

Part IV: Deliberative Democracy vs. Agonistic Pluralism

Jurisdictions in the United States, Canada, and Australia have enacted laws hindering the creation and dissemination of undercover footage from animal agriculture facilities. Dubbed ‘ag-gag’ laws, their constitutionality and compliance with the right to freedom of expression have been called into question by activists, journalists, lawmakers, and Courts. Yet, the distinctively democratic dimension of ag-gag laws has received little attention thus far. The following Chapters employ democratic theory to explain and evaluate ag-gag laws, as well as the legal and public discourse surrounding them. The focus will be on the ag-gag laws and jurisprudence arising in the United States, since this is where ag-gag originated and where Courts and legal scholars have addressed them most comprehensively (Chapter 10). However, Chapter 11 will also shed some light on recent developments in Canada and Australia. Finally, Chapter 12 compares the legal responses to undercover footage in ag-gag jurisdictions and the situation in Germany.

Writing about legal systems other than one’s own comes with certain limitations and challenges. Besides the constraints posed by limited knowledge of a different legal system, there is also the constraint that the author is influenced by a particular legal culture in which she has been educated. The theoretical underpinnings and methods of this dissertation stem from a continental European civil law context. As we will see in the following, these theoretical underpinnings are less apt to explaining and evaluating legal responses to undercover footage in other jurisdictions. They reach their limits in the doctrinal aspects of legal responses to undercover footage in the United States. Legal reasoning in response to undercover footage in the United States provides fewer resources for normative reconstruction through the lens of democratic theory than did the German decisions. Thus, the normative reconstruction in the following Chapters will be less philosophically rich than in previous Chapters on Germany. However, for the dissertation at hand, this methodological constraint is simultaneously a source of knowledge. As I will explain in Chapter 12, the lack of such material highlights a paramount difference between the legal system of Germany and that of the United States, including, but not limited to, their differential legal responses to animal activism and undercover footage.

10. Ag-Gag Laws in the United States: Preempting the ‘Court of Public Opinion’

10.1 Introduction

Legislation referred to as ‘ag-gag’ first emerged in the early 1990s in the United States.¹ Since then, it has resulted in a number of Court cases challenging the constitutionality of these laws,² as well as a rich body of secondary literature. Central to these sources is the question of whether ag-gag laws violate the First Amendment right to free speech. In the following, I will shift the focus to the distinctively democratic implications of ag-gag by arguing that ag-gag functions to ‘preempt’³ public discourse on animal issues. However, Court decisions applying US ag-gag laws are scarce. In the literature and news reports, the case against Amy Meyer in Utah was the first to gain significant attention.⁴ Meyer was filming animals as they were led into a slaughterhouse and was prosecuted for doing so under the Utah ag-gag law.⁵ While filming, Meyer was standing on public property, and thus the charges were dropped.⁶ Despite the lack of cases, critics argue that the mere existence of ag-gag laws has a chilling effect on free speech, and specifically on animal activism and investigative journalism.⁷

1 For a chronological overview see e.g., Marceau, Justin F., *Ag Gag Past, Present, and Future*, *Seattle University Law Review* 38 (2015), 1317–1343.

2 For an overview of past and ongoing litigation see ALDF, *Ag-Gag Laws – Full Timeline*, last update 22 December 2021 available at: <https://aldf.org/article/ag-gag-timeline/> (last accessed 1 February 2022). The timeline provides an important resource as it is being updated continuously and accounts for the most recent developments.

3 The notion of ‘preemption’ was first employed in the context of ag-gag by communication scholar Joshua Frye. Frye, Joshua, *Big Ag Gags the Freedom of Expression*, *First Amendment Studies* 48:1 (2014), 27–43, 28.

4 The case against Meyer received widespread attention. Journalist Will Potter reported on the case. Potter, Will, *First Ag-Gag Prosecution: Utah Woman Filmed a Slaughterhouse from a Public Street*, *Green is the New Red*, 29 April 2013, available at: <http://www.greenisthenewred.com/blog/first-ag-gag-arrest-utah-amy-meyer/6948/> (last accessed 3 August 2021).

5 Meyer, Amy, ‘Ag-gag’ laws will deter reporting on animal abuse, *The Washington Post*, 7 June 2013, available at: https://www.washingtonpost.com/opinions/ag-gag-laws-will-deter-reporting-on-animal-abuse/2013/06/07/f93e8876-ca42-11e2-9245-773c0123c027_story.html (last accessed 3 August 2021).

6 *Ibid.*

7 See e.g., Landfried, Jessalee, *Bound & Gagged: Potential First Amendment Challenges to “Ag-Gag” Laws*, *Duke Environmental Law & Policy Review* 23 (2013) 377–403, 393.

It should be noted that, unlike in previous Chapters, this Chapter will put a spotlight on ag-gag legislation itself, in addition to the decisions of Courts. This makes the lack of published Court decisions applying ag-gag laws non-consequential for the following analysis. This approach is more suitable here, as it is the legislation (rather than its application in distinctive cases) that is tailored to animal activists. Thus, where ag-gag laws exist, the legislation itself, rather than the Court decisions applying it, is the central site for legal change affecting animal activists.

This Chapter will first define ag-gag laws (Section 2), then map existing categories of ag-gag laws in the United States (Section 3), and the current status of litigation and constitutional law challenges that they have given rise to (Section 4). The Chapter does not strive for a comprehensive legal-doctrinal analysis of ag-gag which would be outside the scope of this more normative and comparatively inclined dissertation. That discussion is better left to scholars situated in the United States legal system. Rather, this Chapter will rely on the works of US legal scholars and practitioners, in particular Justin Marceau and Alan K. Chen, in delineating categories of ag-gag and possible First Amendment challenges.⁸

Sections 2 to 4 provide the basis for understanding the following legal analysis and normative reconstruction of the Idaho case: the Idaho ag-gag law is the first one that has been found to be in part unconstitutional by an Appellate Court.⁹ Section 5 analyzes the case, and Section 6 normatively reconstructs it while focusing on the notion of the 'court of public opinion.'¹⁰ In so doing, the Chapter shows that neither ag-gag laws, nor jurisprudence and existing literature, sufficiently account for the democratic challenges arising from undercover footage from animal facilities. It will argue that the metaphorical 'court of public opinion' is a site for societal debate about ani-

8 Chen, Alan K./ Marceau, Justin, Developing a Taxonomy of Lies under the First Amendment, *Colorado Law Review* 89 (2018), 655–705; Marceau, Justin/ Chen, Alan K., Free Speech and Democracy in the Video Age, *Columbia Law Review* 116 (2016), 911–1062; Chen, Alan K./ Marceau, Justin, High Value Lies, Ugly Truths, and the First Amendment, *Vanderbilt Law Review* 69 (2015), 1435–1501; Marceau, Ag Gag Past, Present, and Future, 2015.

9 *ALDF et al. v. Lawrence G. Wasden, in his official capacity as Attorney General of Idaho*, 878 F.3d 1184 (9th Cir. 2018), Ninth Circuit Appeal Decision ('*ALDF v. Wasden*', in the following). The decision is also publicly available: https://www.acluidaho.org/sites/default/files/field_documents/92_opinion.pdf (last accessed 4 August 2021). References to pages in the following refer to page numbers from this publicly available source.

10 *Ibid.*, 7, 12, 13, 22, 25.

mal agriculture, yet it also comes with serious pitfalls: it indicates conflict and antagonism. The legal discourse provides few resources to temper these problems. More precisely, legal discourse in the United States does not reflect the features of deliberative democracy which were so prevalent in previous Chapters that analyzed the decisions of German Courts. Section 7 suggests that, rather than deliberative democracy, an agonistic approach can be employed to explain and evaluate the legal responses to undercover footage in ag-gag jurisdictions. It does so by relying on the works of Chantal Mouffe, who described agonism as a theory of politics that accepts existing conflicts, and does not demand consensus-oriented deliberation, but only a respect for a pluralism of ideas.¹¹ Thus, this Chapter will argue that ag-gag laws stipulate antagonism towards animal activists, as they are based on criminalization and thus further polarize a pre-existing conflict. As such, they stand in the way of agonistic politics.

10.2 Defining Ag-Gag

Journalist Mark Bittman is credited with having coined the term ‘ag-gag’ in a New York Times article in 2011.¹² The term alleges that the laws in question ‘gag’ potential whistleblowers, journalists, and activists in the agriculture industry. A legal term for, or definition of, ag-gag does not exist. Critics commonly describe ag-gag as ‘anti-whistleblower’ laws.¹³ However,

11 See Laclau, Ernesto/ Mouffe, Chantal, *Hegemony and Socialist Strategy. Towards a Radical Democratic Politics* (London: Verso 2001); Mouffe, Chantal, *The Return of the Political* (London: Verso 1993); Mouffe, Chantal, *The Democratic Paradox* (London: Verso 2000); Mouffe, Chantal, *On the Political: Thinking in Action* (London: Routledge 2005).

12 Bittman, Mark, *Who Protects the Animals?* *The New York Times*, 26 April 2011, available at: <https://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/> (last accessed 3 August 2021).

13 See e.g., Gibbons, Chip, *Ag-Gag Across America: Corporate-backed Attacks on Activists and Whistleblowers*, Center for Constitutional Rights and Defending Rights & Dissent, 2017, 4, available at: <https://ccrjustice.org/sites/default/files/attach/2017/09/Ag-GagAcrossAmerica.pdf> (last accessed 3 August 2021); Humane Society of the United States, *Anti-Whistleblower Ag-Gag Bills Hide Factory Farming Abuses from the Public*, available at: <https://www.humanesociety.org/resources/anti-whistleblower-ag-gag-bills-hide-factory-farming-abuses-public> (last accessed 3 August 2021). Referring to animal activists who create undercover footage as whistleblowers is also common in academic literature. See e.g., Shea, Matthew, *Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-Gag*

as explained in Chapter 4 on animal activism, this description does not always appear accurate for these types of cases. However, as ag-gag has emerged as the most commonly used term in the academic literature,¹⁴ I will use it here as well.

The content of ag-gag legislation differs significantly from state to state. Only a teleological definition can express this variety. For the purpose of this dissertation, ag-gag can be defined as legislation having the primary purpose, and potential effect, of preventing animal and environmental activists from creating and disseminating undercover footage from agriculture facilities.

It is not always clear whether a piece of legislation falls under this definition or not. Particularly legislation that is currently mushrooming in Canada and Australia, analyzed in Chapter 11, might be considered a new form of ag-gag. For example, it is not clear whether laws enacted with the declared purpose of safeguarding biosecurity in fact target animal activists, and thus qualify as ag-gag laws. In these cases, the legislative history may be indicative of whether the legislation's primary purpose and potential effect is to prevent activists from creating and disseminating undercover footage.

10.3 Categorizing Ag-Gag Laws

Authors have mapped ag-gag legislation in the United States into categories¹⁵ or waves.¹⁶ For the purpose of this dissertation, I will focus on three categories, which also broadly align with the three waves of ag-gag outlined by legal scholar Justin Marceau.¹⁷ Yet, it should be kept in mind that the field is dynamic and new categories may appear over time, thus,

Laws, *Columbia Journal of Law and Social Problems* 48:3 (2015), 337–371, 338, 340; Marceau, *Ag Gag Past, Present, and Future* 2015, 1335.

14 It is even employed by authors who view these laws in a more positive light: Leamons, Josh W., *Eco-Terrorism: A Legal Update on the Laws Protecting Scientific Research from Extremist Activists*, *Journal of Biosecurity, Biosafety and Biodefense Law* 6:1 (2015), 3–45, 39f.

15 See e.g., Adam, Kevin C., *Shooting the messenger: A common-sense analysis of state "Ag-Gag" legislation under the First Amendment*, *Suffolk University Law Review* 45 (2012), 1129–1176, 113; Ladfried 2013, 380.

16 Frye 2013; Hanneken, Sarah, *Principles Limiting Recovery Against Undercover Investigators in Ag-Gag States: Law, Policy and Logic*, *The John Marshall Law Review* 50:3 (2017), 649–711, 663; Marceau, *Ag Gag Past, Present, and Future*, 2015, 1333 ff.

