutes a breach of § 2 No. 1 of the Animal Protection Act, and instead, without a legal basis, concludes that the practices are legal.[180] As a result, the Court did not consider the defendants' actions justified as defense of others pursuant to § 32 of the Criminal Code.

8.1.1.4 No Necessity Justification

The Court found that the requirements of necessity, enshrined in § 34 of the Criminal Code, were not met because the defendants did not act to avert an imminent danger.[181] § 34 of the Criminal Code reads:

> 'A person who, faced with an imminent danger to life, limb, freedom, honour, property or another legal interest which cannot otherwise be averted, commits an act to avert the danger from himself or another, does not act unlawfully, if, upon weighing the conflicting interests, in

176 Ibid., para. 113.
177 Ibid.
178 Ibid., para. 114.
179 Vierhaus, Hans-Peter/ Arnold, Julian, Zur Rechtfertigung des Eindringens in Massentierhaltungsanlagen, NuR 41 (2019), 73–77, 75 f.
180 Ibid.
181 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 125).

> particular the affected legal interests and the degree of the danger facing them, the protected interest substantially outweighs the one interfered with. This shall apply only if and to the extent that the act committed is an adequate means to avert the danger.'[182]

The Court did not answer the question whether animal protection as enshrined in Article 20a Basic Law is 'another legal interest' in the sense of § 34 of the Criminal Code, for it is up to the State to achieve the state objective.[183] Further, the Court noted that the defendants' aim was not to avert danger from individual animals; rather, they hoped to change the consumers' thinking and inspire changes in intensive farming.[184]

The defendants submitted that they believed the trespassing was necessary to achieve their political aims in the sense that they did not see another way to shake society and politics awake.[185] The Court found that the defendants failed to show why they believed that another film was necessary to pursue the aim of changing consumers' attitudes about intensive farming: while footage may impact the publics' attitude to consuming cheap meat, the Court found that enough footage already existed.[186] Furthermore, the Court argued that footage could be obtained legally with the consent of facility operators.[187] Another illegally obtained film was not necessary to educate consumers about the topic. Consequently, even if one accepted that there was an imminent danger, the defendants failed to show that the danger could not be averted by legal means.[188] Finally, the Court again stressed the consideration made with regard to § 32 of the Criminal Code, namely, that it is alien to the democratic system to allow a minority to change the opinion of the majority through criminal acts.[189]

182 For the official translations see Federal Ministry of Justice, German Criminal Code, available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0141 (last accessed 30 October 2020).
183 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 123).
184 Ibid., para. 124.
185 Ibid., para. 126.
186 Ibid., para. 128.
187 Ibid., para. 129.
188 Ibid., para. 130.
189 Ibid., para. 131.

8.1.1.5 The Court's Reasoning Comprised

The final paragraphs in the Court's decision sum up its reasoning: intensive animal farming is considered 'socially acceptable' to provide large amounts of affordable meat.[190] According to the Court, this situation is comparable to private transport: driving harms a number of people thus it limiting even the highest legal interest (the right to life and bodily integrity), yet it is accepted because this is the preference of the majority.[191] Trespass to create footage is a politically motivated criminal offence against a decision of the majority that came about in accordance with the constitution; and the majority decision is to accept intensive animal farming, including its impact on the wellbeing of animals.[192] A majority decision has to be accepted, or a democracy cannot function: 'the legal order cannot declare lawful a behavior without self-surrender of democracy and legal peace, which attempts to circumvent the majority rule' ['Deshalb kann die Rechtsordnung nicht ohne Selbstaufgabe der Demokratie und des Rechtsfriedens ein Verhalten für rechtmäßig erklären, dass diese Mehrheitsregel zu umgehen versucht'].[193] According to the Court, the act of trespassing could not be justified, including under the aspect of civil disobedience: the Court notes that there is a consensus that civil disobedience does not justify criminal behavior.[194]

8.1.2 Normative Reconstruction

In the above decision, the Heilbronn District Court denied a justification of the act of trespass, clearly stating that considering the acts as civil disobedience would not change the outcome of the case. However, the significance of the Heilbronn decision for the topic at hand does not arise from this superficial mentioning of civil disobedience. Neither does it arise from the act of trespass being morally justified as civil disobedience: the elements of covertness and violence militate against this conclusion. Rather, the core aspects of the Heilbronn Court's reasoning echo the most critical questions in the characterization of animal activism as morally justified

190 Ibid., para. 138.
191 Ibid.
192 Ibid., para. 140.
193 Ibid.
194 Ibid., para. 137.

civil disobedience: the Court reasons that animal protection is a political issue on which animal activists' view departs from the that of the majority, and that acts of trespass undertaken in an attempt to impose the activist's minority view on the majority poses a danger to the rule of law and to democracy. This reasoning echoes the main argument made against democratic approaches to civil disobedience in political theory: if civil disobedience against 'ordinary' political issues is endorsed, it is a danger to the rule of law and to democracy.

It should be noted that the Court's appraisal of animal welfare as simply a political aim, insufficient to trigger § 34 of the Criminal Code,[195] understates the status of animal welfare as a state objective, a value of constitutional rank. Since animal protection is a state objective, it is (in principle) sufficient to trigger § 34 of the Criminal Code. The Heilbronn Court denied this by saying that the relevant provision, Article 20a of the Basic Law is addressed to the state only.[196] This interpretation of the law can be challenged, as the decision of the Nauburg Regional Court, discussed below, shows.

However, in the following, I will accept the Court's premise that animal welfare is but apolitical aim, and critically examine its further argument through the lens of democratic approaches to civil disobedience. Is society really sufficiently informed about factory farming? And does this imply that existing animal welfare law and its enforcement have democratic support?

8.1.2.1 The Epistemic Gap and Related Empirical Matters

The Court's overarching normative claim is that trespass poses a danger to democracy, since it equates to imposing the political view of a minority onto the majority; the majority's view being expressed in existing animal welfare law and practice. This normative claim seems to rest on two empirical assumptions. The Court assumes that (1) society is already informed about the conditions under which animals in intensive farming live and die, and (2) that society nevertheless endorses intensive animal farming for the purpose of affordable animal-based food production.

The first empirical point relates to the epistemic gap on animal welfare and cannot be comprehensively assessed here. In Chapter 7, in discussing

195 Ibid., para. 130.
196 Ibid., para. 123.

democratic approaches to civil disobedience, I noted that more empirical research is needed on the epistemic gap. Contrary to the reasoning of the Court, some activists will say that, in order to show that objectionable practices are not isolated incidents or the wrongdoing of single employees but rather widespread and systematic, recent footage from different facilities is needed. However, for the purpose of this dissertation, I suggest assuming that the Court's assessment is correct in concluding that there is no need for more footage to inform society. After all, countless documentaries and other material on the conditions in factory farms exist already.[197] More footage is, therefore, not necessary to inform society and there exists no epistemic gap on intensive animal farming.

What does this entail for a moral justification of trespass to create footage? If society is already informed about intensive animal farming, a moral justification pursuant to Markovits' approach to civil disobedience would be difficult to sustain. As I argued in Chapter 7, a justification pursuant to this account would require that animal issues are not on the democratic agenda.[198] Yet, a justification pursuant to Smith's deliberative account remains possible. As I showed in Chapter 7, rather than demanding that there be an epistemic gap, Smith makes room for civil disobedience if the preferences of society do not translate into law and policy. This shows that Smith's approach to civil disobedience speaks to the challenges faced by animal activists.

The second assumption of the Court is that society, the legislator, and veterinary inspection offices endorse factory farming as socially adequate, despite its shortcomings. The Court seems to base this assumption on the argument that, if this were different in that society did not endorse factory farming, things would change. This claim is not convincing. The majority of people in Germany seem to reject intensive animal farming when they subscribe to the view that, if animals are used for food, they should be given a decent life.[199]

Animal welfare law, and its enforcement, allow for the continuation of practices that society finds objectionable. But, rather than concluding that

197 In fact, one of the defendants in the case at hand had apparently published several such films in the past. LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 127).

198 Markovits, Daniel, Democratic Disobedience, The Yale Law Journal 114 (2005), 1897–1952, 1939 f.

199 Deutscher Ethikrat 2020, 6.

there must be serious flaws in how the majority's view on animal welfare is translated into law, the Court explains that this apparent tension is not unique to the topic of animal welfare. In arguing that society accepts intensive animal farming as a 'socially acceptable,' the Court compares intensive farming to traffic and traffic accidents: by allowing for traffic, we too accept negative consequences, namely limitations of the right to life and bodily integrity. The Court here implies that the issues of transportation and animal welfare are comparable regarding the democratic decision-making process that governs them. This comparison is interesting, but it seems that it cannot capture the distinguishing features of decision-making processes on animal protection. Animals' interests are not balanced in the same way as human interests. For animals, there is no benefit in intensive farming. Further, a difference exists in that animals are not being represented in the legislative debate.[200]

8.1.2.2 The Democratic Legitimacy of Animal Welfare Law and its Enforcement

Now that I have critically assessed the empirical points – the epistemic gap and democratic support for intensive farming – I turn to the overarching normative claim they support, namely, that animal welfare law and its enforcement enjoy democratic legitimacy. The Court implied that, when activists protest against the current state of animal law with illegal means, they try to overrule a democratic decision and impose their minority view on the majority. This echoes a common objection against democratic approaches to civil disobedience. Democratic disobedience allows one to disobey majority decisions on the basis that the ways in which diverse opinions of citizens are translated into law has shortcomings which, in some cases, may be addressed through civil disobedience. Critics would argue that this poses a risk to democracy as the majority decision should be respected. Further, drawing on the traditional Rawlsian approach to civil disobedience, they may argue that civil disobedience can be appropriate

200 On political representation of animals in politics see e.g., Ahlhaus, Svenja, Tiere im Parlament? Für ein neues Verständnis politischer Repräsentation, Mittelweg 36 5 (2014), 1–12. On animals in deliberative democracy specifically see Meijer, Eva, When Animals Speak. Toward an Interspecies Democracy (New York: New York University Press 2019), 216 ff.

where matters of justice are concerned, but not in other areas of politics and law, such as animal protection.

There are two different ways to respond to this criticism. The first is based on extended liberal approaches to civil disobedience. In Chapter 7 I argued that extended liberal approaches must be based on a theory of animal rights. Proponents of extended liberal approaches will respond to the Court's reasoning by saying that animal welfare is not just an unrealized political aim; rather, it is a matter of justice for animals and poses moral rights. As a matter of political theory or ethics, this argument may have merit. However, as of yet, it is ill equipped to convince lawyers or legal scholars, given that moral animal rights are not recognized as legal rights. In cases where even the 'simple' legal rights[201] conferred to animals via animal protection law are clearly violated, there may be some room for this line of argument, which will be addressed below in the context of the Magdeburg decision. In the case at hand, this reasoning is fruitless, given that the Court did not find a violation of animal welfare law (although this is disputable, too). Instead, one would have to go further and target the interpretation of Article 20a of the Basic Law or the Animal Protection Act, in particular the notion of 'reasonable cause' to reach the conclusion that higher animal welfare norms are being violated. But even then, the extended liberal view leads to a somewhat absurd argument; on the one hand arguing that animals are within the scope of justice and on the other hand wrestling with interpretations of the Animal Protection Act that allows large-scale farming of animals for human consumption and, as such, remains incompatible with most animal rights positions. Against this backdrop, the extended liberal approach does not promise to convince in a legal debate.

A second – and more convincing – way to respond to the democratic legitimacy argument of the Court would be based on democratic approaches to civil disobedience. Earlier I mentioned that a moral justification pursuant to Markovits' account is unlikely since, as the Court pointed out, footage already exists, and the topic is not kept off the political agenda entirely. One could argue that animal rights, as opposed to welfare, are kept off the political agenda. However, Markovits demands that the view on the behalf of which civil obedience occurs 'commands significant support

201 I borrow this term from Saskia Stucki who explains that even if 'simple' animal rights can be derived from animal welfare law, they fall short of the strong legal protection that would correspond to animals' moral rights. Stucki 2020, 551.

among the citizenry,'[202] which is not the case for more radical animal rights approaches. Therefore, we must turn to Smith and 'deliberative inertia' as justification for civil disobedience.