17 Marceau, *Ag Gag Past, Present, and Future*, 2015, 1333 ff.

the following can merely identify existing prototypes. It remains to be seen whether, in the future, other categories will be added to the list, such as laws creating civil liability.¹⁸

10.3.1 Prohibition of Recording

Prohibitions of recording on agricultural land were the first type of ag-gag legislation, dating back to before the term ag-gag was coined. This category of ag-gag laws hinges on conduct that was already illegal prior to their enactment.¹⁹ They first appeared in the early 1990s, when Kansas introduced the *Farm Animal and Field Crop and Research Facility Protection Act*.²⁰ This act criminalized non-consensual entry and recording on an animal facility with intent to cause damage to the enterprise conducted there.²¹ Scholars have voiced doubt as to whether the creation of undercover footage could be prosecuted under this law, as ‘damage’ can be interpreted in accordance with the Kansas law to require direct harm, rather than indirect harm through, for instance, decreasing meat consumption.²² Most of the law (with the exception of provisions on civil remedies and on physical damage) was struck down by a Court in 2019.²³

Montana introduced an ag-gag law in 1991.²⁴ The law requires intent to commit criminal defamation. From this, scholars have concluded that the dissemination of accurate information and footage would not fall within the Montana legislation.²⁵ North Dakota, on the other hand, passed a more extensive law in 1991 which extended criminal liability to the *attempt* to use

18 On ag-gag and civil damages see Hanneken 2017.

19 Hanneken 2017, 663; Marceau, *Ag Gag Past, Present, and Future*, 2015, 1333 ff.

20 The Farm Animal and Field Crop and Research Facilities Protection Act, Kansas Statutes Annotated § 47-1825 – 1830 (1990).

21 The Farm Animal and Field Crop and Research Facilities Protection Act, Kansas Statutes Annotated § 47-1825 – 1830 (1990).

22 Landfried 2013, 392; Shea 2015, 341.

23 ALDF, *Court Rules Kansas Ag-Gag Law Unconstitutional*, 22 January 2020, available at: <https://aldf.org/article/court-rules-kansas-ag-gag-law-unconstitutional/> (last accessed 3 August 2021). The decision is not publicly available.

24 The Farm Animal and Research Facilities Protection Act, Montana Code § 81-30-103(2)(d) (1991).

25 Marceau, *Ag Gag Past, Present, and Future*, 2015, 1334; Landfried 2013, 392; Shea 2015, 342.

recording equipment.²⁶ Scholars find that the North Dakota version lacked language specifying the intent required, and could thus be applied to a broader range of cases than could the Kansas and Montana legislation.²⁷

Ag-gag laws that hinge on recording undisputedly affect speech protected by the First Amendment. US Courts do not make a distinction between the creation of, and the product of, speech when it comes to its protection.²⁸ The creation of a recording is protected in the same way as is the product of the process.²⁹ This will be explored below in the legal analysis of the Idaho law, which also contained a recording provision.³⁰ In the Idaho case, the Courts found that the recording provision was a content-based restriction of speech and did not pass the applicable standard of strict scrutiny.³¹

10.3.2 Employment Fraud

Employment fraud provisions are associated with the second wave of ag-gag, which began in 2012.³² Iowa enacted the first ag-gag law criminalizing ‘agriculture production facility fraud,’ which applied to the misrepresentation or making of a false statement when obtaining employment at an agricultural facility knowingly, and with the intent ‘to commit an act not authorized by the owner.’³³ The offence of employment fraud did not replace ag-gag in the form of prohibition of recording. Idaho, for example, passed a law containing both elements. Similar bills were considered, but failed, in several other states including in Vermont, New Mexico, and Tennessee.³⁴

Marceau, who covered ag-gag most comprehensively, concluded that the ag-gag legislation of 2012, and the following years, criminalizes a broader

26 Animal Research Facility Damage Act, North Dakota Century Code § 12–1–21.1 – 02 – 05 (1991).

27 Marceau, *Ag Gag Past, Present, and Future*, 2015, 1334; Shea 2015, 342; Adam 1159.

28 *ALDF v. Wasden*, 35 f.; see also *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010) (*Anderson v. City of Hermosa Beach*, in the following). The decision is publicly available: <https://caselaw.findlaw.com/us-9th-circuit/1537750.html> (last accessed 4 August 2021).

29 *ALDF v. Wasden* 35 f.; see also *Anderson v. City of Hermosa Beach*.

30 *ALDF v. Wasden* 34.

31 *Ibid.*, 35.

32 Marceau, *Ag Gag Past, Present, and Future* 2015, 1335.

33 Agriculture Production Facility Fraud, Iowa Code § 717A.3A (1)(a)-(b) (2012).

34 Shea 2015, 345.

range of conduct than did the laws passed in the 1990s.³⁵ Marceau further finds that the motivation behind these laws was one of deterring harm to a farm's reputation, even if it resulted from truthful recordings. He states that '[n]othing is more anathema to the First Amendment than punishing someone for the impact of their true speech in shaping political values.'³⁶

As will be explored in greater depth in the legal analysis of the Court decisions below, the constitutionality of misrepresentation provisions and employment fraud, in particular, are in dispute. In the Idaho case, the *Wasden* and *Otter* Courts disagreed on this issue. According to the higher Court, at least employment fraud prohibitions in the strict sense do not contravene the First Amendment and are thus constitutional.³⁷ Chen and Marceau, on the other hand, plead against such provisions, invoking both First Amendment doctrine and theory.³⁸ In short, the authors argued that 'investigative deceptions,' such as lies told to obtain employment at animal facilities to create undercover footage, are of 'high value' and deserve constitutional protection.³⁹ They argued that they have 'instrumental value to the goals underlying the first amendment' as they further the search for truth.⁴⁰ I will return to this claim and critically evaluate it in light of the *ALDAF v. Wasden* decision discussed below, arguing that the considering of lies as protected speech due to their 'instrumental value' is questionable from the perspective of democracy.

10.3.3 Rapid Reporting

Both Matthew Shea and Justin Marceau considered so-called rapid or mandatory reporting laws to be the next wave of ag-gag, and beginning in 2013.⁴¹ The prototype of this category was passed in Missouri. The provision at issue provides that anyone employed at an agricultural animal facility who records what she believes to be abuse or neglect of a farm animal under the relevant legal provisions, must submit the recording to

35 Marceau, *Ag Gag Past, Present, and Future*, 2015, 1335.

36 Marceau, *Ag Gag Past, Present, and Future*, 2015, 1339.

37 *ALDF v. Wasden* 31.

38 Chen/ Marceau 2018.

39 *Ibid.*, 3.

40 *Ibid.*

41 Marceau, *Ag Gag Past, Present, and Future*, 2015, 1340; Shea 2015, 352.

law enforcement within 24 hours.⁴² Successful First Amendment challenges against rapid reporting provisions seem unlikely.⁴³ However, Marceau argues that mandatory reporting laws are 'the proverbial wolf in sheep's clothing.'⁴⁴ In his view, mandatory rapid reporting of animal abuse is not a measure to protect animals, but to deter long-term undercover activity that could indicate the implication of management and systematic practices rather than isolated conduct of employees.⁴⁵

At the time of writing, Missouri remains the only state with a rapid reporting ag-gag law on the books. Against this backdrop, rapid reporting does not seem to have become as popular as the above critics predicted. Nevertheless, rapid reporting constitutes an interesting paradigm that corresponds to some of the themes of this dissertation, falling at the intersection of animal law and fundamental rights. First and foremost, animal law scholars observed that systematic violations of animal welfare, especially in agriculture, are largely tolerated, while individual violations are prosecuted and punished.⁴⁶ Usually this observation is made with regard to the divide between efforts to counter cruelty against pets on the one hand, and lenience towards common agricultural practices on the other. However, it also features within the agriculture industry where the dismissal, and in some cases even criminal prosecution of employees, is less costly to the industry compared to ending widely accepted farming practices that harm animals. This problematic feature of animal welfare law is reproduced by rapid reporting laws. The reporting of individual incidents is encouraged, while the reporting, and possible prosecution, of systematic abuse is discouraged, as delayed reporting is penalized.

Rapid reporting laws also raise social justice concerns.⁴⁷ Workers in slaughterhouses and meat packing plants are often immigrants who are precariously waged and exposed to health risks.⁴⁸ Holding them accountable

42 Shea 2015, 355; Recordings of farm animals alleged to be abused or neglected, submission to law enforcement required, Revised Statutes of Missouri § 578.013 (2012).

43 Landfried 2013, 400.

44 Marceau, *Ag Gag Past, Present, and Future*, 2015, 1341.

45 *Ibid.*

46 In the German context see Bülte, Jens, *Zur faktischen Strafflosigkeit institutionalisierter Agrarkriminalität*, GA 165 (2018), 35–36.

47 For a critical perspective on animal welfare and the criminal law see Marceau, Justin, *Beyond Cages. Animal Law and Criminal Punishment* (Cambridge: Cambridge University Press 2019).

48 This issue received increased public attention as COVID-19 spread in those facilities. See e.g., Jordan, Miriam/ Dickerson, Caitlin, *Poultry Worker's Death Highlights*

as individuals for animal welfare violations that are widespread throughout the industry seems questionable, both from a social justice and from an animal welfare perspective.

Shea shares the doubts about rapid, mandatory reporting and shows that mandatory reporting is usually reserved for serious crimes, especially felonies such as sexual assault.⁴⁹ Targeting a failure to report, especially via criminal law, is beneficial if, and only if, other measures have been taken to safeguard animal welfare. It is generally understood that the criminal law is the *ultima ratio* in a liberal democracy. Therefore, before penalizing the failure to report, other means of ensuring a swift response to animal welfare violations should be established. Animal welfare can only be achieved through transparency, rather than secrecy. For example, England made CCTV mandatory in slaughterhouses.⁵⁰ Further, channels for whistleblowers to report animal abuse within and outside of their companies could be established. Both would be alternative measure serving the declared aim of uncovering animal abuse without resorting to the criminal liability of individuals.

Nevertheless, it has to be acknowledged that rapid reporting laws are different from ag-gag proper. In fact, extending the term ag-gag to laws that make reporting mandatory is a paradox. Several states already have laws obliging veterinarians to report animal abuse.⁵¹ If it was not for the link to ag-gag, notably through the focus on handing over recordings (rather than just reporting), extending such obligations to workers could potentially tackle the enforcement gap in animal welfare law. However, for this possibility to become reality, reporting would have to be mandatory regardless of

Spread of Coronavirus in Meat Plants, The New York Times, 9 April 2020, available at: <https://www.nytimes.com/2020/04/09/us/coronavirus-chicken-meat-processing-plants-immigrants.html> (last accessed 24 October 2021); Laughland, Oliver/Holpuch, Amanda, 'We're modern slaves': how meat plant workers became the new frontline in in Covid -19 war, The Guardian, 2 May 2020, available at: <https://www.theguardian.com/world/2020/may/02/meat-plant-workers-us-coronavirus-war> (last accessed 24 October 2021).

49 Shea 2015, 363 ff.

50 Department for the Environment, Food & Rural Affairs, Press Release, CCTV becomes mandatory in all abattoirs in England, 4 Mai 2018, available at: <https://www.gov.uk/government/news/cctv-becomes-mandatory-in-all-abattoirs-in-england> (last accessed 24 October 2021).

51 See American Veterinary Medical Association, Summary Report: Reporting Requirements for Animal Abuse, Updated March 2021, available at: <https://www.avma.org/sites/default/files/2021-03/Reporting-requirements-for-animal-abuse.pdf> (last accessed 8 June 2021).

footage. Any witnessing of animal abuse, even in the absence of recording, would have to trigger a duty to report. For the animals affected, the fact that cruelty against them has been recorded does not make a difference.

10.4 Litigation

Ag-gag laws have been subject to legal challenges across the United States. Animal advocacy associations, joined by affected individuals, journalists, and media associations,⁵² frequently question their constitutionality, with mixed results.⁵³ The first lawsuit was filed in 2013 by the Animal Legal Defense Fund (ALDF) and others. The case was filed against the ag-gag law of Utah enacted in 2012, arguing that the law violated the First and Fourteenth Amendments.⁵⁴ This case involved Amy Meyer as a plaintiff, who had been charged for violating the Utah ag-gag law. The case against Meyer was subject to widespread attention and was soon dismissed.⁵⁵ As mentioned above, Meyer had filmed a slaughterhouse, but the Court believed that, while doing so, she was standing on public property.⁵⁶ However, *ALDF v. Herbert* is an example of successful litigation against ag-gag since the United States District Court of Utah declared the law unconstitutional in 2017.⁵⁷

52 For an example of the involvement of media associations see e.g., Brief of Amici Curiae The Reporters Committee for Freedom of the Press and 25 Media Organizations In Support of Plaintiffs-Appellants Urging Reversal, in *PETA et al. v. Stein*, filed 11 August 2017, available at: <https://www.rcfp.org/wp-content/uploads/imported/2017-08-11-peta-nc.pdf> (last accessed 5 August 2021).

53 For an overview of past and ongoing litigation see ALDF, Ag-Gag Laws – Full Timeline, available at <https://aldf.org/issue/ag-gag/> (last accessed 3 August 2020). The timeline provides an important resource as it is being updated continuously and accounts for the most recent developments.

54 *ALDF et al. v. Gary R. Herbert in his official capacity as Governor of Utah, and Sean D. Reyes, in his official capacity as Attorney General of Utah*, 2:13-cv-00679RJS (D. Utah 2017), memorandum decision and order (*‘ALDF v. Herbert’*, in the following). The decision is also publicly available: <https://www.animallaw.info/case/animal-legal-defense-fund-v-herbert-0> (last accessed 5 August 2021).

55 The decision is not available. For a summary see Potter, Will, First Ag-Gag Prosecution: Utah Woman Filmed a Slaughterhouse from a Public Street, Green is the New Red, 29 April 2013, available at: <http://www.greenisthenewred.com/blog/first-ag-gag-arrest-utah-amy-meyer/6948/> (last accessed 3 August 2021).

56 Potter, First Ag-Gag Prosecution, 2013.

57 *ALDF v. Herbert*.

Similar cases were brought by ALDF, PETA, and others in several states. So far, Courts have struck down ag-gag laws, in whole or in part, in Utah,⁵⁸ Idaho (see below),⁵⁹ North Carolina,⁶⁰ Iowa,⁶¹ and Kansas.⁶² Further decisions, but also the passing of new legislation in response, are to be expected in the near future. For example, Iowa passed a new ag-gag measure in April 2021,⁶³ after the previous one was struck down in 2020.⁶⁴

Central to the litigation so far has been the question of whether ag-gag legislation violated the Equal Protection Clause of the Fourteenth Amendment, and the right to free speech enshrined in the First Amendment. The Idaho case can speak to so-called employment fraud and recording provisions. Legal challenges against other categories of ag-gag cannot be comprehensively covered here. As to rapid reporting laws, the situation remains as it was in 2013 when Landfried argued that it is difficult to imagine successful First Amendment challenges against them.⁶⁵ However, Equal Protection is a more promising starting point in these cases.⁶⁶

Another emerging category is legislation targeting the dissemination, rather than the creation, of footage. This type of ag-gag legislation is likely unconstitutional. Legislation containing such a provision was discussed in Minnesota in 2011.⁶⁷ Especially considering the litigation since then, includ-

58 Ibid.

59 *ALDF v. Wasden*.

60 *PETA et al. v. Josh Stein, in his official capacity as Attorney General of North Carolina, and Dr. Kevin Guskiewicz, in his official capacity as Chancellor of the University of North Carolina-Chapel Hill*, (4th Cir.). Briefs are available at: <https://food.publicjustice.net/case/peta-et-al-v-cooper-et-al/> (last accessed 5 August 2021).

61 Palotta, Nicole, *Though Ruled Unconstitutional, Industry Keeps Pushing Ag-Gag Laws: Updates in North Carolina, Kansas, and Ontario*, ALDF Website, 15 September 2020 available at: <https://aldf.org/article/though-ruled-unconstitutional-industry-continues-pushing-ag-gag-laws-updates-in-north-carolina-kansas-iowa-ontario/> (last accessed 9 August 2021). The decision is not publicly available online.

62 *ALDF v. Laura Kelly and Derek Schmidt*, CV 18–2657-KHV, 2020 WL 362626 (D. Kan. 2020), memorandum and order. The decision is publicly available at: <https://www.animallaw.info/case/animal-legal-defense-fund-center-food-safety-shy-38-inc-hope-sanctuary-plaintiffs-v-laura-kelly> (last accessed 5 August 2021).

63 Iowa Legislature, House File 775, 30 April 2021, available at: <https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=hf775> (last accessed 9 August 2021).

64 Pallotta 2020.

65 Landfried 2013, 400; see also Coleman, Jacob, *ALDF v. Otter: What does it mean for other State's „Ag-gag“ Laws?*, *Journal for Food Law & Policy* 13:1 (2017), 180–227, 221.

66 Coleman 2017, 221.

67 Minnesota Legislature, Office of the Revisor of Statutes, *House File 1369*, a bill for an act relating to agriculture; imposing penalties and remedies for certain offenses;

ing the Idaho case discussed below, legislation prohibiting the possession or dissemination of unlawfully created recordings from animal facilities would not be sustainable under the First Amendment. Just like provisions targeting the creation of recordings, it would constitute a content-based restriction of free speech and would likely be considered overinclusive (see below).⁶⁸ Furthermore, the Supreme Court held in *Bartnicki v. Vopper* that the publication of truthful information on a matter of interest to the public was protected by the First Amendment, even if media had reason to believe that it had been obtained illegally.⁶⁹

10.5 A Legal Analysis of Ag-Gag: The Idaho Case *ALDF v. Wasden*

This Section will conduct a legal analysis of the Ninth Circuit decision in *ALDF v. Wasden*.⁷⁰ The case pertains to Idaho's ag-gag law. ALDF successfully challenged the constitutionality of the law before the District Court of Idaho in *ALDF v. Otter*.⁷¹ Judge Winmill dismissed Otter as a defendant,⁷² and granted a summary judgement to the plaintiffs.⁷³ The Ninth Circuit Court of Appeals then reversed the lower Court's decision in part.⁷⁴

proposing coding for new law in Minnesota Statutes, Chapter 17, did not become law, available at: <https://www.revisor.mn.gov/bills/text.php?number=Hfl369&version=0&session=ls87> (last accessed 28 August 2022).

68 Landfried 2013, 397 f.

69 *Bartnicki v. Vopper* 532 U.S. 514, 534 (2001). The decision is publicly available at: <https://supreme.justia.com/cases/federal/us/532/514/> (last accessed 4 August 2021).

70 *ALDF, et al. v. C. L. Butch Otter in his official capacity as Governor of Idaho; and Lawrence Wasden, in his official capacity as State of Idaho*, 118 F. Supp. 3d 1195, 1199 (D. Idaho 2015), summary judgement decision ('*ALDF v. Otter*, summary judgement decision' in the following). The decision is also available at: https://www.acluidaho.org/sites/default/files/field_documents/summary_judgment_decision_0.pdf (last accessed 4 August 2021). References to pages in the following refer to page numbers from this publicly available source.

71 *Ibid.*

72 *ALDF, et al. v. C. L. Butch Otter in his official capacity as Governor of Idaho; and Lawrence Wasden, in his official capacity as State of Idaho*, 44 F. Supp. 3d 1009 (D. Idaho 2014), decision denying motion to dismiss ('*ALDF v. Otter*, decision denying motion to dismiss' in the following). The decision is also available at: https://www.acluidaho.org/sites/default/files/field_documents/decision_denying_motion_to_dismiss.pdf (last accessed 4 August 2021). References to pages in the following refer to page numbers from this publicly available source.

73 *ALDF v. Otter*, summary judgement decision.

74 *ALDF v. Wasden*.

The legal analysis will be followed by a normative reconstruction in Section 6. Together, the legal analysis and normative reconstruction of *ALDF v. Wasden* shed light on the legal and normative dimensions of ag-gag. *ALDF v. Wasden* is suitable for this project for several reasons. The decision is the first in which an Appellate Court has struck down provisions of an ag-gag law. Further, the law in question contains elements of the different types of ag-gag laws discussed above. Thus, it holds implications for the ag-gag laws of other states.⁷⁵ But, most importantly, the decision of the Ninth Circuit includes references to extralegal notions such as the ‘court of public opinion,’ and can be linked to a democratic argument for freedom of expression.

10.5.1 Background and Facts

In 2012, the animal advocacy group Mercy for Animals obtained undercover footage from an Idaho dairy farm.⁷⁶ It provided an edited version of the footage to the Idaho State Department of Agriculture and, after the investigation was finished, published the footage, thus drawing widespread attention to animal abuse on farms.⁷⁷ Idaho’s *Interference with Agricultural Production* law was introduced and passed shortly after, signed by Governor Otter on 14 February 2014.⁷⁸

As the Majority Opinion in *ALDF v. Wasden* acknowledged, the bill was drafted by the Idaho Dairymen’s Association, a trade organization who represents the dairy industry’s interests.⁷⁹ One of its declared purposes was to prevent undercover investigations which could ‘expose the industry to the “court of public opinion”’ and result in a loss of customers.⁸⁰ In the legislative debate, lawmakers further invoked privacy and security concerns.⁸¹ Others referred to animal activists as terrorists.⁸²

75 See also Coleman 2017.

76 *ALDF v. Otter*, summary judgement decision, 1.

77 Both Court decisions emphasise the link between this incident and the bill. *ALDF v. Otter*, summary judgement decision, 1 f.; *ALDF v. Wasden* 9.

78 *ALDF v. Otter*, summary judgement decision, 2.

79 *ALDF v. Wasden* 11.

80 *Ibid.*, 11 ff.

81 *Ibid.*, 12.

82 *Ibid.*, 13.

Idaho, at this point, already had legislation on the books protecting the agricultural sector from interferences caused *inter alia* by trespass with the intent to cause damage to, or hinder, agricultural research, enshrined in Idaho Code § 18-7040.⁸³ The new Interference with Agricultural Production law was inserted in § 18-7042 and went even further. When referring to the Idaho Code in the following, I am referring to § 18-7042 of the 2014 version. Subsection (1) read:

- (1) A person commits the crime of interference with agricultural production if the person knowingly:
- (a) Is not employed by an agricultural production facility and enters an agricultural production facility by force, threat, *misrepresentation* or trespass;
 - (b) Obtains records of an agricultural production facility by force, threat, *misrepresentation* or trespass;
 - (c) Obtains employment with an agricultural production facility by force, threat, or *misrepresentation* with the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers;
 - (d) *Enters an agricultural production facility that is not open to the public and, without the facility owner's express consent or pursuant to judicial process or statutory authorization, makes audio or video recordings of the conduct of an agricultural production facility's operations;* or
 - (e) Intentionally causes physical damage or injury to the agricultural production facility's operations, livestock, crops, personnel, equipment, buildings or premises.⁸⁴
(emphasis added to passages that were challenged).

Subsection (2)(a)(v) defines agricultural production. The definition covers not only the keeping of livestock and other animals, but is so broad that – as the Court of Appeals noted in *Wasden* – even a grocery store or restaurant with a herb garden could be covered.⁸⁴ Subsection (3) provides that someone who commits the above offence is guilty of a misdemeanor and is to be punished with imprisonment for a maximum of one year

83 Ibid., 12 ff.

84 Ibid., 23.

and/or with a fine of up to 5000 US dollars.⁸⁵ In addition, according to subsection (4), an offender will be required to:

‘make restitution to the victim of the offense in accordance with the terms of Idaho Code § 19–5304. Provided however, that such award shall be in an amount equal to twice the value of the damage resulting from the violation of this section.’⁸⁶

10.5.2 Procedural History and *ALDF v. Otter*

In 2014, ALDF (supported by a broad coalition of organizations and individuals such as, for example, PETA, the ACLU Idaho, and media organizations) filed a federal action against Idaho Governor, C.L. “Butch” Otter and Idaho Attorney General, Lawrence Wasden, in the United States District Court for the District of Idaho.⁸⁷ They claimed that purpose and effect of the statute were ‘to stifle political debate about modern agriculture by (1) criminalizing all employment-based undercover investigations; and (2) criminalizing investigative journalism, whistleblowing by employees, or other expository efforts that entail images or sounds.’⁸⁸ ALDF and the other plaintiffs challenged the statute based on free speech (First Amendment) as well as equal protection (Fourteenth Amendment) grounds.⁸⁹ Concretely, the plaintiffs challenged § 18–7042(1)(d) and the misrepresentation provisions in § 18–7042(1)(a)-(c) (see above in italics).⁹⁰

The District Court dismissed Otter as a defendant. However, it granted summary judgment to the plaintiffs and declared the Idaho ag-gag law unconstitutional on 3 August 2015.⁹¹ The District Court found that the law violated both the right to free speech enshrined in the First Amendment, and the Equal Protection Clause.⁹² It did so regarding the misrepresentation provisions in § 18–70–42(1)(a)-(c)⁹³ as well as the recording provision

85 Idaho Code § 18–7042 (3) (2014).

86 Idaho Code § 18–7042 (4) (2014).

87 *ALDF v. Otter*, summary judgement decision, 2.

88 *ALDF v. Wasden* 13.

89 ALDF further raised claims under three different federal statutes. However, these claims are not at issue here. *ALDF v. Otter*, summary judgement decision, 3.

90 *ALDF v. Wasden* 17 ft. 8.

91 *ALDF v. Wasden*.