In his book *Civil Disobedience and Deliberative Democracy*, William Smith argues that civil disobedience can be compatible with deliberative democracy under certain conditions.[203] Besides matters of justice, civil disobedience may be used to 'protest against failure of government to debate or enact important policy options, where the discussion or enactment of those options is obstructed by the *phenomenon of deliberative inertia*' (emphasis added).[204] Smith's deliberative account is well suited to point out some possible criticism of the decision at hand. The defendants did not attempt to release the turkeys, thus they did not engage in direct action. Instead, they chose the more democratic and deliberative route, creating footage to make the majority reconsider. If Smith's formulation is taken as a threshold, the question is whether, with regard to animal welfare, there is a failure of government to discuss or enact certain policy options because of deliberative inertia.

A definite statement on this issue would require further empirical research. However, there are good reasons to argue that, when it comes to intensive farming and related practices, these conditions are met. For example, the animals kept in the facility at hand were of the breed 'bigsix.' It is well known that these animals are designed to be particularly profitable, which has negative effects on their health. Nevertheless, this breed is used widely. According to Naturland e.V., an international association for organic agriculture, even organic producers use the breed due to 'lack of alternatives.'[205] Policy options, such as prohibiting the breeding farmed animals in a way that is detrimental to their health, are not being seriously considered, because the discourse on animal welfare is dominated by the goal of continuing the production of large amounts of affordable meat. Thus, deliberative inertia prevents the consideration of further policy options. The Court did not take this perspective into account in its reasoning. It invoked instead a very 'thin' notion of democratic decisions and legitimacy.

202 Markovits 2005, 1939.
203 Smith 2013.
204 Smith 2013, 9.
205 Naturland, Kundeninfo Naturland Puten, 17 February 2014, available at: https://www.naturland.de/images/Verbraucher/tierwohl/pdf/2014_KI-Puten.pdf (last accessed 15 January 2022).

To sum up, one can say that the Court denied the possibility of letting animal activists go unpunished, arguing that intensive animal farming was socially accepted and that trespass to create footage posed a danger to democracy.[206] In short, it argued that trespass is but a means by which the minority can impose their 'political aim' on the majority.[207] This argument is familiar from Chapter 7; it can be employed by critics of democratic approaches to civil disobedience. A strictly Rawlsian account of civil disobedience can support this reasoning of the Court. However, the deliberative account[208] points out its weaknesses: The Court concluded from the existence of certain practices, both the legality and the democratic legitimacy of those practices. It invoked a 'thin' notion of democracy, failing to engage with the shortcomings of public discourse and political decision-making on animal issues where the stated preferences of the public do not always translate into policy and law. In so doing, the Court underestimated the effect of deliberative inertia that may prevent alternative policy options from being considered.

8.2 Magdeburg District Court and Naumburg Regional Court: Legally Justified Civil Disobedience?

In this criminal case, the Naumburg Regional Court reached a very different finding than that of the case above; holding that the wellbeing of animals constituted a legally protected good ['Rechtsgut'] a threat to which could trigger a legal necessity justification for trespass.[209] Previously, the Magdeburg District Court had considered the act of trespass justified based on both self-defense/ defense of others (§ 32 of the Criminal Code), and necessity (§ 34 of the Criminal Code). This Section will analyze the decisions and reconstruct them through the lens of civil disobedience. I suggest looking at the Magdeburg District Court decision as an attempt to apply an 'extended liberal approach' to civil disobedience for animals, while the Naumburg District Court decision includes elements of democratic approaches to civil disobedience.

206 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 126).
207 Ibid.
208 Smith 2013.
209 OLG Naumburg [Regional Court Naumburg] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2064).

8.2.1 Legal Analysis

8.2.1.1 Background and Facts

The accused were affiliated with an animal advocacy organization. For a number of years, they had reported violations of the Animal Protection Act to law enforcement.[210] However, they noticed that law enforcement did not take their reports seriously, unless they were supported by evidence.[211]

In 2013, an unknown third party informed the accused of violations of the Farm Animal Welfare Regulation [Tierschutz-Nutztierhaltungsverordnung] in a pig breeding facility.[212] Motivated by their compassion for animals, and knowing that the authorities would disregard a report without evidence, the animal activists entered the premises at night in June 2013.[213] They wore protective clothing and took other sanitary measures to protect the health of the pigs.[214] In the facility, they observed a number of violations of the Farm Animal Welfare Regulation, which they documented on film.[215] At that time, 62,000 animals were kept on the premises, and it was impossible for the activists to document all violations in just one night.[216] They returned on another night under observance of the same safety measures.[217]

A few month later, in November 2013, the defendants filed a criminal report with the Public Prosecutor's Office in Magdeburg.[218] They also informed the public, the state's Ministry of Agriculture and Environment, and another regional authority ['Landesverwaltungsamt'].[219] As a consequence, the regional authority conducted an unannounced check of the facility, which revealed several breaches of the applicable animal welfare law.[220] To give just a few examples, crates were of insufficient width,[221] cracks in the floor were too wide,[222] and some areas of the facility were

210 Ibid.
211 Ibid.
212 Ibid.
213 Ibid.
214 Ibid.
215 Ibid.
216 Ibid.
217 Ibid.
218 Ibid.
219 Ibid.
220 Ibid.
221 Violation of § 24 (2) Farm Animal Welfare Regulation [TierSchNutztV].
222 Violation of § 22 (3) Farm Animal Welfare Regulation [TierSchNutztV].

overcrowded and equipped with an insufficient number of troughs.[223] An expert described some of these conditions as causing 'significant suffering' ['erhebliches Leiden'] in the sense of § 17 No. 2 lit. b of the Animal Protection Act.[224] In the investigations that followed, it turned out that the county's veterinary inspection office had already been aware of the conditions and had not taken action.[225]

8.2.1.2 Applicable Law

The Naumburg Regional Court's decision, as well as the decisions of the lower Courts, revolved around § 123 of the Criminal Code (trespass), and possible justifications for the commission of trespass pursuant to § 32 of the Criminal Code (self-defense/defense of others), and § 34 of the Criminal Code (necessity).

8.2.1.3 Reasoning of the Courts

The Magdeburg District Court tentatively assessed the question of whether animals, like humans, are 'another' in the sense of § 32 of the Criminal Code (self-defense/defense of others).[226] The Naumburg Regional Court upheld the decision of the lower Courts to acquit the accused, despite a noteworthy shift in the reasoning, denying their justification pursuant to § 32 of the Criminal Code but relying on § 34 of the Criminal Code (necessity) instead. This Section discusses both decisions as well as the criticism of them, in order to contrast their varying approaches to the relevant legal questions of the case.

223 Violation of § 29 (2) and (3) Farm Animal Welfare Regulation [TierSchNutztV], respectively.

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

225 Ibid.

226 LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018 (173).

8.2.1.3.1 Defense of Others Justification

§ 32 (2) of the Criminal Code defines self-defense/defense of others as 'any defensive action that is necessary to avert an imminent unlawful attack on oneself or another.' Thus, the first essential question the Courts answered was whether animals could be considered 'another' in the sense that provision. The Magdeburg District Court answered this in the positive.[227] In addition, the Magdeburg Court endorsed a view according to which § 1 of the Animal Protection Act also protected human feelings towards animals, which could then also trigger § 32 of the Criminal Code.[228] The first approach is remarkable in its essence, as it implicitly recognizes animals as holders of individual rights. However, the Magdeburg District Court did not provide a comprehensive reasoning for this approach, it referred only to the animal protection state objective enshrined in Article 20a of the Basic Law, and § 1 of the Animal Protection Act.

The Naumburg Regional Court did not apply § 32 of the Criminal Code (self-defense/defense of others). The Court argued that the measures taken by the activists were unlikely to terminate the threat to the animal's wellbeing: considering the short lifespan of animals in the factory farm system, they would be dead by the time law enforcement could take action based on the criminal report.[229] This reasoning is curious as the institutionalization of animal suffering in factory farms, and the resulting short lifespan, becomes the obstacle to improving the living conditions of animals.

8.2.1.3.2 Necessity Justification

The Magdeburg Court and the Naumburg Court both considered the acts of trespass to be justified pursuant to § 34 of the Criminal Code. The main legal question the Courts had to answer in applying this provision was whether the wellbeing of animals is 'another legal interest' in the sense of § 34 of the Criminal Code. Again, the Magdeburg Court answered this question in the positive. It recognized the 'right of the animals to a keeping according to the requirements of the Animal Protection Act and the

227 Ibid.
228 Ibid.
229 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2066).

Farm Animal Protection Regulation' ['das Recht der Tiere auf eine Haltung nach den Vorgaben des Tierschutzgesetzes und der Tierschutz-Nutztierhaltungsverordnung'],[230] and defined this right as a legal interest sufficient to trigger § 34 of the Criminal Code.[231] The Naumburg Court also applied § 34 of the Criminal Code but based that decision on a different reasoning: the Court considered animal welfare to be a 'legal interest of society as a whole' ['Rechtsgut der Allgemeinheit'].[232]

Furthermore, both Courts agreed that the violation of applicable animal welfare laws constituted an imminent danger, albeit, as the Naumburg Regional Court pointed out, one that persisted over a longer period of time ['Dauergefahr'].[233] They also agreed that this danger called for immediate action, and that documenting the conditions was the least intrusive remedy available.[234]

A final point worth mentioning is the Naumburg Regional Court's response to the Public Prosecutor's submission stating that § 34 of the Criminal Code was not applicable in the case at hand, since the owner of the animal facility did not consent to the intervention of the activists.[235] In pointing out that the consent of the animal owner was irrelevant, the Court drew a powerful comparison to a dog about to suffocate in an overheated car as a result of the owner refusing to open the car.[236] If the reasoning of the Public Prosecutor was applied consistently, it would not be justified to destroy the window of the car in order to save the dog.[237]

230 Quote from the context of § 34 of the Criminal Code, but also applicable to § 32 of the Criminal Code, LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018 (173).

231 LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018 (173).

232 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065).

233 LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018 (174); OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065).

234 Ibid.

235 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065).

236 Ibid.

237 Ibid.

8.2.2 Normative Reconstruction

The Naumburg Regional Court decision has received widespread attention, both in the public and in academic discourse. In particular, Hans-Peter Vierhaus and Julian Arnold deliver a legal analysis supporting the finding of the Naumburg Court in stating that animal welfare can trigger § 34 of the Criminal Code.[238] They show that, under certain narrowly defined circumstances – most notably the unlawful omission of actions by the responsible authorities, the law allows citizens to protect the legal interests of society as a whole, including the wellbeing of animals.[239]

8.2.2.1 A Blueprint for Civil Disobedience?

In discussing the Heilbronn case above, I noted that the activists' conduct in this case did not qualify as civil disobedience due to the use of violence. In the Naumburg case, the threshold of civil disobedience may also not be met. For the purpose of the normative reconstruction this is hardly relevant as exploring the arguments of the Courts through the lens of civil disobedience does not require drawing conclusions as to whether acts in question actually constitute civil obedience. Nevertheless, asking whether civil disobedience was present in the case at hand may illuminate some further challenges to civil disobedience in the context of animal law.

First, it is up for debate whether the activists in this case fulfilled the requirement of publicity.[240] After all, months passed before the activists filed a criminal report. However, the Courts found that the long timespan between filming and reporting was necessary for the activist to process the material and to draft the criminal report.

Second, civil disobedience could be precluded because the activists did not communicate disagreement with a certain law. If anything, they communicated disagreement with the lacking enforcement of existing animal protection law. But the notion of civil disobedience is not limited to com-

238 Vierhaus/ Arnold 2019.

239 Ibid.

240 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065); LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018 (173). This point is of vital importance, as it stands in square contrast to so-called 'rapid reporting' statutes in the United States, which will be discussed in Chapter 10.

municating disagreement with law, it can also be invoked to communicate disagreement with a certain policy, like that of the enforcement gap in animal protection law.

With regard to farmed animals, there exists a significant enforcement gap in Germany.[241] Not only did responsible authorities on the ground fail to take action like in the case at hand, but they fail to do so systematically as illustrated by, for example, legal scholar Jens Bülte.[242] A recent example is the legislator's approach to sow stalls ['Kastenhaltung von Schweinen']. In 2016 the Federal Administrative Court found that, in the common form of sow stalls, sows are not kept in accordance with § 24 (4) No. 2 of the Farm Animal Protection Regulation, which provides that sows must be kept in a manner that allows them to stand, lay down, and stretch their limbs at any time.[243] In 2020, the legislator finally passed a bill addressing this issue and phasing out the long term keeping of sows in sow stalls.[244] However, for some of the required changes the bill allows for transition periods of up to 15 years;[245] disregarding that – as the Federal Administrative Court held – existing industry practices with regard to sow stalls are not permissible under the Farm Animal Protection Regulation. In a nutshell, the legislator is hesitant to take measures against common practices in the industry, despite Courts finding them to be already in violation of existing law.[246] Considering the systemic nature of the underlying conditions, there is a strong argument that the non-enforcement in this case is a policy choice, rather than a mere oversight, and thus a potential target for civil disobedience.

As a rule, legal remedies should be available for enforcement related action. If enforcement policies are unlawful, remedies can be sought, most commonly in administrative Courts. In such a case, there would be little room for civil disobedience. However, animal law is exceptional in this

241 See Bülte, Jens, Zur faktischen Straflosigkeit institutionalisierter Agrarkriminalität, GA 165:1 (2018), 35–56.

242 Ibid.

243 BVerwG [Federal Administrative Court] 8 November 2016, 3 B 11/16, NJW 404, 2017.

244 Decision of the Federal Council [Bundesrat], Siebte Verordnung zur Änderung der Tierschutz-Nutztierhaltungsverordnung, 3 July 2020, Drucksache 302/20, Grunddrucksache 587/19, 11, available at: https://www.bundesrat.de/SharedDocs/drucksachen/2020/0301-0400/302-20(B).pdf?__blob=publicationFile&v=1 (last accessed 23 February 2022).

245 Ibid.

246 See also Bülte 2018, 45 on the example of laying hens.

regard. Not only do animals lack legal standing, but it is also difficult for humans to take legal actions regarding enforcement gaps in animal law. The Naumburg Court took the authorities' failure to follow up on criminal reports without evidence seriously.[247] However, this failure of law enforcement is not a stand-alone issue. What is more important is the lack of legal mechanisms in place to address the enforcement gap in administrative Courts. On a federal level, as well as in many states in Germany, animal protection associations do not have the right to sue in these matters ['Verbandsklagerecht']. Consequently, and as the Court emphasized, activists filing complaints, or otherwise calling upon the authorities, are unlikely to be successful.[248]

All in all, the status of enforcement-related action as civil disobedience remains ambivalent. Those who target the enforcement gap of animal law, rather than animal law as such, indicate a higher fidelity to the legal order. This, combined with the systemic enforcement gap in animal law, militates against excluding enforcement related action from the notion of civil disobedience. What remains is a puzzle of academic interest: while activists target the policy of non-enforcement, they also play by the rules of this policy by providing authorities with unmistakable evidence of unlawful conditions before they can be expected to act. Activists who create footage to prompt law enforcement to act are doing precisely what the policy requires.

With this in mind, the next Section will explain and evaluate the decisions of both the Magdeburg District Court and the Naumburg Regional through the lens of civil disobedience.

8.2.2.2 Magdeburg District Court and the Extended Liberal Approach

The Magdeburg District Court's reasoning can serve as an example of an 'extended liberal' approach to civil disobedience. It shows how extended liberal approaches, which require considering animals as rights-bearers, can be reflected in legal reasoning.

In considering the acts of trespass justified pursuant to both § 32 of the Criminal Code (self-defense/defense of others), and § 34 of the Criminal

247 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065).

248 Ibid.

Code (necessity), the Court primarily based both its justifications on the rights of animals. Not only did it consider animals, like humans, to be 'another' in the sense of § 32 of the Criminal Code, but it also considered the 'right of the animals to a keeping according to the requirements of the Animal Protection Act and the Farm Animal Welfare Regulation'[249] to be a legal interest sufficient to trigger § 34 of the Criminal Code.[250] This implies – as critics of the decision have noted – that animals have legal rights.[251]

The Court appears to have in mind animal rights that are derived from animal welfare law. Saskia Stucki proposes referring to this notion of animal rights as 'animal welfare rights' or 'simple' rights.'[252] These 'animal welfare rights' do not correspond to the common understanding of rights as being strong protections of moral animal rights.[253] Nevertheless, the Magdeburg Court centers the individual animal's, rather than society's, interests. This approach – albeit likely unintentionally – relates to what I have above characterized as an extension of the liberal conception of civil disobedience. Although it limits the consideration of animal wellbeing to the level of protection that is granted by the law, it looks at this protection as existing for the good of the individual animal.

The Magdeburg District Court was criticized for this decision not only in the literature,[254] but implicitly also by the higher Court. The Magdeburg Court's decision can be perceived as more radical than the higher Court's decision as it considered animals to be 'another' in the sense of § 32 of the Criminal Code.[255] However, from the perspective of democratic theory, the Magdeburg Court's approach is more modest than that of the higher Court. In the decision of the Magdeburg Court, the interest that triggers the justification is an *individual interest*, albeit one of animals. Elevating an interest of society as a whole to an interest triggering § 34 of the Criminal Code arguably has a higher potential of endangering the state's monopoly

249 Quote from the context of § 34 Criminal Code, but also applicable to § 32 Criminal Code, LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018 (173).

250 LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018 (173).

251 Scheuerl, Walter/ Glock, Stefan, Hausfriedensbruch in Ställen wird nicht durch Tierschutzziele gerechtfertigt, NStZ (2018), 448–451, 449.

252 Stucki 2020, 551.

253 Ibid.

254 Scheuerl/ Glock 2018, 449.

255 Ibid.

on the use of force. This threat to the state's monopoly on the use of force is the central point of criticism against both decisions.[256]

What is lacking is a more thorough reasoning is for the Court to find that animals are 'another' in the sense of § 32 of the Criminal Code. In that way, the decision too replicates problems that I identified in Chapter 7 with regard to the extended liberal approaches. That is, they are in need of a normative basis. If defense of others is to serve as a justification for trespass to create footage from animal facilities, this point needs to be clarified.

8.2.2.3 Naumburg Regional Court and the Democratic Approaches

The Naumburg Regional Court considered animal protection to be a legal interest of society as a whole, expressed in the state objective enshrined in Article 20a of the Basic Law, and thus sufficient to trigger § 34 of the Criminal Code (necessity).[257] Saskia Stucki argues that the decision can be considered an instance of 'judicial courage' in defense of 'green' civil disobedience.[258]

Unlike the lower Court, the Naumburg Regional Court did not base its justification on individual interests, but on interests of society as a whole. Unlike in the case before the Heilbronn District Court, the case at hand does not raise questions regarding legitimacy, neither of the law nor of activism, as the conditions in the pigsty were found by the Court to be unlawful. In other words, the conditions clearly contradicted the law, which is the result of democratic procedures. Therefore, the arguments advanced by proponents of democratic approaches to civil disobedience can lend support to the reasoning of the Naumburg Court.

From the perspective of democratic theory and civil disobedience, the Naumburg decision is further reaching than that of the lower Court: the Naumburg Court considered animal welfare as an interest of society sufficient to trigger the necessity justification. However, the Court did not rely

256 Ibid., 450 f.

257 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065).

258 Stucki, Saskia, In Defence of Green Civil Disobedience: Judicial Courage in the Face of Climate Crisis and State Inaction, Verfassungsblog, 30 October 2020, available at: https://verfassungsblog.de/in-defence-of-green-civil-disobedience/ (last accessed 23 February 2022).

on the interest of individuals. Against this backdrop, it cannot be supported by the liberal approaches.

An essential step in the application of the necessity justification of § 34 of the Criminal Code is the balancing of interests. In the case at hand, the Court emphasized that those in charge of the animal facility were in breach of animal protection law, and thus they were responsible for the danger to animal welfare.[259] Those responsible for a danger to a protected legal interest have to accept limitations of their own rights to a greater extent than others.[260] Now turning to democratic disobedience, one could say that, rather than the activists, those responsible for the facility had deemed themselves higher authorities than the democratic legislator by breaching the law.

The footage was primarily meant to serve as evidence in a criminal report, because the primary goal of the activists was not reform but enforcement. The enforcement of these standards is, in this case, the enforcement of a democratic minimal consensus regarding animal protection. As opposed to arguing that the majority endorses higher animal protection standards than the law delivers, or that they would but for deliberative inertia,[261] the finding that existing law was violated does not require a questioning of the democratic legitimacy of animal protection law.

The necessity justification, which is legally the most convincing, hinged on animal welfare as legally protected interest of society as a whole.[262] If animal welfare law is considered as democratic minimum consensus on animal welfare, this line of argument can find support in democratic approaches to civil disobedience.

8.3 Conclusion

This Chapter analyzed and normatively reconstructed recent decisions of German Courts relating to trespass to create footage through the lens of civil disobedience. It employed civil disobedience, and the arguments made by

259 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2066).
260 Ibid.
261 Smith 2013.
262 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018.

proponents of liberal and democratic approaches, to explain and evaluate legal reasoning.

The Heilbronn District Court decision denying the possibility of letting animal activists go unpunished can be criticized for engaging with democracy superficially. In short, the Court argued that trespass is but a means by which the minority can impose their political aim on the majority, who considers intensive animal farming acceptable and legal.[263] The deliberative account points out what is problematic about this reasoning: the democratic decisions on animal issues may be impacted by deliberative inertia and hegemonic discourses.[264] Courts should not conclude that practices in animal industries are legal and enjoy democratic legitimacy, just because they commonly exist.

The reasoning of the Magdeburg District Court, letting activists go unpunished, faces other challenges. The Court employed a defense of others justification, which finds support in extended liberal approaches to civil disobedience, as it implies that animals are 'others' in the sense of the Criminal Code; they are bearers of animal welfare rights.[265] Unfortunately, the Court did not further substantiate this ambitious argument.

Finally, the Naumburg Regional Court's reasoning in this case highlights the legal potential of enforcement related civil disobedience.[266] The Court's necessity justification, which is legally convincing, hinged on animal welfare as legally protected interest of society as a whole.[267] If animal welfare law is considered as democratic minimum consensus on animal welfare, this line of argument can find support in democratic approaches to civil disobedience. The downside of this argument is that it rests on conditions in a facility being considered illegal.

Importantly, the above decisions do not necessarily contradict each other, as the favorable decisions hinged upon the illegality of the conditions found in the facility and the reluctance of the authorities to enforce the law.

A remarkable level of legal uncertainty remains for activists. Due to the multiple layers of animal law, from the abstract commitment of Article 20a

263 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 126).

264 Smith 2013.

265 LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018.

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

267 Ibid.

of the Basic Law, to the concrete Farm Animal Protection Regulation and its enforcement, the legality of conditions found in factory farming is not a clear-cut criterion. Again, activists' rights depend on animal law: only if the conditions to be revealed through footage are considered unlawful, a case can be made for activists' behavior being legally justified as necessity. Against this backdrop, the legality of the creation of undercover footage deserves further attention. The next Chapter will discuss which other options exist to allow animal activists who trespass to create footage go unpunished. In so doing, the Chapter draws on existing literature and jurisprudence on civil disobedience.