92 *Ibid.*

93 *Ibid.*, 9 ff.

in § 18–7042(1)(d).⁹⁴ Not only did the District Court consider undercover investigations to create ‘politically-salient speech,’⁹⁵ it also stated that the legislation in question:

‘seeks to limit and punish those who speak out on topics relating to the agricultural industry, striking at the heart of important First Amendment values. The effect of the statute will be to suppress speech by undercover investigators and whistleblowers concerning topics of great public importance: the safety of the public food supply, the safety of agricultural workers, the treatment and health of farm animals, and the impact of business activities on the environment.’⁹⁶

The state of Idaho appealed.

10.5.3 Applicable Law

The First Amendment was most central to the case. A First Amendment challenge entails three steps.⁹⁷ First, the plaintiff must demonstrate that the First Amendment applies; meaning that the activity at stake is in fact protected speech.⁹⁸ If this is the case, the Court must, in a second step, determine which First Amendment standards are applicable.⁹⁹ Third, the Court must assess whether the government’s justification for restricting the speech in question suffices for the applicable standard.¹⁰⁰ The reasoning of the Ninth Circuit engaged all three steps of the analysis.

94 *Ibid.*, 13 ff.

95 *ALDF v. Otter*, summary judgement decision, 12.

96 *Ibid.*, 6.

97 *Ibid.*, 8.

98 *Ibid.*; citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n. 5 (1984). The decision is publicly available at: <https://www.law.cornell.edu/supremecourt/text/468/288> (last accessed 6 August 2021).

99 *ALDF v. Otter*, summary judgement decision, 8; citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985) (*‘Cornelius v. NAACP Legal Def. & Educ. Fund,’* in the following). The decision is publicly available: <https://supreme.justia.com/cases/federal/us/473/788/> (last accessed 6 August 2021).

100 *ALDF v. Otter*, summary judgement decision, 8; citing *Cornelius v. NAACP Legal Def. & Educ. Fund*.

Amongst the cases cited by the Courts, *United States v. Alvarez* stands out.¹⁰¹ In this case, the Supreme Court struck down the *Stolen Valor Act*, a federal statute making it a crime to lie about receiving military medals or decorations.¹⁰² Central to the case was the question of whether lies are protected speech under the First Amendment. In a nutshell, the plurality opinion and the concurrence found that false speech did not constitute a category generally unprotected by the First Amendment.¹⁰³ However, lies may be restricted if they are made for material gain or inflict legally recognizable harm, for example.¹⁰⁴ Both the District Court and the Court of Appeals applied *Alvarez* to the misrepresentation provisions in Idaho Code § 18–7042(1)(a)–(c), to determine whether they restricted speech protected by the First Amendment, and to determine which standard was applicable for possible regulation.¹⁰⁵

As for the recording provision in § 18–7042(1)(d), *Anderson v. City of Hermosa Beach* requires mentioning.¹⁰⁶ In this case, the Ninth Circuit held – with regard to the process of tattooing – that there is no line to be drawn between the creation of speech and its dissemination.¹⁰⁷ Both are protected by the First Amendment.¹⁰⁸ The *Wasden* Court applied ‘strict scrutiny’ to the recording provision, requiring ‘some pressing public necessity, some essential value that has to be preserved; and, even then, the law must restrict as little speech as possible to serve the goal.’¹⁰⁹

Further, the Ninth Circuit applied the Equal Protection Clause to § 18–7042(1)(b) and (c). In so doing, it was guided by *City of Cleburne v. Cleburne Living Ctr.*, finding that the targeting of a specific group – in *Cleburne* the group was persons with mental disabilities – did not necessarily require heightened scrutiny and could pass the so-called rational basis

101 *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (*‘United States v. Alvarez,’* in the following). The decision is publicly available: <https://www.supremecourt.gov/opinions/11pdf/11-210d4e9.pdf> (last accessed 6 August 2021).

102 *Ibid.*

103 *Ibid.*, 7.

104 *Ibid.*, 6, 11.

105 *ALDF v. Otter* 13 ff.; *ALDF v. Wasden* 16 ff.

106 *ALDF v. Wasden* 35 f.; *ALDF v. Otter*, summary judgement decision, 9 f.

107 *Anderson v. City of Hermosa Beach*.

108 *Ibid.*

109 *ALDF v. Wasden* 34, 38; citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). The decision is publicly available at: <https://supreme.justia.com/cases/federal/us/512/622/> (last accessed 9 August 2021).

test, if it was based on a legitimate government aim and not on ‘irrational prejudice.’¹¹⁰

10.5.4 Reasoning of the Court

Unlike the District Court, the higher Court found only the misrepresentation provision in § 18–7042(1)(a) (entering an agricultural production facility by misrepresentation) and the recording provision in § 18–7042 (making audio or video recordings of an agricultural production facility’s operations without consent or other authorization) to violate the First Amendment.¹¹¹ In light of this, the Court refrained from analyzing the provisions under the Equal Protection Clause.¹¹² However, the Court considered the misrepresentation provisions in § 18–7042(1)(b) (misrepresentation to obtain records) and § 18–7042(1)(c) (misrepresentation to gain employment with the intent to cause economic or other injury) permissible under both the First and Fourteenth Amendments.¹¹³

10.5.4.1 Misrepresentation to Gain Entry

With regard to § 18–7042(1)(a) the Court stated: ‘The hazard of this subsection is that it criminalizes innocent behavior, that the overbreadth of this subsection’s coverage is staggering, and that the purpose of the statute was, in large part, targeted at speech and investigative journalists.’¹¹⁴ According to the Court, the misrepresentation to gain entry provision applied to speech protected by the First Amendment.¹¹⁵ Crucially, the Court stated that speech that is simply false and made in order to gain access to an agricultural production facility does not imply that it effects fraud or is made to ‘secure money or other valuable considerations.’¹¹⁶ Unlike what the

110 *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (‘*City of Cleburne v. Cleburne Living Ctr.*,’ in the following). The decision is publicly available at: <https://supreme.justia.com/cases/federal/us/473/432/> (last accessed 6 August 2021).

111 *ALDF v. Wasden* 17 ff. (on misrepresentation), 34 ff. (on recording).

112 *Ibid.*, 26 f.

113 *Ibid.*, 27, 29.

114 *Ibid.*, 18.

115 *Ibid.*, 17 f.

116 *Ibid.*, 18 citing *United States v. Alvarez* (opinion of Justice Kennedy).

State of Idaho argued, material gain does not consist of the entry itself.¹¹⁷ Pursuant to this understanding, a teenager who makes a reservation at a high-end restaurant under his mother's name would be liable under the law – even if he leaves the restaurant before ordering, or if he pays for a meal like any other guest.¹¹⁸ In both cases, the Court said ‘the lie is pure speech,’ and damage does not occur.¹¹⁹ In the same scenario, the teenager would likely not even be liable for ordinary trespass under Idaho law, noted the Court.¹²⁰

Further, the Court pointed to *Food Lion, Inc. v. Capital Cities/ABC, Inc.* and *Desnick v. American Broadcasting Companies, Inc.*¹²¹ In these cases, the Fourth and the Seventh Circuit Courts respectively were required to decide on trespass claims against journalists who misrepresented their identities.¹²² Both Courts denied trespass, saying that the entry predicated by misrepresentation did not infringe upon the interests of the plaintiffs that trespass law protects, namely ownership and possession.¹²³

Returning to the example of the teenager described above, the Court found that, under the law in question, he could be subjected to criminal prosecution for what was an unimportant lie.¹²⁴ The misrepresentation provision in § 18–7042(1)(a) thus covered ‘falsity and nothing more’ and was, in accordance with the plurality in *United States v. Alvarez*, subject to ‘most exacting scrutiny.’¹²⁵ This means that the speech restriction in question ‘must be “actually necessary” to achieve a compelling government interest, and that there must be a “direct causal link between the restriction imposed and the injury to be prevented.”’¹²⁶

The Court found that the misrepresentation provision in § 18–7042(1)(a) did not pass this test. First, the Court assumed that the state of Idaho

117 *ALDF v. Wasden* 18.

118 *Ibid.*, 18 f.

119 *Ibid.*, 19.

120 *Ibid.*, 21.

121 *Ibid.*, 20; *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (1999) (*‘Food Lion, Inc. v. Capital Cities/ABC, Inc.’*, in the following). The decision is also publicly available: <https://caselaw.findlaw.com/us-4th-circuit/1201654.html> (last accessed 6 August 2021). *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345 (1995).

122 *ALDF v. Wasden* 20; *Food Lion, Inc. v. Capital Cities/ABC, Inc.* 581.

123 *Ibid.*

124 *ALDF v. Wasden* 21.

125 *Ibid.*, citing *United States v. Alvarez* (opinion of Justice Kennedy).

126 *ALDF v. Wasden* 21 f., citing *United States v. Alvarez* (opinion of Justice Kennedy).

had a 'compelling interest' in protecting property rights and the agriculture industry.¹²⁷ Even in this case, according to the Court, the provision criminalizing misrepresentation was not necessary. Ordinary trespass laws, which do not restrict speech, would have been sufficient.¹²⁸

However, the Court voiced concern that this was not the main interest behind the legislation.¹²⁹ Pointing to the legislative history, and in particular statements of legislators and representatives of the dairy industry, the Court considered the possibility that the objective behind the legislation was in fact to 'quash investigative reporting on agriculture production facilities.'¹³⁰ In this case the Court found that the statute 'is even more problematic. The focus of the statute to avoid the "court of public opinion" and treatment of investigative videos as "blackmail" cannot be squared with a content-neutral trespass law.'¹³¹ The Court even goes so far as to voice a 'suspicion that [subsection (a)] may have been enacted with impermissible purpose.'¹³² It bases this concern, again on the legislative history, in particular the intent to 'protect members of the agricultural industry from "persecute[ion] in the Court of public opinion"' and from undercover journalists.¹³³ Although the Court did not find it necessary to determine the motivation behind the law in question with certainty, it made clear that these concerns added to the finding that the provision in question did not satisfy the "exacting scrutiny" required under *Alvarez*.¹³⁴

Further, the Court criticized the fact that the misrepresentation provision could lead to selective prosecutions, where only targeted groups, such as investigative journalists, would fear prosecution and risk higher penalties than they did under ordinary trespass laws, while others, such as the teenager in the above example, would remain unaffected.¹³⁵ The Court also took issue with the breadth of the statute, considering the definition of 'agricultural production facility' and 'agricultural production' in § 18-7042(2)(a) and (b), respectively.¹³⁶ The Court found that these definitions

127 *ALDF v. Wasden* 22.

128 *Ibid.*

129 *Ibid.*

130 *Ibid.*

131 *Ibid.*

132 *Ibid.*, 25.

133 *Ibid.*

134 *Ibid.*, 25 f.

135 *Ibid.*, 22 f.

136 *Ibid.*, 23.

would encompass even restaurants with herb gardens or grocery stores, in other words, places generally open to the public.¹³⁷ Again, the Court pointed to *Alvarez* where the Supreme Court criticized the *Stolen Valor Act* for its ‘sweeping, quite unprecedented reach.’¹³⁸ The limitation, through the requirement ‘knowingly,’ was not considered to counter the broad reach of the statute in the eyes of the Court.¹³⁹ Particularly as speakers might still be concerned about being prosecuted if they make a careless statement, which may result in a chilling effect on speech.¹⁴⁰

Finally, the Court took into account that the majority of the Judges on the Supreme Court, who agreed that the *Stolen Valor Act* must be struck down, could not agree on a common rationale. In his concurring opinion Justice Breyer indicated that intermediate scrutiny should be applicable.¹⁴¹ In *Wasden*, the Court argued that the misrepresentation provision in § 18–7042(1)(a) would still not pass the test, if intermediate scrutiny was applied: the speech in question would not inflict ‘specific harm,’ is very broad, and may have a ‘chilling effect’ on speech not actually covered by the provision.¹⁴² ‘A more finely tailored statute’ could achieve the government’s objective of protecting property rights.¹⁴³

As for possible solutions, the Court found that the State may simply strike out the misrepresentation provision in § 18–7042(1)(a).¹⁴⁴ It also mentioned the option of adding a requirement for specific intent or harm caused, as it is the case in § 18–7042(1)(c).¹⁴⁵ In that case, the provision would be in line with the First Amendment requirements set out in *Alvarez*.

137 Ibid.

138 Ibid., citing *United States v. Alvarez* (opinion of Justice Kennedy).

139 *ALDF v. Wasden* 24.

140 Ibid.

141 *United States v. Alvarez* (opinion of Justice Breyer).