9. Civil Disobedience and the Law

Chapter 7 showed that trespass to create undercover footage can be discussed under the headline of civil disobedience, and that it can be morally justified as such, though dependent on which theory one subscribes to, as well as on empirical factors. Further, Chapter 8 analyzed and normatively reconstructed recent decisions of German Courts, offering a more in-depth analysis of the Courts' arguments. Considering the nascent state of the jurisprudence on civil disobedience in the context of animal activists, and the probability that similar cases will arise in the future, it is worth taking a closer look at other legal resources which may allow animal activists who create undercover footage go unpunished.

Although civil disobedience is not a legal concept, it sometimes features in legal scholarship where the key questions arise: is there a legal justification, excuse, or other legal construct that allows one to let acts of civil disobedience go unpunished; and can some of the criteria for a moral justification of civil disobedience be advanced in a criminal trial? To answer these questions, this Chapter draws on the works of legal scholars in the 1980s in the context of the 'peace movement' in Germany,[268] and on the literature from political theory discussed in Chapter 7. It further draws

268 Dreier, Ralf, Widerstandsrecht und ziviler Ungehorsam im Rechtsstaat, in: Peter Glotz (ed.), Ziviler Ungehorsam im Rechtsstaat (Frankfurt a.M.: Suhrkamp, 1983), 54–75; Roxin, Claus, Strafrechtliche Bemerkungen zum zivilen Ungehorsam, in: Peter-Alexis Albrecht, Alexander Ehlers, Franziska Lamott, Christian Pfeiffer, Hans-Dieter Schwind, Michael Walter (eds.), Festschrift für Horst Schüler-Springorum zum 65. Geburtstag (Köln: Carl Heymanns Verlag 1993), 441–457; Schüler-Springorum, Horst, Strafrechtliche Aspekte zivilen Ungehorsams, in: Peter Glotz (ed.), Ziviler Ungehorsam im Rechtsstaat (Frankfurt a.M.: Suhrkamp, 1983), 76–98. On

comparisons with other jurisdictions, in particular the United States, which makes the insights of this Chapter interesting beyond the German context.

The Chapter begins by explaining how German Courts have approached civil disobedience in the past. It illustrates that the highest German Courts have always employed a democratic, rather than Rawlsian, notion of civil disobedience and that they have never considered it to impact legal decisions. Next, Section 2 critically examines the view as held by the FCC and voiced in the literature according to which civil disobedience can never be legally justified. Following these general questions, Section 3 turns to the topic of animal activists who trespass to create footage, specifically. Civil disobedience cannot erase trespass on the level of the elements of the offence. However, as shown in Section 4, legal defenses from constitutional law (in particular freedom of expression, Article 5 (1) of the Basic Law) and from criminal law (in particular necessity § 34 of the Criminal Code) have been discussed in the context of civil disobedience. In Sections 5 to 8, I consider other avenues allowing for animal activists to go unpunished: from excuses over an error of law (§ 17 of the Criminal Code); to prosecutorial discretion and sentencing. Finally, Section 9 discusses how the matter of civil disobedience has been approached by Courts in the United States, and whether invoking civil disobedience could be beneficial for animal activists in that context.

Chapter 9 concludes that justifications from constitutional law, in particular the right to freedom of expression enshrined in Article 5 (1) of the Basic Law and animal welfare enshrined in Article 20a of the Basic Law, may resonate with those voices in the literature who emphasize the communicative value of civil disobedience. However, justifications from constitutional law are doctrinally unsound. Justifications from the criminal code, in particular necessity in § 34 of the Criminal Code, provide more promise. It further zeroes in on the error of law argument, given the ongoing debate in legal scholarship that is causing uncertainty for activists. Finally, Chapter 9 suggest that matters of civil disobedience can be considered both at the sentencing stage, and when exercising prosecutorial discretion, given that the rationales for punishment are rarely applicable in cases of civil disobedience which results in there being a minimal public interest in prosecution. Some further considerations will be discussed regarding the

civil disobedience and German criminal law generally see Kröpil, Karl, Ziviler Ungehorsam und strafrechtliches Unrecht, JR (2011), 283–287.

differences between the United States and the German legal system on the matter of civil disobedience.

9.1 Civil Disobedience and German Courts

Most of the literature and jurisprudence on civil disobedience and German law focuses on coercion (§ 240 of the Criminal Code) and is closely linked to the specific societal and political climate at the time of the peace movement.[269] This is important to bear in mind for the following Sections.

In 1986, the FCC – citing to a publication by the protestant church[270] – stated:

> 'Civil or civic disobedience is – as opposed to the right to resistance against an unjust system[271] – understood as a resistance of the citizen vis-à-vis singular weighty governmental decisions, in order to face a decision considered as fatal and ethically illegitimate through demonstrative, symbolic protest up to spectacular rule-breaking.'
>
> ['Unter zivilem oder bürgerlichem Ungehorsam wird – im Unterschied zum Widerstandsrecht gegenüber einem Unrechtssystem – ein Widerstehen des Bürgers gegenüber einzelnen gewichtigen staatlichen Entscheidungen verstanden, um einer für verhängnisvoll und ethisch illegitim gehaltenen Entscheidung durch demonstrativen, zeichenhaften Protest bis zu aufsehenerregenden Regelverletzungen zu begegnen.'][272]

269 For a comprehensive account on civil disobedience, the peace movement, and the law see Quint, Peter E., Civil Disobedience and the German Courts (New York: Routledge-Cavendish 2008).

270 Kirchenamt im Auftrag der evangelischen Kirche, Evangelische Kirche und freiheitliche Demokratie: Der Staat und das Grundgesetz als Angebot und Aufgabe, Denkschrift der Evangelischen Kirche in Deutschland (Gütersloh: Verlagshaus Mohn 1990, 4th edition), available at: https://www.ekd.de/ekd_de/ds_doc/evangelische_kirche_und_freiheitliche_demokratie_1985.pdf (last accessed 23 February 2022).

271 The 'right to resist against an unjust system' ['Widerstandsrecht'] is a constitutional right protected in Article 20 (4) Basic Law, which reads: 'All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available.'

272 BVerfG [Federal Constitutional Court] 11 November 1986, 1 BvR 713/83, NJW 43, 1987 (47).

Referring to literature and research in the field of peace and conflict studies, the Court stated that acts of civil disobedience must be triggered by issues of significant public importance, especially the prevention of grave dangers to the public.[273] Civil disobedience must be aimed at impacting the process of public formation of opinion, it must be without risk to others, peaceful, public, and proportionate in time and place.[274]

This definition differs from that of Rawls' account of civil disobedience in significant ways.[275] There exist some similarities in the descriptive elements of civil disobedience, but few regarding the purpose of the acts in question. The FCC case concerned a sitting blockade as part of a protest against military armament – a constellation that cannot be morally justifiable under Rawls' account of civil disobedience because it did not concern issues of justice in the strictly Rawlsian sense. The FCC did not consider the acts legally justified either, but it did so for reasons other than a failure to meet Rawls' criteria for justification. Tentatively, to use the terms introduced in Chapter 7, one could say that German Courts have always had a democratic rather than liberal conception of civil disobedience. Civil disobedience was discussed with reference to cases that did not match the Rawlsian definition. Daniel Markovits shows that, similar to the protests against the Vietnam War in the United States, protests against nuclear missiles in Europe can hardly be subsumed under the liberal approach.[276] Markovits supports this claim *inter alia* by saying that the political decisions involved were within the democratic authority of governments.[277] German Courts did not consider civil disobedience to be legally permissible in the context of the 'peace movement;' yet this is the context in which their jurisprudence developed.

The Courts have two paramount objections to the use of civil disobedience leading to impunity. One is that, in a democracy, a minority cannot be allowed to force the majority to change their politics. We saw this argument applied in the reasoning of the Heilbronn District Court in one of the cases analyzed in detail in Chapter 8. The second paramount objection is that it is part of the definition of civil disobedience that those employing it

273 Ibid.
274 Ibid.
275 For the contrary opinion see Kröpil 2011. Kröpil considers the definition similar to that of Rawls.
276 Markovits, Daniel, Democratic Disobedience, The Yale Law Journal 114 (2005), 1897–1952, 1901.
277 Markovits 2005, 1901.

must accept punishment. This argument will be addressed in the following Section.

9.2 Legally Justified Civil Disobedience – A Contradiction?

At first glance, the search for a legal defense of civil disobedience seems doomed to failure. After all, civil disobedience by definition requires a breach of the law. Hannah Arendt argued that, although civil disobedience is compatible with the 'spirit' of the (in this case US) law, it could not be legally justified since the law cannot justify its own violation, even if the purpose of the violation is to prevent the violation of another law.[278]

Similar views are echoed in legal reasoning. The German Federal Constitutional Court – followed by other Courts and authors – pointed towards this tension when it stated that civil disobedience cannot be invoked as a justification, for it requires by its definition a symbolic breach of the law and an acceptance of the risk of punishment.[279]

However, the inherent tension within the notion of legally justified civil disobedience should not be overstated for it can be resolved. There is a distinction to be made between the prevalent interpretation of the law by the Courts, and the law as such. An activist may believe she has breached the law, in the sense that she knows that the Courts will consider her action illegal. At the same time, she may also have a different interpretation of the law in question, thus maintaining that that if the law was applied correctly, her actions would be justified. In the words of Ronald Dworkin: '[s]ometimes, even after a contrary Supreme Court decision, an individual may still reasonably believe that the law is on his side; such cases are rare, but they are most likely in disputes over constitutional law when civil disobedience is involved.'[280]

278 Arendt, Hannah, Crises of the Republic (New York: Harcourt Brace Jovanovich, Inc. 1969), 99.

279 BVerfG [Federal Constitutional Court] 11 November 1986, 1 BvR 713/83, NJW 43, 1987 (48). See also LG Dortmund [Dortmund District Court], 14 October 1997, Ns 70 Js 90/96, NStZ-RR 139, 1998 (141); Perron, Walter, § 34 Rechtfertigender Notstand, in: Adolf Schönke, Horst Schröder (founders), Albin Eser (ed.), Strafgesetzbuch (München: C.H. Beck Verlag 30st ed., 2019), para. 41a.

280 Dworkin, Ronald, On Not Prosecuting Civil Disobedience, The New York Review of Books, 6 July 1968, available at: https://erikafontanez.files.wordpress.com/2015/08/on-not-prosecuting-civil-disobedience-b-dworkin-the-new-york-review-of-books.pdf (last accessed 23 February 2022).

In the cases of animal activists in Germany, such a disagreement could revolve around Article 20a of the Basic Law (the state objective on animal protection) and to what extent that provision can trigger justifications such as that of § 34 of the Criminal Code (necessity). More precisely, there is disagreement about the weight that *is* and *should* be assigned to animal protection in the balancing of interests that provisions such as § 34 of the Criminal Code require.

Unlike the FCC,[281] some legal scholars draw a distinction between the breach of a legal norm and illegality in the context of civil disobedience. Ralf Dreier argued that it would be misguided to define civil disobedience by saying that it is not justifiable.[282] Instead of requiring illegality as defining feature of civil disobedience, he required meeting 'the elements of a prohibitive norm' ['Tatbestant einer Verbotsnorm'].[283] Similarly, Claus Roxin – against the backdrop of the FCC decision mentioned above – emphasized the possibility of an act of civil disobedience fulfilling elements of a crime and still being justified.[284] This distinction, mentioned by Dreier and Roxin, is well established in criminal law theory. As such, civil disobedience and legal defenses are not mutually exclusive, at least not by their definition.