142 *ALDF v. Wasden* 26. In *Alvarez* there was no consensus over whether strict scrutiny applied. Chen and Marceau side with the Otter Court and convincingly argue that in the case of ag-gag laws strict scrutiny must apply. Chen/ Marceau 2015, 1480 ff.

143 *ALDF v. Wasden* 26.

144 Ibid.

145 Ibid., 24.

10.5.4.2 *Obtaining Records by Misrepresentation*

The District Court had found all three misrepresentation provisions in Idaho Code § 18–7042 (1)(a)-(c) unconstitutional. It argued that the lies told by undercover investigators were not told in order to facilitate material gain, but to ‘advance Core First Amendment values by exposing misconduct to the public eye and facilitating dialogue on issues of considerable public interest.’¹⁴⁶ With regard to the misrepresentation provisions in § 18–7042(1) (b) and (c), the Circuit Court revised the decision of the District Court.

The higher Court found that Subsection (b) did not regulate speech protected by the First Amendment.¹⁴⁷ In its reasoning, the Court highlighted differences between Subsections (a) and (b). First, the act of misrepresentation to obtain records may – unlike misrepresentation to gain entry – ‘inflict a property harm upon the owner, and may also bestow a material gain on the acquirer.’¹⁴⁸ The Court showed that similar conduct has long been prohibited in Idaho in a number of statutes, for example, in theft by false pretense in Idaho Code § 18–2403(2)(a), (b). As for the harm to the owner, the Court argued that depriving an agricultural production facility owner of the ability to exercise control over his property constituted a ‘legally recognizable harm.’¹⁴⁹ Besides property, other rights protected by Idaho law, such as those relating to trade secrets might also be affected.¹⁵⁰ Obtaining records showing confidential information constitutes a ‘material gain.’ Thus, prohibiting misrepresentation to obtain them is permissible in accordance with *Alvarez*.¹⁵¹ In addition, the legislative history behind Idaho Code § 18–7042(1)(b) showed that the conduct prohibited therein has either caused harm or threatens to cause harm. The Court pointed to the damage that can occur when the location of genetically engineered crops is disclosed.¹⁵² Further, the Court inferred from the legislative history that, although some proponents of the law sought to counter undercover investigations, Subsection (b) served the legitimate purpose of preventing harm caused by the taking of records.¹⁵³

146 *ALDF v. Otter*, summary judgement decision, 12.

147 *ALDF v. Wasden* 29.

148 *Ibid.*, 27.

149 *Ibid.*, 28.

150 *Ibid.*

151 *See United States v. Alvarez* (opinion of Justice Kennedy).

152 *ALDF v. Wasden* 28.

153 *Ibid.*, 28 f.

10.5.4.3 Obtaining Employment by Misrepresentation

Unlike the District Court, the Circuit Court found that Idaho Code § 18–7042(1)(c) was in accordance with guidance given by the Supreme Court in *Alvarez* and with the First Amendment.¹⁵⁴ In *Alvarez*, employment offers were explicitly listed as a kind of material gain, and the government may restrict lies for material gain.¹⁵⁵ Further, the Court found that the scope of Subsection (c) was limited by the requirement of ‘intent to cause economic or other injury.’¹⁵⁶ Unlike ALDF claimed, this requirement excluded someone who simply overstates her qualifications in her resume to get a job.¹⁵⁷ Rather, as the government claimed, the provision was in line with ‘the covenant of good faith and fair dealing that is implied in all employment agreements in Idaho.’¹⁵⁸

In its analysis of § 18–7042(1)(c), the Court also turned to the restitution clause in § 18–7042(4) and made clear that it understood this provision not to include reputational or similar damage.¹⁵⁹ It should be noted that debates about so-called ‘employment fraud’ versions of ag-gag are not settled. Marceau and Chen argued – notably in 2015, prior to the Ninth Circuit Court decision at issue – that even under *Alvarez*, lies told to obtain employment must not always be left unprotected by the First Amendment.¹⁶⁰

10.5.4.4 Recordings Provision

The Circuit Court found that § 18–7042(1)(d) not only regulated speech protected by the First Amendment, but also constituted a ‘content-based restriction that cannot survive strict scrutiny.’¹⁶¹ First, the Court made clear that creating a recording was speech protected by the First Amendment. Denying this, said the Court, would be ‘akin to saying that even though

154 *Ibid.*, 31.

155 *Ibid.*, citing *United States v. Alvarez* (opinion of Justice Kennedy).

156 *ALDF v. Wasden* 31, Idaho Code § 18–7042(1)(c) (2014).

157 *Ibid.*, 31 f.

158 *Ibid.*, 32.

159 *ALDF v. Wasden* 32 f.

160 *Ibid.*, 56 f.; Chen/ Marceau 2015.

161 *ALDF v. Wasden* 34.

a book is protected [...] the process of writing the book is not.¹⁶² Further, audiovisual recordings constitute 'organ[s] of public opinion' and they are significant 'for the communication of ideas.'¹⁶³ The Court further pointed out the importance of recorded images for public discourse.¹⁶⁴ It cited *Fordyce v. City of Seattle*, affirming a right, based on the First Amendment 'to film matters of public interest.'¹⁶⁵ Citing *Anderson v. City of Hermosa Beach* it further showed that drawing a distinction between the process of creating speech and the product of the process would be contrary to existing jurisprudence and common sense.¹⁶⁶

Further, the Court considered Idaho Code § 18–7042(1)(d) to contain a content-based restriction on speech. The provision criminalized the recording of a 'defined topic' namely 'conduct of an agricultural production facility's operations.'¹⁶⁷ It was clearly a content-based restriction on speech, since, in the words of the Supreme Court in *Reed v. Town of Gilbert*, 'it defin[es] regulated speech by particular subject matter.'¹⁶⁸ A content-based restriction is given when the regulation applies depending on the content of the message 'or when the purpose and justification of the law are content based.'¹⁶⁹ Importantly, the Court further cited *United States v. Stevens*, a landmark case on the connection between animal welfare and the First Amendment. In this case, the Supreme Court struck down a statute pro-

162 *Ibid.*, 35. This clarification is important. Chen and Marceau argue that a misrepresentation is not the 'proximate cause' for reputational damage. Rather, the wrongdoing of the facility operator, is the cause of harm. Chen and Marceau 2015, 1503 ff. This argument does not apply if the facility operator acted in accordance with low welfare standards or industry guidelines. In this case, the legal and social order does not disapprove of the 'risk' for reputational damage created by the facility owner. Against this backdrop, the clarification of the Court based on the wording of the statute and the requirement for 'economic loss' was warranted.

163 *ALDF v. Wasden* 35, citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). The decision is also publicly available at: <https://www.law.cornell.edu/supremecourt/text/343/495> (last accessed 6 August 2021).

164 *ALDF v. Wasden* 35, referring to Kreimer, Seth F., Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record, *University of Pennsylvania Law Review* 159:2 (2011), 335–409.

165 *ALDF v. Wasden* 35, citing *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). The decision is not publicly available online.

166 *ALDF v. Wasden* 35 f.; citing *Anderson v. City of Hermosa Beach*.

167 *ALDF v. Wasden* 35.

168 *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) ('*Reed v. Town of Gilbert*', in the following). The decision is also publicly available at: https://www.supremecourt.gov/opinions/14pdf/13-502_9olb.pdf (last accessed 6 June 2021).

169 *ALDF v. Wasden* 37, citing *Reed v. Town of Gilbert*.

hibiting commercial production, sale, and possession of videos depicting animal cruelty.¹⁷⁰ The Supreme Court reasoned that the statute was content based as it prohibited images ‘depending on whether they depict conduct in which a living animal is intentionally harmed.’¹⁷¹ According to the Circuit Court, this matched § 18–7042(1)(d): one could record a birthday party, a historic tree, or a farmer’s car creation, ‘but not the animal abuse, feedlot operation, or slaughterhouse conditions.’¹⁷²

The Court went even further in its criticism, stating that Idaho ‘effectively eliminated the [...] recording of agricultural operations made without consent and has therefore “prohibit[ed] public discourse of an entire topic.”’¹⁷³ Against this backdrop, the relevant standard to test the constitutionality of the recording provision was ‘strict scrutiny:’ to pass this test, the provision must be ‘necessary to serve a compelling state interest’ and be ‘narrowly drawn to achieve that end.’¹⁷⁴ The District Court had voiced doubts as to the legitimacy of the state interest at stake.¹⁷⁵ It had pointed out, *inter alia*, that agricultural production facilities are heavily regulated, as they impact food and workers safety, as well as the treatment of animals.¹⁷⁶ Where these public interests are at stake there is a lower expectation of privacy, and property, and thus privacy interests cannot weigh too high in these facilities.¹⁷⁷

The Circuit Court found that, even if the protection of property and privacy on agricultural production facilities may be ‘a compelling government interest,’ the ‘narrow tailoring requirement’ was not satisfied.¹⁷⁸ The statute was simultaneously under- and over-inclusive. Singling out ‘audio

170 *United States v. Stevens*, 559 U.S. 460, 468 (2010) (*United States v. Stevens*, in the following). The decision is also publicly available at: <https://www.supremecourt.gov/opinions/09pdf/08-769.pdf> (last accessed 6 August 2021).

171 *ALDF v. Wasden* 37, citing *United States v. Stevens*.

172 *ALDF v. Wasden* 37.

173 *Ibid.*, citing *In re Nat’l Sec. Letter*, 863 F.3d 1110, 1122 (9th Cir. 2017). The decision is not publicly available.

174 *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). The decision is also publicly available at: <https://supreme.justia.com/cases/federal/us/460/37/> (6 August 2021).

175 *ALDF v. Otter*, summary judgement decision, 19.

176 *Ibid.*, 19, 21.

177 *Ibid.*, 19.

178 *ALDF v. Wasden* 38.

or video recordings,’ and not including photographs was under-inclusive.¹⁷⁹ Similarly, the limitation to ‘operations’ as opposed to other conduct on an agricultural facility that may actually raise *more* privacy concerns (such as, for example, a birthday party) was under-inclusive.¹⁸⁰ The Circuit Court endorsed the finding of the District Court that ‘[t]he recording prohibition gives agricultural facility owners veto power, allowing owners to decide what can and cannot be recorded, effectively turning them into state-backed censors able to silence unfavorable speech about their facilities.’¹⁸¹ Further, the Circuit Court found itself ‘left to conclude that Idaho is singling out for suppression one mode of speech—audio and video recordings of agricultural operations—to keep controversy and suspect practices out of the public eye.’¹⁸²

Yet, the Recordings Clause was simultaneously also over-inclusive as it was found to prohibit more speech than necessary to achieve the stated goal.¹⁸³ Agriculture facility owners have tort laws at their disposal to counter infringements of privacy and to protect their trade secrets, as well as defamation laws.¹⁸⁴ The Court concluded by quoting *Alvarez* in saying that “‘the remedy for speech that is false is speech that is true’ – and not, as Idaho would like, the suppression of that speech.”¹⁸⁵

10.5.4.5 *Equal Protection Clause*

The District Court had addressed all equal protection issues arising from the different provisions of Idaho Code § 18–7042 taken together. In so doing, it again argued that the statute protected the interests of the agricultural industry against exposure to ‘public scrutiny’¹⁸⁶ and did thus not serve a legitimate government interest: ‘[t]he State’s logic is perverse—in essence

179 Ibid. For under-inclusiveness the Court cites *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994). The decision is publicly available at: <https://www.law.cornell.edu/supct/html/1/92-1856.ZO.html> (last accessed 6 August 2021).

180 *ALDF v. Wasden* 38.

181 Ibid., 39, citing *ALDF v. Otter* summary judgement decision, 18.

182 *ALDF v. Wasden* 39.

183 Ibid, referring to *Lone Star Security and Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1197 (9th Cir. 2016) for over-inclusiveness. The decision is not publicly available.

184 *ALDF v. Wasden* 39.