9.3 Civil Disobedience and the Elements of a Crime

Civil disobedience has no impact on the question of whether the elements of a crime ['Tatbestand'] are fulfilled in a given case. The only cases in which this could be discussed are those where the criminal law provision in question provides room for interpretation in accordance with the constitution ['verfassungskonforme Auslegung']. For example, when determining whether a given statement is 'insulting' in the sense of § 185 of the Criminal Code (insult ['Beleidigung']), Article 5 (1) of the Basic Law (freedom of expression) demands that the statement in question be interpreted in a way favorable to the accused.[285]

281 BVerfG [Federal Constitutional Court] 11 November 1986, 1 BvR 713/83, NJW 43, 1987 (48).
282 Dreier 1983, 61.
283 Ibid., 60.
284 Roxin 1993, 443.
285 BVerfG [Federal Constitutional Court] 10 October 1995, 1 BvR 1476/91, 1 BvR 1980/91, 1 BvR 102/92, 1 BvR 221/92, NJW 3303, 1995 (3309). The statement at issue in this case was 'soldiers are murderers' ['Soldaten sind Mörder'].

The elements of § 123 of the Criminal Code (trespass ['Hausfriedensbruch']) do not leave room for reinterpretation in light of Article 5 of the Basic Law, or any other constitutional norms. As such, only one, rarely supported, view could provide resources for a different conclusion: according to Rolf Dietrich Herzberg, there is an element of insult ['Beleidigungsmoment'] inherent in trespass.[286] This resonates with a view in political theory according to which significance attaches to civility and respect.[287] However, the view according to which insult matters to trespass is far removed from the text of § 123 of the Criminal Code and consequently not relevant for a legal assessment.

9.4 Legal Justifications for Civil Disobedience

Civil disobedience can influence legal decisions to a larger extent on the level of justification. In civil law systems, a justification describes a defense that renders an act lawful, although the elements of an offense were fulfilled. It is distinct from so-called excuses, which submit that someone committed an unlawful act but did so without guilt. According to Dreier, one of the few proponents of a legal justification for civil disobedience, there exist three options of justification in cases of civil disobedience: the first one arising from a non-codified right to resistance, the second arising from fundamental rights, and the third arising from justifications in the criminal and in the civil code.[288] This distinction can help to categorize justifications which will be done in the following, though possible justifications and matters that are not relevant to animal activism will not be covered.[289]

286 Herzberg, Rolf Dietrich, *Eigenhändige Delikte*, ZStW 82:4 (1970), 896–947, 928.

287 For civility and respect in possible cases of civil disobedience for animals see Milligan, Tony, Civil Disobedience: Protest, Justification, and the Law (New York: Bloomsbury Academic 2013), 17 f.

288 Dreier 1983, 59.

289 There is a comprehensive body of literature on cases of civil disobedience and the 'unlawfulness' requirement in coercion, § 240 Criminal Code. See e.g., Kröpil 2011, 285 f. with further references. This issue is specific to German criminal law and not relevant to animal activism and trespass.

9.4.1 Justifications from Constitutional Law

The first constitutional law provision that should be mentioned is Article 20 (4) of the Basic Law, which codifies the right to resistance ['Widerstandsrecht']. It confers 'the right to resist any person seeking to abolish this constitutional order if no other remedy is available.' There is a broad consensus that the right to resistance enshrined in Article 20 (4) of the Basic Law does not extend to civil disobedience.[290] Legal scholar Christoph Degenhart sums up the distinction: the right to resistance is aimed at maintaining the existing legal order, it is 'legality-related,' while those acting in civil disobedience want legitimacy to trump legality.[291] The right to resistance can be triggered only if the constitutional order itself is under threat, it cannot be triggered by decisions made from within that order.[292] Therefore, the right to resistance enshrined in Article 20 (4) of the Basic Law cannot be advanced for a legal justification of trespassing to create footage from animal facilities. Further, Article 20 (4) of the Basic Law is final; it does not leave room for a non-positivized right to resistance arising from natural law theories or an extralegal state of emergency, for example.[293]

Dreier focused on the second option listed above, namely a justification of civil disobedience grounded in basic rights. He argued that the realm protected by basic rights ['Schutzbereich'] must be broadly construed so that acts of civil disobedience are not *per se* excluded from constitutional protection as afforded by the right to freedom of expression, enshrined in Article 5 (1) of the Basic Law.[294] Dreier argued that other norms, such as

290 Degenhart, Christoph, Staatsrecht I. Staatsorganisationsrecht (Heidelberg: C.F. Müller 35th ed., 2019), 174 f.; Kröpil 2011, 284 f. Before the codification of the right to resistance in Article 20 (4) Basic Law the distinction between the right to resistance and civil disobedience was not as clear in German legal theory. For an informative account of the evolution from one right to resistance to differentiation see Dreier 1983, 54.

291 Degenhart 2019, 174 f.

292 Ibid.

293 Grzeszick, Bernd, Art. 20 (4) GG Widerstandsrecht, in: Theodor Maunz, Günter Dürig (founders), Roman Herzog, Rupert Scholz, Matthias Herdegen, Hans H. Klein (eds.), Grundgesetz (München: C.H. Beck, last updated November 2021), para. 24.

294 Dreier 1983, 64 f. Similar considerations have been made regarding the right to freedom of conscience in Germany enshrined in Article 4 (1) of the Basic Law. For a critical discussion of freedom of conscience and criminal law (in the Swiss context) see Mona, Martino, Der Gewissenstäter im Strafrecht, in: Peter Kunz, Jonas Weber, Andreas Lienhard, Iole Fargnoli, Jolanta Kren Jostkiewicz (eds.), Berner Gedanken

those in the Criminal Code, may limit freedom of expression, but must be interpreted in a way that takes freedom of expression into account: the value protected by the basic right to freedom of expression and the value protected by the other norm in question must be balanced against each other on a case-by-case basis.[295] The prohibitive norm in question must step back behind the right to freedom of expression if the act of civil disobedience is committed in protest against a 'grave wrong' ['schwerwiegendes Unrecht'] and if it the act is proportional.[296] Dreier stated that, besides basic rights, state objectives provide the relevant yardstick of what can be considered as a grave wrong.[297] This is interesting, given that, although it was not at the time, the protection of animals has been enshrined in Article 20a of the Basic Law as a state objective since 2000. As such, Dreier's account would hold promise for animal activists.

However, Dreier's account cannot be reconciled with established jurisprudence. Article 5 (2) of the Basic Law provides that freedom of expression and the freedom of the press are limited by 'provisions of general laws,' such as § 123 of the Criminal Code (trespass).[298] Further, the FCJ held in the so-called Walraff-Springer decision, that the unlawful creation of footage is not covered by Article 5 (1) of the Basic Law, freedom of expression.[299] This rules out a justification of trespass arising from constitutional law.

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zum Recht. Festgabe der Rechtswissenschaftlichen Fakultät der Universität Bern für den Schweizerischen Juristentag 2014 (Bern: Schultheiss Verlag 2014), 471–495, 484 f.

295 Dreier 1983, 65.

296 Ibid., 66 f.

297 Ibid., 67.

298 For a detailed explanation of which las qualify as 'general laws' in English see Payandeh, Mehradad, The Limits of Freedom of Expression in the Wunsiedel Decision of the German Federal Constitutional Court, German Law Journal 11:8 (2010), 929–942, 932 f. The prohibition of trespass in § 123 of the Criminal Code undisputedly qualifies as 'general law,' for it does not prohibit a specific opinion. It protects the right to authority over one's premises ['Hausrecht'] which is worth protecting as such. According to the 'Wechselwirkungslehre' laws that limit the right to freedom of expression have to be interpreted in a way that again takes into account the basic right. But as explained above, § 123 of the Criminal Code does not leave room for an alternative interpretation more accommodating for freedom of expression.

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

9.4.2 Justifications from Criminal Law

Contemporary cases on animal and environmental civil disobedience in Germany and Switzerland hinge on criminal law justifications. In Chapter 8, I introduced 'defense of others' in the context of the Magdeburg decision.[300] Defense of others, enshrined in § 32 of the Criminal Code in German law, is not suitable to address civil disobedience. It describes situations in which a defensive action is necessary to avert a present unlawful attack on oneself or another. Against this backdrop, it is surprising that the Court applied it to the creation of undercover footage. Even if animals were considered 'another' in the sense of § 32 of the Criminal Code, the lengthy process from the creation of footage to law enforcement action, or even to social and legal change, is not capable of averting danger from individual animals presently in danger. If anything, the rationale behind this justification could be advanced for so-called animal rescue, rather than the case of undercover footage. In the following, I will examine the necessity justification in more detail, before briefly introducing the justification of safeguarding legitimate interests.

9.4.2.1 Necessity

Necessity is enshrined in § 34 of the Criminal Code in German law and was considered to justify trespassing in an animal facility in the Naumburg decision, as discussed in Chapter 8.[301] Further, the necessity justification will likely become salient in the discourse currently emerging around climate protest.

In the 1980s – during the prime of civil disobedience in European legal theory – Horst Schüler-Springorum advocated for a justification based on necessity using § 34 of the Criminal Code.[302] The provision reads:

> 'A person who, faced with an imminent danger to life, limb, freedom, honour, property or another legal interest which cannot otherwise be

300 LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018.

301 OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018; LG Magdeburg [Magdeburg District Court] 11 October 2017, 28 Ns 182 Js 32201/14 74/17, ZUR 172, 2018.

302 Schüler-Springorum 1983, 87 f.

> averted, commits an act to avert the danger from himself or another, does not act unlawfully, if, upon weighing the conflicting interests, in particular the affected legal interests and the degree of the danger facing them, the protected interest substantially outweighs the one interfered with. This shall apply only if and to the extent that the act committed is an adequate means to avert the danger.'[303]

§ 34 of the Criminal Code requires, first and foremost, a state of necessity, which is granted if a legal interest is in imminent danger and cannot be averted otherwise. The list of legal interests provided in § 34 of the Criminal Code is not exhaustive. The protected interests – according to the majority of authors – include legal interests of society as a whole.[304] Since its codification as a state objective in Article 20a of the Basic Law, there remains no doubt that animal protection qualifies as an interest of society as a whole.[305]

A legal interest is in a state of danger if, given the risk factors that are under consideration, there is a certain degree of likelihood that harm will occur.[306] In the case of animal activists and undercover footage, the requirement of imminent danger can be fulfilled if violations of animal welfare law are documented. However, this argument is more difficult to make when animals are kept and treated in accordance with the minimum standards set by animal welfare law. In this case one could only argue that the provisions of animal welfare law are so low that they, in effect, still pose a danger to animal welfare in the sense of Article 20a of the Basic Law.

The danger posed is imminent if it can imminently turn into harm.[307] This is also considered to be the case if a continuous danger ['Dauergefahr']

303 For the official translations see Federal Ministry of Justice, German Criminal Code, available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0141 (last accessed 30 October 2020).

304 Erb, Volker, § 34 Rechtfertigender Notstand, in: Volker Erb, Jürgen Schäfer (eds.), Münchner Kommentar zum Strafgesetzbuch (München: C.H. Beck Verlag 4th ed., 2020), para. 72; Perron 2019, para. 10 (for the inclusion of legal interests of society as a whole but against the inclusion of acts of civil disobedience); OLG München [Munich Regional Court] 10 March 1972, 2 Ws 40/72, NJW 2275, 1972 (2276) public health [Volksgesundheit]; OLG Düsseldorf [Düsseldorf Regional Court] 25 October 2005, VIII ZR 392/03, NJW 243, 2006 (244) safety of air traffic.

305 Explicitly including animal protection as legal interest of society as a whole: Erb 2020, para. 72.

306 Ibid., para. 74.

307 Perron 2019, para. 17.

exists.[308] Consequently, the state of necessity is not precluded by the fact that animals have been kept in inhumane conditions for a long period of time.