185 Ibid., citing *United States v. Alvarez* (opinion of Justice Kennedy).

186 *ALDF v. Otter*, summary judgement decision, 24.

the State says that (1) powerful industries deserve more government protection than smaller industries, and (2) the more attention and criticism an industry draws, the more the government should protect that industry from negative publicity or other harms.¹⁸⁷

The Circuit Court refrained from considering § 18–7042(1)(a) and (d) under the Equal Protection Clause, as it had already found these provisions to violate the First Amendment.¹⁸⁸ However, the Court considered Subsections (b) and (c), and concluded that they did not violate the Equal Protection Clause. It agreed with the District Court that the legislation was motivated, amongst other considerations, by ‘animus toward animal welfare groups and other undercover investigators in the agricultural industry,’ but did not find the provision unconstitutional on this ground.¹⁸⁹

According to the rational basis test, a law is presumed to be valid in accordance with the Equal Protection Clause ‘if the classification drawn by the statute is rationally related to a legitimate state interest.’¹⁹⁰ If the law in question indicates ‘a desire to harm an unpopular group,’ Courts may engage in ‘a “more searching” application of rational basis review.’¹⁹¹ If – as in the case at hand – the ‘politically unpopular group is not a traditionally suspect class, a Court may strike down the challenged statute under the Equal Protection Clause “if the statute serves no legitimate governmental purpose *and* if impermissible animus toward an unpopular group prompted the statute’s enactment.”’¹⁹² Applying this test, the Court found that, although the law, displayed animus against reporters and activists, it served the legitimate purpose of protecting property and privacy interests on agricultural production facilities.¹⁹³ Thus, the provision did rest on an ‘irrational prejudice’ against activists only.¹⁹⁴

187 Ibid.

188 *ALDF v. Wasden* 26, 40.

189 Ibid., 29.

190 *ALDF v. Wasden* 29, citing *City of Cleburne v. Cleburne Living Ctr.*

191 *ALDF v. Wasden* 30, citing *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring). The concurring opinion is available at: <https://www.law.cornell.edu/supct/html/02-102.ZC.html> (last accessed 6 August 2021).

192 *ALDF v. Wasden* 30, citing *Mountain Water Co. v. Mont. Dep’t of Pub. Serv. Regulation*, 919 F.2d 593, 598 (9th Cir. 1990) (emphasis added by the Court). The decision is not publicly available online.

193 *ALDF v. Wasden* 31.

194 Ibid., 32, citing *City of Cleburne v. Cleburne Living Ctr.* 450.

10.5.4.6 *Separate Opinion of Judge Bea, Dissenting in Part and Concurring in Part*

Judge Bea disagreed with the majority regarding the entry gained through misrepresentation provision in § 18-7042(1)(a). Referring to the common law right to property, and common law trespass, Justice Bea argued that entry by misrepresentation entailed a legally recognizable harm.¹⁹⁵ Further, Justice Bea disagreed with the Majority Opinion on the applicability of *Alvarez* to § 18-7042(1)(a). Unlike *Alvarez*, what was stake in the relevant provision was not just lying but entering an agricultural facility. Thus, according to Justice Bea, the provisions in question did not regulate 'pure speech.'¹⁹⁶ Overall, Justice Bea invoked the protection of property in his dissent regarding Subsection (a), finding that there was no reason to distinguish between Subsections (a) and (b).¹⁹⁷ Regarding the other Subsections Justice Bea concurred with the majority opinion.¹⁹⁸

10.6 The Idaho Case: A Normative Reconstruction of Ag-Gag

This Section will apply the method of normative reconstruction to the *Wasden* case by employing political philosophy and democratic theory to explain and evaluate the normative underpinnings that transpire from the judicial reasoning in this case.¹⁹⁹ Although the First Amendment featured prominently in the legal analysis above, the Courts did not elaborate on the democratic rationale behind the protection of free speech. The case is no exception in this regard. References to democracy are scarce in Court decisions pertaining to ag-gag laws. This poses a challenge for the method of normative reconstruction. However, one extra-legal notion that alludes to democracy is striking in the decisions analyzed above, namely the 'court of public opinion.' This metaphor best reflects the democracy related concerns raised in the legal and public discourse around ag-gag laws.

The following will show that the 'court of public opinion' is present in the above decisions, and is salient in the legislative history, but does not actually reflect the most pertinent questions of constitutional law. Further,

195 *ALDF v. Wasden* 40 f.

196 *Ibid.*, 43.

197 *Ibid.*, 42, 56.

198 *Ibid.*, 42.

199 For a more detailed explanation of the method see Chapter 2.

connections will be drawn to the previous Chapters and existing literature. While existing literature compellingly identified normative criticism against the function of ag-gag laws being to prevent the Court of public opinion, it has overstated the relevance of this finding to the First Amendment and constitutional law analysis at the risk of *inter alia* conflating *de lege ferenda* and *de lege lata* considerations. Finally, I suggest that the Court of public opinion alludes to what Chantal Mouffe named agonism: a political conflict between adversaries. Rather than promoting agonism, ag-gag turns adversaries into political enemies.

10.6.1 The Court of Public Opinion

The term ‘court of public opinion’ appears five times in *Wasden* and four times in *Otter*.²⁰⁰ The *Otter* Court only referred to it in the context of the legislative history and quoted the bill’s drafter, Dan Steenson (representative of the Idaho Dairymen’s Association) as well as members of the House of Representatives in saying that the legislation aimed at protecting Idaho’s agriculture from the ‘court of public opinion.’²⁰¹ The *Wasden* Court also cited some of these statements.²⁰² Further, and more importantly, the *Wasden* Court used the same language, in quotation marks, in its reasoning when assessing the purpose of the legislation.²⁰³ The Court voiced concerns that § 18–7042(1)(a) (misrepresentation to gain entry) was

‘enacted with an impermissible government purpose. [...] Our suspicion is not eased after reading the legislative history. The record reflects that the statute was partly motivated to protect members of the agricultural industry from “persecut[ion] in the Court of public opinion.”’²⁰⁴

The *Otter* Court had also voiced doubts as to the purpose behind the legislation, arguably in even stronger terms, and based on the legislative history: ‘a review of § 18–7042’s legislative history leads to the inevitable conclusion that the law’s primary purpose is to protect agricultural facility owners by, in effect, suppressing speech critical of animal-agriculture practices.’²⁰⁵

200 *ALDF v. Wasden* 7, 12 f., 22, 25; *ALDF v. Otter*, summary judgement decision, 4 f.

201 *ALDF v. Otter*, summary judgement decision, 4 f.

202 *ALDF v. Wasden* 12 f.

203 *Ibid.*, 22, 25.

204 *Ibid.*, 25.

205 *ALDF v. Otter*, summary judgement decision, 16.

At this point the Court was considering the recording provision in § 18–7042(1)(d). Although the *Otter* Court did not employ the notion of the ‘court of public opinion’ here, it is present through the statements cited in relation to the legislative history.

Thus, the notion of the Court of public opinion was present in the legislative history and was relevant for the question of whether the legislation pursued a permissible purpose²⁰⁶ as avoiding the ‘court of public opinion,’ said the Courts, is not a permissible purpose. Yet, as the legal analysis clearly shows, this finding played a marginal role for the outcome of the case. The *Wasden* Court especially displayed mixed understandings of the purpose of the statute and did not consider the law to violate the Equal Protection Clause for lacking a legitimate government interest. The role of the ‘court of public opinion’ in the decisions should not be overstated. Although it clearly encapsulates grave concerns of the Courts, other considerations, first and foremost the reach of the protection of property, were more decisive. This is especially highlighted by the conclusion that § 18–7042(1)(b) and (c) did not violate the First Amendment, and by the, in-part, dissenting opinion of Justice Bea. Although the Court identified a questionable purpose behind the legislation, the compliance of these provisions with the First Amendment ultimately depended on property rights.

10.6.1.1 *Meaning of the Court of Public Opinion*

Dictionaries do not define the term ‘court of public opinion,’ and it rarely features in legal literature. However, it does appear in relation to some of the most controversial legal matters in recent US history. For example, Alger Hiss, a US lawyer and public official, who was accused of espionage for the Soviet Union in 1939, later wrote a book on the controversial case titled ‘In the Court of Public Opinion.’²⁰⁷

The notion of the ‘court of public opinion’ is generally employed in the context of increased media attention on trials. In this context, Supreme Court Justice Kennedy noted in *Gentile v. State Bar* ‘an attorney may take reasonable steps to defend a client’s reputation and reduce the adverse

206 This question has been raised both with regard to misrepresentation provisions (in *Wasden*) and recording provisions (in *Otter*).

207 Hiss, Alger, *In the Court of Public Opinion* (New York: Harper & Row 1972).

consequences of indictment [...] including an attempt to demonstrate in the Court of public opinion that the client does not deserve to be tried.²⁰⁸ Jonathan M. Moses used the term to describe the practice of lawyers advocating for their clients outside the courtroom by speaking to the media, and thus to the public.²⁰⁹ One example he invoked is the infamous trial against OJ Simpson which received widespread media attention.²¹⁰ Despite the quote of Judge Kennedy, there is clearly a concern that the course of a case is stirred by public opinion communicated through the media, rather than the law.

In legal literature, the ‘court of public opinion’ was further invoked in the context of the United States involvement with the International Criminal Court. Monroe Leigh, (who vigorously argued in favor of the United States becoming a party to the Rome Statute) noted critics’ concern that ‘a politically motivated prosecutor might attempt to convict the United States in the Court of public opinion of a violation of international law, by charging one of its military or civilian officials with war crimes, crimes against humanity, or genocide [...] The United States can be put in the dock of public opinion at any time it applies military power abroad.’²¹¹

Most recently, the ‘court of public opinion’ also featured in the debate surrounding Special Counsel Robert Mueller’s report on Russian involvement in Donald Trump’s 2016 presidential campaign. Legal scholar Bruce A. Green assessed whether the comparatively low level of media presence raised accountability questions, and defended Mueller against these accusations.²¹² Green was critical of prosecutors seeking publicity: ‘[w]hen prosecutors present their case in the Court of public opinion, no one with inside knowledge can present the other side.’²¹³

From these references to ‘the court of public opinion,’ taken together, we can infer that this concept is usually contrasted against a Court of law. The term is invoked in the context of politically sensitive cases or decisions.

208 *Gentile v. State Bar*, 501 U.S. 1030, 1043 (1991), 27 June 1995. The decision is publicly available at: <https://supreme.justia.com/cases/federal/us/501/1030/> (last accessed 10 August 2021).

209 Moses, Jonathan M., *Ethics and Advocacy in the Court of Public Opinion*, *Columbia Law Review* 95:7 (1995), 1811–1856.

210 *Ibid.*

211 Leigh, Monroe, *The United States and the Statute of Rome*, *The American Journal of International Law* 95:1 (2001), 124–131, 129.

212 Green, Bruce A., *Prosecutors in the Court of Public Opinion*, *Duquesne Law Review* 57:2 (2019), 271–292.

213 *Ibid.*

It alleges that, if prosecution under the law fails, an accused might still be subject to prosecution by the media in front of the public. Such a 'prosecution' bears the potential for significant reputational damage, even if the accused has the law on her side.

However, usage in existing literature not necessarily implies that these are the terms in which this phrase should be understood. In any case, the 'correct' definition or usage is secondary here, for I am more interested in how the 'court of public opinion' is invoked in the Court decisions at issue. In the statements by the Idaho lawmakers cited in the above decisions, the 'court of public opinion' clearly has a strong negative connotation. This is indicated by the invocation of a 'persecution'²¹⁴ in the 'court of public opinion.' It 'destroys farmers' reputations [and] results in death threats.'²¹⁵ 'Farm terrorists' use it for their ends.²¹⁶

Besides the negative connotation, the language in these statement links the 'court of public opinion' to actual court proceedings: '[a]fter the infiltrator's work is done, the vigilante operation assumes the *role of prosecutor* in the Court of public opinion by publishing edited recordings' (emphasis added).²¹⁷ Further, the lawmakers claim that agricultural producers are 'declar[ed] guilty in the court of public opinion.'²¹⁸

Interestingly, at least the *Wasden* Court implied a slightly more positive understanding of the 'court of public opinion.' As noted above, the Court took up statements from the legislative history in its reasoning regarding the purpose of the legislation, holding that preventing agricultural producers from exposure to the 'court of public opinion' was not a permissible purpose for legislation.²¹⁹

10.6.1.2 *The Rules of the Intellectual Battle of Ideas in the Court of Public Opinion*

Looking back on previous Chapters and the decisions of German Courts, the *Tierbefreier* case and the 'rules of the intellectual battle of ideas,' which

214 *ALDF v. Wasden* 13; *ALDF v. Otter*, summary judgement decision, 4.

215 *ALDF v. Wasden* 12.

216 *ALDF v. Otter*, summary judgement decision, 5.