§ 34 of the Criminal Code further requires that there exists no possibility to avert the danger by a means other than the action taken; that the protected interest weights heavier than the violated one; and that the act committed is an adequate means to avert the danger. The first criterion is understood to require that the act committed was apt to avert the danger and that, out of the alternatives available, it was the most moderate or least intrusive one.[309] It can be argued that trespassing and creating footage is a less intrusive alternative compared to so-called animal rescue, for instance. However, the question remains whether the creation and dissemination of footage is apt to avert the danger of a breach of animal welfare. It can certainly not avert the danger for the individual animals filmed. However, acts of civil disobedience, including those for animal protection, can perhaps limit the danger in the future, or at least prevent an increase of danger.[310] Schüler-Springorum pointed out that this kind of answer to the legal criterion of averting danger mirrors the idea that civil disobedience does not seek to rescue or change, but rather to raise awareness and contribute to the formation of opinion.[311] Yet, even if one accepts this line of reasoning, the question is whether the same could not be achieved by other means, in particular, legal protest without undercover footage, or reporting to law enforcement. This constitutes an important objection to applying the necessity justification to animal activists.

The next step in the assessment of the objective elements of § 34 of the Criminal Code requires a balancing of the interests at stake. The balancing of interests is at the heart of necessity. Interests must be balanced both in the abstract and in the concrete, whereby the priorities set by the democratic legislator in the legal order are decisive for the abstract level of balancing.[312] Here, the state objective on animal protection in Article 20a of the Basic Law may be invoked in favor of the activists. However, it remains a legal interest of society as a whole, which speaks in favor of

308 Ibid.
309 Erb 2020, para. 104.
310 This point was also raised by Schüler-Springorum in the context of the peace movement. Schüler-Springorum 1983, 88 f.
311 Ibid., 89.
312 Erb 2020, paras. 130 f.

leaving its enforcement to state authorities.[313] On a more positive note, it may be considered that trespassing on the premises of animal facility operators interferes not with the rights of, as Schüler-Springorum put it, 'innocent third parties,' but rather the rights of those who are responsible for the animal welfare conditions in the facility.[314]

In a nutshell, one can say that a justification of civil disobedience pursuant to § 34 of the Criminal Code depends on several considerations which must be addressed on a case-by-case basis. As animal protection is a state objective, and as most authors accept that legal interests of society as a whole can trigger § 34 of the Criminal Code, there is no doctrinal obstacle preventing the application of § 34 of the Criminal Code to animal activism *per se*. In practice, however, the requirement that less intrusive and legal means have been exhausted, poses a challenge to the necessity justification for animal activists. It can always be argued that further lawful protest would have been feasible. Climate activists face similar challenges. Both would benefit from a broader application of the necessity defense with adjusted standards regarding the legal measures that must be exhausted before resorting to civil disobedience.

9.4.2.2 Safeguarding Legitimate Interests

The rationale behind safeguarding legitimate interests may be better equipped to accommodating for civil disobedience than is the justifications discussed above. This justification is frequently mentioned in the context of civil disobedience, although in Germany, it has so far played a subsidiary role.[315] The provision on safeguarding legitimate interests, § 193 of the Criminal Code, was employed in analogous application as a legal justification by the District Court in a case regarding pacifist activists who entered a deserted United States military area in Germany, spraying buildings with pacifist messages, planting trees and flowers and letting sheep roam around

313 Ibid., para. 182.

314 In the contect of the peace movement, Schüler-Springorum noted that acts of civil disobedience were often committed at the cost of others, who were not the addressees of the acts.

315 For a more detailed analysis of § 193 Criminal Code in the context of civil disobedience see Lenckner, Theodor, Strafrecht und ziviler Ungehorsam – OLG Stuttgart, NStZ 1987, 121, JuS (1988), 349–355, 353; LG Dortmund [Dortmund District Court], 14 October 1997, Ns 70 Js 90/96, NStZ-RR 139, 1998 (141).

the grounds.[316] In 1987 the Stuttgart Regional Court overturned the favorable decision of the District Court.[317] The position of § 193 of the Criminal Code as placed behind defamatory offences enshrined in §§ 185 et seq. of the Criminal Code, makes clear that the legislator intended the justification to be available for those offences only, which is the prevalent view in jurisprudence and legal literature.[318]

Only few authors argue that § 193 of the Criminal Code could be applied to other offences relating to § 193 of the Criminal Code in that they create cultural value, for example.[319] Against this backdrop, one could argue that § 193 of the Criminal Code is triggered in the case of undercover footage which falls in the vicinity of protected speech, and thus the rationale behind § 193 of the Criminal Code. Having said this, these considerations are vague and thus are insufficient to overcome the clear decision of the legislator to apply the provision only to defamatory offences.[320]

In other jurisdictions, safeguarding legitimate interests may be more relevant in the context of civil disobedience. In Switzerland, safeguarding legitimate interests is accepted as not-positivized justification both by Courts and by legal scholars. It requires that an act is both a necessary and adequate means for the achievement of a legitimate aim, and that the interests which the offender seeks to protect outweigh the other interests at stake.[321] This justification is currently discussed in the cases of whistleblowers,[322] which is comparable to that of undercover footage in terms of the aspects

316 For more details on this unpublished decision see Lenckner, 1988.

317 OLG Stuttgart [Stuttgart Regional Court] 5 December 1986, 1 Ss 551/86, NStZ 121, 1987 (122).

318 See e.g., Regge, Phillip/ Pegel, Christian, § 193 Wahrnehmung berechtigter Interessen, in: Volker Erb, Jürgen Schäfer (eds.), Münchner Kommentar zum Strafgesetzbuch (München: C.H. Beck Verlag, 4th ed., 2021), para. 8, with further references.

319 Noll, Peter, Tatbestand und Rechtswidrigkeit: Die Wertabwägung als Prinzip der Rechtfertigung, ZStW 77:1 (1965), 1–36, 32.

320 Regge/Pegel 2021, para. 8.

321 Schweizerisches Bundesgericht [Swiss Federal Court] 1 May 2001 – 6S.49/2000/bue, available at: https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F01-05-2001-6S-49-2000&lang=de&type=show_document&zoom=YES& (last accessed 23 February 2022). ['Der übergesetzliche Rechtfertigungsgrund der Wahrung berechtigter Interessen setzt voraus, dass die Tat ein zur Erreichung des berechtigten Ziels notwendiges und angemessenes Mittel ist, sie insoweit den einzig möglichen Weg darstellt und offenkundig weniger schwer wiegt als die Interessen, welche der Täter zu wahren sucht.']

322 Konopatsch, Cathrine, Whistleblowing in der Schweiz – Mitteilung an die Presse als ultima ratio, NZWiSt (2012), 217–223.

relevant for this justification. However, again, problems arise regarding subsidiarity: a defense based on safeguarding legitimate interests is likely to fail if defendants have not exhausted legal means of protest.

9.4.2.3 Summary: Legal Justifications for Civil Disobedience

The justifications discussed above all suffer similar shortcomings. As a rule, defendants will likely fail to show that they exhausted all legal means to protest and achieve their goals. However, animal activists may constitute the exception to this rule. The enforcement gap in animal law is well known, and as discussed in Chapter 8, other means, such as the of filing criminal reports without footage, tend to be unsuccessful. As such, a necessity justification provides promise for animal activists in some cases.

And yet, despite the possibility of applying necessity in some cases, it remains questionable whether necessity is the best suited mechanism to expressing and addressing the challenge that animal activists pose to the legal order. At least one compelling argument against necessity, which has received little attention in the relevant literature so far, deserves consideration here. Consider that a legal justification of trespass precludes those in charge of an animal facility from exercising self-defense against the trespassers.[323] A self-defense justification of § 32 of the Criminal Code requires the existence of an 'unlawful attack.' If trespassing on animal facilities is justified, it is no longer an unlawful act in the sense of § 32 of the Criminal Code. As a result, those in charge of an animal facility would be very limited in what they can do to counter trespass. This shows that the necessity justification would have far-reaching logical consequences, which would be rather extraordinary and should at least give reason to carefully consider other, less far-reaching, concepts to let activists go unpunished.

323 Scheuerl, Walter/ Glock, Stefan, Hausfriedensbruch in Ställen wird nicht durch Tierschutzziele gerechtfertigt, NStZ (2018), 448–451, 451. The authors claim that even a livestock farmer who perfect animal husbandry practices would have to tolerate trespass is not in line with the Naumburg decision. Roxin mentioned the issue in the context of sitting-blockades, noting that if they were to be considered justified the police would be legally prevented from removing the protesters from the site: Roxin 1993, 448.

9.5 Legal Excuses for Civil Disobedience

The above problem, arising from necessity and other justifications, would not arise if trespass to create footage was excused rather than justified. Excuses are concerned with the guilt of the offender, not with the lawfulness of her behavior. This corresponds to the defining features of civil disobedience, in particular the conscientious motivation of those acting in civil disobedience. However, there is no excuse in German law that could be applied to trespass on animal facilities. Due to its title, the necessity as excuse under § 35 of the Criminal Code [Entschuldigender Notstand] may come to mind.[324] The rationale behind necessity as excuse resonates with civil disobedience, as it aims to mitigate conflicts between the law and the understandable reasons for acting against it.[325] An activist engaging in civil disobedience may experience a conflict between the law, and the integrity of her conscience, which is a legal interest protected by the constitution.[326] In the Swiss context, Martino Mona shows that necessity as excuse, enshrined in Article 18 of the Swiss Criminal Code, could operate as a resource for offenders motivated by their conscience, including animal activists.[327]

The same does not apply in Germany. § 35 of the German Criminal Code requires one to act to avert danger to life, limb, or liberty from oneself, a relative, or another person to whom one is close. In other words, the provision is limited both as regards the protected legal interests, and the possible beneficiaries. The finding of the Magdeburg Court that animals are 'another' in the sense of § 32 of the Criminal Code[328] does not make a difference in this regard, since § 35 of the Criminal Code additionally requires a close personal relationship between the individual who is acting and the individual under threat.

Another legal excuse, this one not written in the Criminal Code, is that of extralegal necessity [übergesetzlicher entschuldigender Notstand]. However, the validity of this excuse is highly disputed, and it has only

324 Alternatively, 'Entschuldigender Notstand' may be translated as 'necessety as defense.' However, in the present context this translation could be ambiguous.
325 Mona 2014, 491.
326 Ibid., 491 f.
327 Ibid., 492.
328 Or to return to the philosophical literature on civil disobedience, the extended liberal view according to which animals are included in the scope of justice.

been discussed in scenarios similar to the so-called trolley problem where human lives are at stake.[329]

9.6 Legally Relevant Errors: Putative State of Necessity and Error of Law

Neither is the so-called 'Erlaubnistatbestandsirrtum,' a category of putative state of necessity, applicable. It describes a scenario in which an accused imagines objective circumstances which would – if they were existent – justify her actions.[330] For this consideration to be applicable, activists would have to be under the mistaken impression that a specific animal abuse is occurring within a facility. Importantly, the error would have to be on the *factual*, not on the *legal* level: they would have to be mistaken about a *specific* violation of animal welfare law taking place in the facility – not about whether a certain practice constitutes a violation of animal welfare law.[331] In practice, especially under the standards set by the Naumburg Court,[332] such a scenario is hardly conceivable. Activists will rarely have a precise image of the conditions inside an animal facility in mind before entering. The Naumburg Court made clear that general suspicion of breaches of animal welfare laws are not sufficient. Therefore, further elaborations on the legal assessment of this scenario is superfluous.

Instead, the error of law, enshrined in § 17 of the Criminal Code [Verbotsirrtum] may become relevant. § 17 reads:

> 'If, at the time of the commission of the offence, the offender lacks the awareness of acting unlawfully, then the offender is deemed to have

329 Müssig, Bernd, § 35 Entschuldigender Notstand, in: Volker Erb, Jürgen Schäfer (eds.), Münchner Kommentar zum Strafgesetzbuch (München: C.H. Beck Verlag 4th ed., 2020), para. 89 f.

330 A common text-book example could go as follows: during a carnival street festival, someone wearing a bank robber costume enters a bank. A bank employee sees the person in bank robber costume and mistakenly believes that she intends to rob the bank. Considering herself and the bank under threat, the bank employee hurts the alleged bank robber.

331 If they erred about the legality of existing conditions, this would again be in the realm of a mistake of law in the sense of § 17 of the Criminal Code, although it would ultimately likely not qualify as such, because in order to meet the criteria of the Naumburg Court, they would also need a denial of the authorities to provide remedies.

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

acted without guilt if the mistake was unavoidable. If the mistake was avoidable, the penalty may be mitigated pursuant to section 49 (1).'

In the case of trespass to create footage, the applicability of § 17 sentence 1 of the Criminal Code is conceivably applicable in the case where an activist mistakenly believes in the broad applicability of an existing legal justification, such as necessity (§ 34 of the Criminal Code), or the a justifying nature of Article 5 (1) of the Basic Law, and its applicability in the case of investigative journalism.[333] Put simply, the offender would have to believe that trespass on animal facilities was *legally* justified. This scenario is conceivable, especially since the Naumburg decision discussed in Chapter 7: if activists overestimate the extent to which the necessity justification applies, and, for example, assume that they do not need evidence of a breach of animal welfare law, but that a suspicion of any unethical condition would suffice, then § 17 sentence 1 of the Criminal Code would be relevant.

For an unavoidable error of law, there is a high threshold to pass: an error of law is avoidable if, when using her best judgement, the accused would have had to develop doubts regarding the legality of her plan, and thus reconsider it or obtain legal advice.[334] Considering the sensational way in which the Naumburg decision was communicated, lay persons could be led to believe that trespassing on animal facilities to create footage was commonly justified.[335] On the other hand, anyone plotting to follow suit and enter animal facilities to create footage could be expected to inform herself further about the legal situation. As a result, she would become aware of the more nuanced nature of the Naumburg decision, and develop, at the very least, doubts that would warrant seeking legal advice. Only if a lawyer then gave a wrong legal opinion, saying that trespassing to create footage was always, or in an imagined scenario different from that of the

333 This form of the mistake of law is commonly called 'indirect mistake of law' ['indirekter Verborsirrtum'].

334 Joecks, Wolfgang/ Kulhanek, Tobias, § 17 Verbotsirrtum, in: Volker Erb, Jürgen Schäfer (eds.), Münchner Kommentar zum Strafgesetzbuch (München: C.H. Beck Verlag, 4th ed 2020), para. 39.

335 See e.g., Redaktion Fleischwirtschaft.de, Stalleindinglinge bleiben straffrei, 2 März 2018, available at: https://www.fleischwirtschaft.de/wirtschaft/nachrichten/OLG-bestaetigt-Urteil-Stalleindringlinge-bleiben-straffrei-36276?crefresh=1 (last accessed 23 February 2022); Deter, Alfons, Freibrief für Stalleindringlinge? Für Rukwied ein Skandal, top agrar online 23 February 2018, available at: https://www.topagrar.com/management-und-politik/news/freibrief-fuer-stalleinbrueche-fuer-rukwied-ein-skandal-9545680.html (last accessed 23 February 2022).

Naumburg decision, justified, would an excuse pursuant to § 17 sentence 1 of the Criminal Code be possible.

Interestingly, despite the high threshold for an unavoidable error of law, § 17 of the Criminal Code has already been discussed in animal cruelty cases: in the past, Courts and public prosecutors have allowed those in charge of animals, and who disobeyed animal protection law, to go unpunished based on this norm.[336] As the legality of given conditions in an animal facility also is a decisive criterion in deciding whether trespass to create footage was justified, § 17 of the Criminal Code could become relevant in this context.

In conclusion, the current legal and political frameworks governing trespass on animal facilities to create footage, resonate with an error of law in two ways. First, the legal situation is to some extent unclear. What is required for a legal situation to be so unclear as to meet the threshold for § 17 of the Criminal Code is not entirely established.[337] Second, the question of whether the error can be avoided is based on the best judgement of the accused, which encompasses a moral judgement.[338] This causes problems in situations where the relationship between moral beliefs – not only of the individual but also of society as a whole – and the law is a central part of the dispute, as it tends to be in cases against animal activists. In a field where industry practice diverges from the law, legislation is not always able to keep up with jurisprudence, and both the law and practice diverge from what society would ideally prefer. That is, there is room for an error of law. As a rule, the error of law will be avoidable, but this leaves room for a mitigation of the sentence via § 17 sentence 2 of the Criminal Code pursuant to § 49 (1) of the Criminal Code.

336 OLG Frankfurt [Frankfurt Regional Court] 12 April 1979, 4 Ws 22/79, NJW 409, 1980 (the Court discontinued criminal proceedings *inter alia* due to the accused not having been aware that it was illegal to keep chickens in cages); LG Darmstadt [Darmstadt District Court], 4 October 1983, 5 Kls 4 Js 29471/81, NStZ 173, 1984 (174) (in favor of an unavoidable error of law), overturned by OLG Frankfurt [Frankfurt Regional Court], 14 September 1984, 5 Ws 2/84, NStZ 130, 1985; OLG Celle [Celle Regional Court] 10 January 1993, 1 Ss 297/92, NStZ 291, 1993 (292) (regarding enforcement issues and error of law).

337 Joecks/ Kulhanek 2020, para. 42.

338 Sternberg-Lieben, Detlef/ Schuster, Frank Peter, § 17 Verbotsirrtum, in: Adolf Schönke, Horst Schröder (founders), Albin Eser (ed.), Strafgesetzbuch (München: C.H. Beck, 30th ed. 2019), para. 41a.

9.7 Prosecutorial Discretion

Prosecutorial discretion can be employed as a mechanism to allow acts of civil disobedience to go unpunished.[339] In some cases, the question of whether non-prosecution is in the interest of those acting in civil disobedience may arise. Activists may, in fact, consider the courtroom another venue to advocate for change, thus speaking against the choice not to prosecute.

In German criminal law, § 153 of the Criminal Procedure Code allows for non-prosecution of petty offences ['Absehen von der Verfolgung bei Geringfügigkeit'] by the public prosecutor's office if: the offence at stake is a misdemeanor ['Vergehen']; the guilt of the offender is to be considered minor; and there is no public interest in prosecution. Further, § 153a of the Criminal Procedure Code (non-prosecution subject to the imposition of conditions and directions ['Absehen von der Verfolgung unter Auflagen und Weisungen']) allows for the non-prosecution of misdemeanors subject to the imposition of conditions and directions under similar conditions. In both cases, the approval of the Court is needed. Commentators critical of legal defenses for civil disobedience submit that §§ 153 and 153a of the Criminal Procedure Code may be applied in some cases.[340] It is important to note that §§ 153 and 153a of the Criminal Procedure Code do not depend on the approval of the joint plaintiff [Nebenkläger] who would typically be the person in charge of the animal facility that the activists entered.

Empirical research on the exercise of prosecutorial discretion in cases against animal activists is lacking. However, prosecutorial discretion played an important and interesting role in a recent high-profile case against the well-known animal activist Matt Johnson in the United States.[341] Johnson engaged in both the creation of undercover footage and animal rescue.[342] In January 2022, shortly before a hearing on possible news media recording

339 This possibility (albeit regarding a version of § 153 Criminal Procedure Code that has undergone changes) was also mentioned by Schüler-Springorum. Schüler-Springorum 1983, 91.

340 Perron 2019, para. 41a.

341 Bolotnikova, Martina, Animal activist was in Court on criminal charges. Why was the case suddenly dismissed?, The Guardian, 23 January 2022, available at: https://www.theguardian.com/world/2022/jan/22/an-animal-rights-activist-was-in-court-on-criminal-charges-why-was-the-case-suddenly-dismissed (last accessed 23 February 2023).

342 Ibid.

of the trial, the prosecutor filed to dismiss the charges against Johnson 'in the interest of justice.'[343] Johnson was opposed to this, and his legal team even filed an objection to the dismissal.[344] Their goal was to have what they called a 'right to recuse' being heard in Court.[345] This case shows that exercising prosecutorial discretion is not always in the interest of activists claiming civil disobedience, in particular when their goal is to effect legal change.

9.8 Sentencing

Another promising way of recognizing civil disobedience in criminal law is at the sentencing stage.[346] Political theorists and legal scholars alike have pointed out that the rationales behind punishment are rarely applicable in the case of civil disobedience.[347] One of the most prominent legal scholars who advocated this view was Claus Roxin. He argued that special prevention ['Spezialprävention'] does not speak in favor of punishment in cases of civil disobedience.[348] Quite the opposite, special prevention requires one to not treat the offenders in question as criminals, for otherwise there is a danger of radicalizing them.[349] Similarly, general prevention ['Generalprävention'] is better achieved by letting those acting in civil disobedience go unpunished, because this is how peace in society can be reestablished.[350] In the case of civil disobedience, this can be achieved by not punishing the offenders: those engaging in civil disobedience are not against the legal

343 Ibid.
344 Ibid.
345 Ibid.
346 Schüler-Springorum 1983, 92 f.; Mona 2014, 482. While civil disobedience and conscious objection are to be separated conceptually, they have much in common when it comes to the issue of punishment. Arguments made in the context of the 'Gewissenstäter' are informative for civil disobedience, too.
347 See e.g., Bennett, Christopher/ Brownlee, Kimberley, Punishment and Civil Disobedience, in: William E. Scheuerman (ed.), The Cambridge Companion to Civil Disobedience (Cambridge: Cambridge University Press 2021), 280–309, 283 with further references.
348 Roxin 1993, 455. More specifically, Roxin suggested addressing civil disobedience with an exclusion of criminal responsibility ['Ausschluss der strafrechtlichen Verantwortlichkeit'] due to the minimal level of guilt of someone acting in civil disobedience.
349 Roxin 1993, 455 f.
350 Ibid.

system as such, and therefore they should not be excluded from society. Roxin explicitly listed 'ecology' motivated civil disobedience as a possible category for acts to which the approach should be applied.[351]

Few authors dispute the appropriateness of considering civil disobedience at the sentencing stage. However, as Kent Greenawalt pointed out, it may be difficult to judge in which cases leniency is appropriate.[352] He voiced concern about arbitrariness of decisions: whether a certain motivation is worthy of impacting the enforcement of criminal law involves fundamental issues that should be in the hands of a democratic legislator, rather than individual officials.[353] However, in the absence of legislation to that end, the criteria of civil disobedience developed in Chapter 7 may be of help to identify the cases where leniency is appropriate. In Germany, § 46 (2) of the Criminal Code does leaves room for many considerations that are relevant in the context of civil disobedience, in particular, the offender's motives and objectives.

In other jurisdictions, similar provisions exist. In Switzerland, for example, the possibility of privileging civil disobedience at the sentencing stage results from Article 48 (a) (2) of the Criminal Code, according to which '[t]he Court shall reduce the sentence if [...] the offender acted [...] while in serious distress' and Article 48 (c) of the Criminal Code, which requires leniency if 'the offender acted in a state of extreme emotion that was excusable in the circumstances or while under serious psychological stress.'[354] It remains to be seen whether Courts make use of this possibility. Like with prosecutorial discretion, it is unclear to what extent the criteria of civil disobedience are considered at the sentencing stage in practice when cases against animal activists arise.

9.9 Civil Disobedience and the Law in the United States

Many of the above considerations are informative for other jurisdictions, including common law jurisdictions, particularly insofar as prosecutorial

351 Ibid., 456.

352 Greenawalt, Kent, Conflicts of Law and Morality (New York: Oxford University Press 1987), 273.

353 Ibid., 276.

354 Mona 2014, 482; For a translation see Fedlex, the publication platform for federal law, Swiss Criminal Code, available at: https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en (10 April 2021).

discretion and sentencing are concerned. Given the comparative angle of this dissertation, a brief outlook to possible legal approaches to civil disobedience cases in the United States is warranted.