217 *Ibid.*

218 *Ibid.*

219 *ALDF v. Wasden* 25.

were the central subject of Chapter 5, come to mind. The ‘intellectual battle of ideas’ and the ‘court of public opinion’ represent two different conceptions of public debate. Unlike an ‘intellectual battle of ideas,’ ‘the Court of public opinion’ does not allow for respectful exchange between proponents of a variety of different views. Rather, it represents an adversarial system where two parties – animal activists and animal facility operators – stand opposed to each other. Each party can only win or lose, and the stakes are high. Lawmakers cited above maintain that activists, or ‘farm terrorists,’ assume the role of prosecutors to obtain a guilty verdict for the agricultural industry.²²⁰ It seems that the ‘rules’ of the ‘intellectual battle of ideas’ do not apply, as non-deliberative forms of communication are salient on both sides. Personal attacks and emphasis on moral disagreement, rather than on compromise, are only the start. Not only are advocates of the industry concerned about death threats,²²¹ they themselves arguably also bend the ‘rules’ when linking the creation of undercover footage to terrorism.²²² In addition, ‘the Court of public opinion’ is more personal than ‘the intellectual battle of ideas.’ It seems that, in ‘the Court of public opinion,’ it is the people, rather than their ideas, who are on trial. The intellectual battle, on the other hand, is a battle of ideas.

It appears that ‘the Court of public opinion’ forms the stage on which the conflict between animal activists and the agricultural industry takes place. Public, and to some extent even legal, discourses are far from the deliberative ideal; deliberative democracy is inapposite to capture and explain the debate. This raises the question of whether there is another approach to politics and democracy that is equipped to do so. In a next step, one may ask how ag-gag laws (with the declared purpose of preventing the Court of public opinion) are to be viewed through the lens of this approach.

10.6.2 Democracy and the Court of Public Opinion in Ag-Gag Literature

As seen above in the Idaho case, references to democracy are scarce in Court decisions on ag-gag. The following will explore whether this is also reflected in existing literature on ag-gag. The focus of this Section are the works of Joshua Frye, Katharine Gelber and Siobhan O’Sullivan, Justin

220 *ALDF v. Otter*, summary judgement decision, 5.

221 *ALDF v. Wasden* 12.

222 *Ibid.*, 13; for more details on links between ag-gag and eco-terrorism legislations see Chapter 12.

Marceau and Allan Chen as the works of these authors stand out as the most theory driven contributions. As such, they are best suited for the following analysis as they promise the most insights regarding the role of democracy in ag-gag discourse.

10.6.2.1 *Frye: From the Public Sphere to the Public Screen and the Politics of Preemption*

In his 2014 essay, communications scholar Joshua Frye employed communication theory to analyze ag-gag as a political strategy.²²³ He finds that the second wave of ag-gag (see above) 'hinges on freedom of expression.'²²⁴ Further, he identified 'message framing, pre-empting the public screen, and discursive closure' as mechanisms at play, and argued that they negatively impact on democracy.²²⁵

The public screen is sometimes invoked in communication theory, and describes a version of Habermas' concept of the public sphere, adapted to the 21st century and to recent technological developments.²²⁶ Frye invokes the theory to describe how rational deliberation amongst citizens in public places, which was present in the second half of the 20th century, has been replaced by 'fragmented, yet uniform individualized reception via new electronic mass media,' in a 'return to the spectacle of the Middle Ages.'²²⁷ The second wave of ag-gag was structured around communication, rather than property rights, according to Frye's analysis, as it prevents content about animal welfare from reaching the public screen.²²⁸

In this context, Frye uses the notion of preemption.²²⁹ He points out that preemption as a policy option was legitimized by former US President George W. Bush since 2002: it allows one to act, or even use military force, in response to an anticipated future threat without 'material evidence' of such threat.²³⁰ Similarly, Frye seemed to imply, potential threats to the agriculture industry through increased consumer awareness are prevented

223 Frye 2014.

224 *Ibid.*, 27.

225 *Ibid.*

226 *Ibid.*, 36.

227 *Ibid.*

228 *Ibid.*, 37.

229 *Ibid.*, 38.

230 *Ibid.*

by preempting the public screen. I borrow the notion of preemption in this context from Frye.

Unfortunately, Frye did not delve deeper into the different concepts invoked in this analysis. My understanding of this argument, therefore, remains tentative. In particular, it is unclear why Frye invoked the public screen rather than the original Habermasian concept of the public sphere. For the sake of Frye's argument, the public screen seems to be the functional equivalent of the public sphere, but one that already displays certain pathologies. This is interesting because the metaphor of the public screen – unlike what is commonly assumed by critics of ag-gag – indicates that engagement with undercover footage and animal welfare, even if not preempted, would not take the form of ideal Habermasian deliberation in the public sphere.

10.6.2.2 *Marceau and Chen: Translating First Amendment Theory into Legal Doctrine*

Above, in the introductory Sections, I heavily relied on the works of US lawyers and scholars Marceau and Chen. The authors served as legal counsel for plaintiffs challenging ag-gag laws in before Courts, including in Idaho.²³¹ Their work on the issue is the most comprehensive, and they are the only US scholars to have extensively written on ag-gag laws by connecting First Amendment doctrine and theory so far. They employed First Amendment theory to argue against both the recording and misrepresentation provisions. The idea that undercover footage contributes to public discourse is salient in their work, although the empirical side of this claim is not unpacked in detail.

As for recording provisions, Marceau and Chen conclude that the First Amendment implies a right to film matters of public interest, even on private property, when lawfully present even if that is without consent of those in charge.²³² As we have seen in the Idaho case, this conclusion resonates with existing jurisprudence. The Courts – although they do not discuss this in the form of a right to film on private property – are highly critical of recording provisions.²³³

231 Marceau/ Chen 2016, 995, ft. 17.

232 Ibid., 1038 f.

233 *ALDF v. Wasden* 34 f.

Regarding misrepresentation provisions, Marceau and Chen argue that the First Amendment protects 'high value lies' which promote the democracy and truth-finding function of free speech.²³⁴ As the Idaho decisions show, Courts did not follow this line of argument. The legal validity dimension of this claim is therefore up for debate. The issue is further complicated by the fact that in *Alvarez*, the most important precedent on this issue, the judges could not agree on a rationale.²³⁵

However, the theoretical element of Marceau and Chen's account is of greater interest to the inquiry at stake here, as it involves arguments from democracy. Put bluntly, the authors argue that lies invoked to enable the creation of undercover footage deserve protection due to their 'instrumental' value:²³⁶ they are preparatory to protected speech in that they are 'a necessary precursor to public debate about important political, social, and moral issues.'²³⁷ Therefore, the authors argue, misrepresentation provisions in ag-gag laws contravene the First Amendment.

This claim appears controversial. One could take the opposing view and argue that lies made for instrumental reasons disserve the cause of democracy and the search for truth. Identifying 'high value' lies requires distinguishing between good and bad, or worthy and unworthy, causes, or even political aims in the process of deciding which lies are covered by free speech, a distinction that is impossible to make without privileging certain political agendas over others and thus distorting the democratic process. For instance, false speech can severely impact the democratic process, most evidently if it occurs in election campaigns. This is not to say that lies should not be protected. Especially in cases where there is no harm caused, good reasons speak against censoring lies: above all, governments may not always be well placed to determine what is true and what is false.²³⁸ Further, restricting lies might have a chilling effect on speech generally, including true speech.²³⁹ Yet, the argument that Marceau and Chen point to seems to be distinct, as it seeks to protect only a specific kind of falsehood for narrowly constructed instrumental reasons.

234 Chen/ Marceau 2018, 1473.

235 For further implications of *Alvarez*, its tension with free speech theory and prior jurisprudence see Sunstein, Cass R., *Liars: Falsehood and Free Speech in an Age of Deception* (New York: Oxford University Press 2021), 112 f.

236 Chen/ Marceau 2018, 1472.

237 *Ibid.*, 1473.

238 See Sunstein 2021, 56 f.

239 *Ibid.*, 61.

Regardless of what one may think of the argument in substance, there are numerous normative and empirical assumptions underlying it that are not sufficiently transparent. If one allows the idea that free speech and its underlying rationales are important to ag-gag, the relevant and controversial question is not: does the First Amendment and existing jurisprudence allow extending protection to 'high value lies;' but rather, is doing so really desirable from the perspective of democracy and other rationales behind the First Amendment? Appealing to democracy and the search for truth as rationales behind the First Amendment requires unpacking the implications, and considering the effects of the arguments on these very values. In other words, it requires taking democratic theory seriously, too.

Marceau and Chen present their arguments as First Amendment theory, and thus as distinctively legal claims. This may create the impression that legality and only legality considerations are relevant to a legal study on ag-gag laws. For the adjudication of Court cases, legality is of course paramount. But relying on legality in scholarly arguments has a serious downside as it leaves animal advocates empty handed in the face of new, more carefully drafted ag-gag laws that cannot be said to raise the same constitutional challenges. The First Amendment claims are further unhelpful when ag-gag laws are discussed in other jurisdictions. Even if the First Amendment protects 'high value lies,' this is not necessarily the case in other jurisdictions. The German Basic Law, for example, does not protect false statements of *fact* (as opposed to *opinion*). On a normative level, one may attempt to argue that it should, but it would be clearly *contra lege*, and in light of this, very few lawyers and legal scholars would consider it convincing.

Relying on legality alone neglects other, and arguably stronger, arguments against ag-gag laws, especially arguments from democracy. The focus on legality thus results in an overemphasis on the First Amendment, touching upon, but not really substantiating, the democratic rationales behind free speech that speak against ag-gag laws.

10.6.2.3 Gelber and O'Sullivan: Democratic Arguments for Free Speech

The Australian political science scholars Katharine Gelber and Siobhan O'Sullivan are, so far, the only authors who have focused in on ag-gag

and public deliberation on matters of public importance.²⁴⁰ Yet, they too presented their arguments as a matter of free speech. The authors argue that trespass is a peaceful, non-violent, yet illegal activity and that it was the only way of obtaining certain information about animal welfare at farms.²⁴¹ According to the authors, this information is essential to public deliberation about animal welfare, which is a matter of public interest.²⁴² As such, trespass on animal facilities can further public deliberation and the democratic process. Thus, legislative attempts to hinder this activity via ag-gag laws impact on animal activists' ability to shed light on issues relevant to public deliberation.²⁴³ Against this backdrop, ag-gag laws – at least in the Australian context – are questionable under the democratic argument for free speech.²⁴⁴

Gelber and O'Sullivan's account is compelling. They seminally spelled out distinctively democratic arguments against ag-gag laws. Yet, the contribution leaves some crucial questions unanswered. The central claim of the authors is that ag-gag laws are not supported by the democratic rationale for freedom of expression. Although this conclusion follows from the finding that ag-gag laws do not further democracy, the focus on freedom of speech rather than democracy itself is surprising, considering that the crux of the argument is not the (fairly undisputed) relevance of democracy for freedom of expression, but the relevance of undercover footage to democracy.

10.6.2.4 *Common Elements*

The majority of authors in the literature consider ag-gag laws primarily as an encroachment upon free speech, and as a matter of legality only. This is even the case for the most theory driven works on the topic that were discussed above. The focus on free speech is strategically conceivable, as those arguments are fertile in legal disputes. Yet, it is unfortunate as it takes the contribution of undercover footage to democracy for granted, and

240 Gelber, Katharine/ O'Sullivan, Siobhan, Cat got your tongue? Free speech, democracy and Australia's 'ag-gag' laws, *Australian Journal of Political Science* 56:1 (2021), 19–34.

241 *Ibid.*, 19.

242 *Ibid.*, 19, 29.

243 *Ibid.*

244 *Ibid.*, 20.

glosses over distinctively non-deliberative means such as lies and trespass. One could argue that these acts are justified given the lack of transparency in the agricultural industry but, in order to do so, one must acknowledge that they are problematic in the first place. The focus on free speech usually does not leave room for these crucial inquiries. Especially with regard to employment fraud ag-gag laws, the arguments brought forward are thus incomplete and therefore unconvincing both from the perspective of political theory and legal theory, at least if one considers the latter to include considerations beyond US constitutional law.

10.6.3 Conclusion: Brushing over Democracy

The above section reconstructed how legislators and – with reference to those legislators – Courts invoked ‘the Court of public opinion’ in the context of ag-gag laws. While legislators explicitly want to avoid subjecting the agriculture industry to ‘the Court of public opinion,’ the Courts voiced doubts as to whether this would constitute a legitimate government interest allowing encroachment on activities otherwise protected by the First Amendment. Voices in the literature go further than the Courts, and portray the industry’s exposure to public scrutiny as a desirable development that furthers democracy.

Clearly, to what extent animal agriculture should be subjected to public scrutiny, and whether this is enough to outweigh privacy and property interests, is a central point of disagreement between advocates and opponents of ag-gag laws. However, even theoretically inclined literature has not yet explored this angle in great depth, and has instead focused on free speech, likely because this corresponds to a legal claim that promises a finding that some existing ag-gag laws are unconstitutional. Outside the courtroom, or when it comes to addressing ag-gag laws in other jurisdictions or those more carefully crafted ag-gag laws in the United States, this line of argument results in dead ends.