Some features of the common law system may render it a more favorable forum for the discussion of civil disobedience. Above I referred to Kent Greenawalt, who wrote from a common law perspective.[355] Greenawalt pointed out that many legal terms and standards in the common law system, such as, for example, what is 'reasonable,' call for 'moral evaluation' of a given situation, albeit restraint by prior legal decisions.[356] The space that is left for 'moral evaluation' in common law may thus be broader, and therefore more conducive to considerations of civil disobedience than in civil law systems. Further, writing from a German perspective, the ethicist Konrad Ott hypothesized that the jury system could be beneficial for those who invoke civil disobedience[357] as ordinary citizens may be more receptive of these arguments than are judges who have received legal training.[358] In fact, in the United Kingdom, a jury recently acquitted climate activists who damaged property. The jury acquitted the defendants, although they had been instructed by the judge that there was no legal defense available for the defendants.[359]

In the United States, activists successfully invoked the necessity defense in cases of civil disobedience in the past.[360] In *City of Chicago v. Streeter* in 1985 protesters successfully invoked the necessity defense as codified in Illinois law.[361] The protesters were charged with trespass after they entered, and refused to leave, the South African Consulate in Chicago in protest

355 Greenawalt 1987.

356 Ibid., 282.

357 Ott, Konrad, Is Civil Disobedience Appropriate in the Case of Climate Policies?, Ethics in Science and Environmental Politics 11 (2011), 23–26, 26.

358 Ibid.

359 PA Media, Jury acquits Extinction Rebellion protesters despite 'no defense in law', The Guardian, 23 April 2021, available at: https://www.theguardian.com/environment/2021/apr/23/jury-acquits-extinction-rebellion-protesters-despite-no-defence-in-law (last accessed 9 January 2022).

360 For examples and further references see Fallon, Abigail J., Break the Law to Make the Law: The Necessity Defense in Environmental Civil Disobedience Cases and Its Human Rights Implications, Journal of Environmental Law and Litigation 33 (2018), 375–394, 381; Rausch, Joseph, The Necessity Defense and Climate Change: Climate Change Litigant's Guide, Columbia Journal of Environmental Law 44 (2019), 553–602, 570 f.

361 *City of Chicago v. Streeter*, No. 85–108644 (Cook Cty., Ill., May 1985). The decision is not publicly available online. For a summary of the relevant aspects see Wride,

of apartheid.[362] The defense brought in witnesses, including high ranking politicians, who testified to the injustice of apartheid. The protesters were acquitted by the jury.[363] Civil disobedience was also successful in *People v. Gray* in 1991.[364] The defendants in that case were charged with disorderly conduct for blocking Queensboro Bridge in New York when a new line on the bridge was scheduled to open for traffic. As part of the necessity defense, the defendants showed that additional air pollution constituted a harm to people living in New York.[365]

So far, at the time of writing, the necessity defense has not been successfully applied to the creation of undercover footage from animal facilities in the United States. Nevertheless, prominent activists have expressed their intention to pursue this option. In 2021, well-known animal activist Matt Johnson said that he intended to rely on a necessity defense when he was charged *inter alia* with violation of Iowa's ag-gag law. However, the charges against him were dismissed as the affected facility operator refused to testify.[366]

Nevertheless, the use of the necessity defense in the context of animal activism is currently receiving some attention in academic discourse. Legal scholar Hadar Aviram recently shed light on the applicability of the necessity defense in cases of animal rescue.[367] As noted previously, animal rescue and the creation of undercover footage give rise to different issues and thus the legal and moral assessment of these acts is not identical. For example, regarding necessity, it may make a difference that activists remove animals from facilities instantly, without counting on legal change to be brought about later. As such, the potential of transferring findings from animal rescue to the creation of undercover footage is limited.

Brent D., Political Protest and the Illinois Defense of Necessity, University of Chicago Law Review 54 (1987), 1070–1094, 1070.

362 Wride 1987, 1070.

363 Ibid.

364 *People v. Gray*, 150 Misc. 2d 852, 854 (N.Y. Crim. Ct. 1991). The decision is not available online. For a summary of the relevant aspects of the case see Rausch 2019, 570.

365 Rausch 2019, 570.

366 Foley, Ryan J., Charges dropped against activist who exposed Iowa hog death, AP News, 29 January 2021, available at: https://apnews.com/article/pandemics-iowa-city-iowa-trials-subpoenas-50332a3905f4913d108865d27ee5d21d (last accessed 23 February 2022).

367 Aviram, Hadar, Standing Trial for Lily: How Open Rescue Activists Mobilize Their Criminal Prosecutions for Animal Liberation, in: James Gacek, Richard Jochelson (eds.), Green Criminology and the Law (Cham: Palgrave Macmillan 2022), 85–106.

Instead, looking at cases where the necessity defense was invoked in the context of climate or environmental civil disobedience may better shed light on the potential success of this defense in cases arising from trespass to create footage. Doing so quickly highlights problems for those favorable perspectives of civil disobedience arising within common law systems as were noted above. For example, Ott underestimates the role of the judge in a jury trial. A judge may bar the defense team from presenting a necessity defense to a jury.[368] In *United States v. DeChristopher*, the Federal District Court granted the government's pre-trial motion, barring the defendant DeChristopher from using a necessity defense.[369] DeChristopher had protested against the Bureau of Land Management's auctioning of land for drilling by placing bids on land.[370] A jury sentenced DeChristopher to a prison sentence.[371] Against this backdrop, scholars argue that, even being permitted to present a necessity defense to a jury can be considered a success.[372]

Further, judges determine which evidence can be presented to the jury. This point is crucial in cases against animal activists who create undercover footage: showing the created footage to a jury may convince them that there was in fact a state of necessity. In a recent case against another prominent animal activist, Wayne Hsiung, the prosecution excluded evidence regarding the suffering of a goat rescued by Hsiung.[373] For removing the sick goat from the facility, Hsiung was convicted of larceny and breaking and entering.[374]

Additionally, if a judge allows one to present a necessity defense to a jury, the judge may still instruct the jury not to acquit the defendant on

368 Rausch 2019, 568.

369 *United States v. DeChristopher*, 695 F.3d 1082, 1088 (10th Cir. 2012). The case is not available online. For a summary see Climate Change Litigation Database, available at: http://climatecasechart.com/climate-change-litigation/case/united-states-v-dechristopher/ (last accessed 5 January 2022). See also Fallon 2018, 381.

370 Fallon 2018, 381.

371 Ibid., 384.

372 Ibid., 568.

373 Lennard, Natasha, Prosecutors Silence Evidence of Cruel Factory Farm Practices in Animal Rights Cases, The Intercept, 30 January 2022, available at: https://theintercept.com/2022/01/30/animal-rights-activists-dxe-trial-evidence/ (last accessed 3 February 2022).

374 Ibid.

this ground. As such, a jury may convict defendants despite expressing admiration for their cause.[375]

A central point in such cases is the assertion that other legal means are available to the protesters. This is a major obstacle to employing the necessity defense in cases of civil disobedience. In 1991, the Ninth Circuit made clear that it does not allow a necessity defense in cases of indirect civil disobedience where the law violated is not the law that is the one being opposed.[376] This poses a severe obstacle to the application of the necessity defense to climate protest.[377] With regard to the creation of undercover footage, the distinction between direct and indirect civil disobedience is ambivalent. Ironically, it implies better chances for the necessity defense in jurisdictions with ag-gag laws on the books. Ag-gag laws protect the property and privacy (or as activists would likely argue, secrecy) of animal facilities. When animal activists create footage in ag-gag jurisdictions, they break the law they oppose. In other jurisdictions, they break 'neutral' trespass laws, which are not the laws they oppose. Rather, they oppose low animal welfare standards or their lacking enforcement. Thus, creating footage in ag-gag jurisdictions can be framed as direct civil disobedience, for which a necessity justification is not ruled out. In other jurisdictions, the creation of footage can only be conceived of as indirect civil disobedience, for which a necessity justification is not available according to the Ninth Circuit.

9.10 Conclusion

Civil disobedience will likely continue to occupy, not only political theorists, but also legal scholars in the future. Besides animal activists, those who cross the boundaries of the law to protest climate change will press Courts to address matters of civil disobedience. This Chapter illustrated that even the most fundamental question of whether civil disobedience

375 Fallon 2018, 381; Wong, Julia Carrie, Activists lose criminal case on climate change defense – but judge praises effort, The Guardian 15 January 2016, available at: https://www.theguardian.com/environment/2016/jan/15/delta-5-seattle-washington-climate-change-court-defense (last accessed 5 January 2021).

376 *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1991). The case is not publicly available online. See also Fallon 2018, 379; Rausch 2019, 567.

377 Nosek, Grace, The Climate Necessity Defense: Protecting Public Participation in the U.S. Climate Policy Debate in a World of Shrinking Options, Environmental Law 49 (2019), 249–261, 259.

can ever be legally justified is not settled. It argued that the understanding of civil disobedience employed by German Courts is incomplete, to say the least: the argument that civil disobedience *per definition* cannot go unpunished cannot be supported.

Subsequently, this Chapter highlighted possible avenues that those defending civil disobedience on behalf of animals in Court may be able to pursue. Views according to which constitutional law, and in particular the right to freedom of expression (Article 5 (1) of the Basic Law), can be advanced as a justification for civil disobedience conflict with established legal doctrine, and should not be supported. What remains is the option of criminal law justifications, specifically necessity (§ 34 of the Criminal Code). Although a justification may be doctrinally possible in limited cases, it seems questionable whether a justification – declaring an offender's conduct legal rather than excused – is the appropriate answer to civil disobedience.

Instead, the error of law (§ 17 of the Criminal Code), a so far underexplored avenue, may provide some resources. It is certainly not a one-size-fits-all option, but it reflects the disagreement that exists between legal scholars and Courts on the issue, as well as the gray area between legality and legitimacy in which animal activists often operate.

In any case, civil disobedience can be considered when assessing the guilt of an offender, not in form of an excuse, but rather by recognizing the conscientiousness of the act as significant factor in determining adequate sentencing, and when exercising prosecutorial discretion. After all, even some of the voices critical of attaching significance to civil disobedience in the courtroom acknowledge that, in the cases at stake, the rationales for punishment rarely apply. As a result, there is little public interest in sentencing those offenders whose acts display the defining features of civil disobedience.

9.11 Outlook

The analysis of political theory in Chapter 7 and of the law in Chapter 8 taken together with the Chapter at hand allow to draw some conclusions about the relationship between law and civil disobedience. Political theorists advance different reasons for why civil disobedience is admirable in some cases. For example, defenders of the democratic approaches point out that civil disobedience can remedy democratic deficits, others point to the

urgency of certain causes, to the value of communication, or to the absence of reasons to punish those individuals who act under a sincere moral conviction. As we have seen, the potential of the law, in particular German criminal law, to accommodate these arguments, is limited. The law has its own normative structure that does consider factors such as communicative value, democracy, and necessity, but it does so on its own terms. That is to say that the communicative value and the importance and urgency of certain causes may be relevant to, for instance, a legal assessment determining whether freedom of expression is concerned, or whether a necessity justification is triggered. But the legal assessment remains independent of whether the acts in question are to be considered civil disobedience.

And yet, even given this, civil disobedience does matter to a legal study as it allows one to evaluate individual decisions, as well as the law's capacity to respond to the social and environmental challenges of our time. It helps to place concrete decisions and legal changes in the broader context of social and political change. In some cases, the moral pedigree of civil disobedience may even reach further and succeed at winning acquittals for activists even where they are not legally demanded, such as in the recent Shell case in the United Kingdom.[378] Whether this development is desirable is up for debate. Rather than giving cause for celebration, these decisions should invite us to reconsider whether the law is in need of reform, enabling a jury to find that justice can be done by applying the law.

378 PA Media, Jury acquits Extinction Rebellion protesters despite 'no defense in law', The Guardian, 23 April 2021.