Courts, proponents, and opponents of ag-gag alike are thus brushing over the crucial democratic element of this discussion. In the existing discourse, democracy is covered beneath free speech and, sometimes, animal welfare concerns, although it constitutes a promising framework to address challenges raised by undercover footage and its regulation via the legal system. Courts seem to recognize the democratic dimension at stake, but engage with it only to a very limited extent. In the case analyzed above,

the metaphor of 'the Court of public opinion' is the only reference that touches upon questions of democracy. However, as we have seen above, the rationales behind free speech, including democracy, do not form a central element of legal reasoning. Rather, it was the reach of property protection that was decisive.

Proponents of ag-gag highlight the dangers of a 'court of public opinion,' presenting its 'preemption' as adequate remedy. However, 'preemption' is problematic from the perspective of democracy. As many those scholars referred to above have pointed out (although mostly within a framework centering free speech), ag-gag legislation hinders the exposure of practices that the public is not sufficiently informed about. As such, ag-gag can be criticized from an epistemological perspective, as it hinders the creation of knowledge. The same authors also implied that, if citizens were better informed, they would demand better protection for animals. Ag-gag can thus be questioned from the perspective of self-governance, for a society cannot legislate for itself about matters unknown. Finally, 'preemption' stifles deliberation, for it circumvents public debate on animal welfare as matter of public interest.

Yet, opponents of ag-gag also tend to gloss over democracy concerns. For example, US scholars critical of ag-gag rarely acknowledge the history of violent animal activism in the United States, which arguably cannot be squared with (deliberative) democracy.²⁴⁵ Further, the empirical assumptions mentioned above, especially the assumption that citizens would demand higher animal welfare standards if they were informed about animal agriculture, are not substantiated.

10.7 From Antagonism to Agonism

Clearly, deliberative democracy is not apt to reconstruct legal responses to undercover footage in jurisdictions with ag-gag laws within the United States. Both public and legal discourse on ag-gag, as well as on industrialized animal farming more generally, are characterized by antagonism. In Germany, antagonism between animal activists and those they consider responsible for animal abuse is salient, too. However, as we have seen throughout the previous Chapters, the law, and especially legal reasoning,

245 Ibid. Gelber and O'Sullivan mention this point.

find ways to temper the existing antagonism through features of deliberative democracy, for example, by invoking public interest, balancing tests, and distinctions between lawful and unlawful activities on animal facilities. In ag-gag states, such an element of deliberative democracy, which could function as a bridge between interests of animal facility operators and those of animal activists, is distinctly absent.²⁴⁶ So then, if deliberative democracy cannot explain the theory behind ag-gag, which stream of theory can conceptualize the legal responses to undercover footage in the United States?

10.7.1 Agonism, Activism, and Ag-Gag

Agonism may provide a framework capable of explaining and evaluating legal responses to undercover footage in ag-gag jurisdictions. Agon is a Greek word that is usually translated to ‘struggle’ or ‘contest.’²⁴⁷ Agonism is a stream of political theory which emphasizes the inevitable, and positive, nature of conflict in (democratic) politics. Foundations of today’s models of agonism can be found in the works of Friedrich Nietzsche,²⁴⁸ Carl Schmitt,²⁴⁹ Hannah Arendt²⁵⁰ and Michel Foucault.²⁵¹ Today, Chan-

246 I develop this aspect further in Chapter 12.

247 See e.g., Minkinen, Panu, Agonism, Democracy, and Law, in: Simon Stern, Maksymilian Del Mar, and Bernadette Meyler (eds.), *The Oxford Handbook of Law and Humanities* (New York: Oxford University Press 2019), 427–442, 427; Wenman, Mark, *Agonistic Democracy: Constituent Power in the Era of Globalisation* (Cambridge: Cambridge University Press 2013), 4.

248 Nietzsche, Friedrich, *Homer’s Contest*, in: Friedrich Nietzsche, *On the Genealogy of Morality* (Cambridge: Cambridge University Press 2007), 174–181; see also Davis Acampora, Christa, *Naturalism and Nietzsche’s Moral Psychology*, in: Keith Ansell Pearson (ed.), *A Companion to Nietzsche* (Oxford: Blackwell 2006), 314–333; Davis Acampora, Christa, *Contesting Nietzsche* (Chicago: University of Chicago Press 2013).

249 Schmitt, Carl, *The Concept of the Political*, Expanded Edition (London: University of Chicago Press 2008).

250 Arendt, Hannah, *Between Past and Future* (New York: Penguin Books 2006); Arendt, Hannah, *The Human Condition* (Chicago: University of Chicago Press 2nd ed., 2013).

251 Foucault, Michel, *The Order of Things* (New York: Pantheon Books 1971); Foucault, Michel, *Society Must Be Defended* (London: Penguin 2003). For an overview of how the works of the aforementioned authors are related to each other and to agonism in contemporary political theory see Paxton, Marie, *Agonistic Democracy: Rethinking Political Institutions in Pluralist Times* (New York: Routledge 2019), 29–52.

tal Mouffe,²⁵² Bonnie Honig²⁵³ and William E. Connolly²⁵⁴ are the most prominent defenders of agonism in political theory. While their positions are far from uniform, the rejection of deliberative democracy is a common element of their work.

The following focuses on the works of Mouffe, which are usually discussed under the headline of 'agonistic pluralism.' Mouffe criticizes deliberative democracy *inter alia* for denying antagonism. According to Mouffe, antagonism is ever present in human societies and cannot be eradicated.²⁵⁵ Controversially, proponents of agonism argue that deliberative democracy denies antagonism by claiming that a consensus on political questions can be found through rational deliberation.²⁵⁶ To this, deliberative democrats would likely object that deliberation is a way to overcome antagonism by listening and offering reasons in pursuit of the common good, as explained in Chapter 3. However, according to proponents of agonism, such a rational solution simply does not exist for most 'properly political' conflicts.²⁵⁷ Mouffe defines 'the political' as 'the antagonistic dimension which is inherent in all human societies' and human relations.²⁵⁸

Further, Mouffe criticizes deliberative democracy for being too focused on rationality and underestimating the role of passion.²⁵⁹ According to Mouffe, passion creates political identities ('us' and 'them').²⁶⁰ The 'us' and 'them' distinction is inevitable, given the pluralism and diversity of perspectives and values.²⁶¹ The paramount question is, then, how to acknowledge this pluralism and conflict without creating a 'friend/enemy confrontation'

252 Laclau/ Mouffe 2001; Mouffe 1993; Mouffe 2000; Mouffe 2005.

253 Honig, Bonnie, *Political Theory and the Displacement of Politics* (Ithaca: Cornell University Press 1993).

254 Connolly, William E., *Pluralism* (Durham: Duke University Press 2005); Connolly, William E., *Political Theory and Modernity* (London: Cornell University Press 1993); Connolly, William E., *The Terms of Political Discourse* (Princeton: Princeton University Press 1993).

255 Mouffe, Chantal, *Democratic Politics and Conflict: An Agonistic Approach*, *Política Común* 9 (2016) not paginated.

256 Ibid.

257 Mouffe, Chantal, *By Way of a Postscript*, *Parallax* 20:2 (2014), 149–157, 150.

258 Politics, on the other hand is 'the ensemble of practices, discourses and instructions which seek to establish a certain order and to organize human coexistence in conditions which are always potentially conflicting' since they are not immune to 'the political.' Mouffe 2016.

259 Mouffe 2014.

260 Ibid., 150.

261 Ibid.

where ‘the enemy is to be destroyed.’²⁶² The challenge of democratic politics is to transform antagonistic enemies into *agonistic* adversaries.²⁶³ Agonism allows one to conceive of the opponents as adversaries, whose existence is legitimate although their ideas will continue to be fought vigorously.²⁶⁴ In any case, consensus remains out of reach.²⁶⁵

Now, the question is what we can take from this idea of agonism arising in politics for the understanding of animal activism and ag-gag laws. Although agonism has received some attention in political theory, it very rarely features in legal literature. Yet, agonism is relevant to the law, first and foremost because, as Panu Minkkinen observed, both share a concern for democracy.²⁶⁶ Further, legal theorist Carl Schmitt is frequently mentioned as an influential figure for agonism.²⁶⁷ In light of his support of the Nazi regime, it is questionable whether Schmitt can be invoked at all in the context of democracy. Yet, he is credited with establishing the friend/ enemy distinction that is at issue in contemporary models of agonism.²⁶⁸ This kind of thinking is clearly at odds with deliberative democracy. Yet, it may provide resources to capture the reality of the conflict between animal activists and those deemed as complicit in causing animal suffering in the United States.

In Chapter 3, I argued that deliberative democracy, even as non-ideal theory, provides resources to improve the wellbeing of animals. I also argued that I consider the treatment of animals to be a topic of reasonable disagreement. The topic evokes strong emotions and involves questions of morality. Consequently, consensus is difficult to reach. Nevertheless, I maintain that it can be approached as a matter of rational argument, which can take the form of deliberation. However, in this Chapter, I have shown that this approach might be out of reach in some jurisdictions. Here, the question is not: ‘which democratic theory should govern the

262 Ibid., 150 f.

263 Ibid.

264 Ibid. 151.

265 Ibid.

266 Minkkinen 2019, 427.

267 Ibid.; see also Paxton, 2019.

268 Schmitt, Carl, *Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Corollarien* (Berlin: Duncker & Humblot, 1963), 26–37. For a systematic comment on the friend/enemy distinction in the work of Carl Schmitt see Ladwig, Bernd, *Die Unterscheidung von Freund und Feind als Kriterium des Politischen*, in: Reinhard Mehring (ed.), *Carl Schmitt: Der Begriff des Politischen. Ein kooperativer Kommentar* (Berlin: Akademie Verlag 2003), 45–70.

discourse on how humans ought to treat animals?' Rather, the question is: 'which democratic theory can explain existing legal responses and the *status quo* well enough to open room for evaluation?' As regards that latter question, agonism as employed by Chantal Mouffe is promising in ag-gag jurisdictions.

Antagonism is omnipresent in debates on animal activism. Animal activists criticize that the animal agriculture industry in US ag-gag states causes immense animal suffering. At the same time, animal agriculture forms the basis of livelihood, at least for those working in animal agriculture. Animal activists find animal suffering to be intolerable and demand an end to these practices, thus questioning the basis of other people's livelihood. The antagonism inherent in that conflict is indisputable.

In a next step, one may ask how the law in general, and ag-gag laws in particular, respond to this antagonism. Ag-gag laws aim to prevent or – as Frye aptly suggested – even 'preempt'²⁶⁹ the conflict. Clearly, they do not strive for consensus. But as we have seen above, some might argue that a consensus is impossible to reach regardless. Against this backdrop, the question is whether ag-gag laws at least turn existing antagonism into agonism. This question must be answered in the negative. Special criminal laws targeting animal activists imply that there is no place for their activities in society; they are enemies, not adversaries.

According to Mouffe's agonistic approach, the role of the enemy should be reserved for those who 'reject the very basic idea of pluralist democracy.'²⁷⁰ This may be appropriate for some animal activists who engage in coercive direct action. It is not appropriate, however, with regard to those who create and disseminate undercover footage precisely to take part in what Mouffe calls the 'agonistic struggle,'²⁷¹ to fight for their ideas by persuading others to join their cause.

To illustrate the above claims, one can return to the notion of 'the Court of public opinion.' Above, I described 'the Court of public opinion' as a metaphor for the situation in which the public passes a judgement that is not based on the law, but on opinion. It is inherently antagonistic, as either side can only either win or lose, rather than entering into a consensus. This image describes a form of antagonism that can potentially become agonism. If we take the metaphor of the Court seriously, it implies that

269 Frye 2014, 38.

270 Mouffe 2014, 151.

271 Ibid.

the opponents are adversaries but not enemies. In a Court, the parties are equal. They have rights, which are guarded by procedural law, for example. In a criminal trial, there is a presumption of innocence. The purpose of the trial is to achieve justice, and not to destroy an opponent. Against this backdrop, a trial, especially in the Anglo-American system, can be considered ‘a contemporary agonistic context *par excellence*’ in the words of Minkkinen.²⁷²

If a matter is prevented from reaching the Court of public opinion through ag-gag laws, the underlying conflict does not cease to exist. What ceases to exist is merely the opportunity for one side, namely animal activists (‘them’), to make their case. They are excluded from the ‘agonistic struggle’ as the enemy, which – as I have argued above – is inappropriate.

10.7.2 Legal Implications

From the Section above, it should be clear that ag-gag laws tend towards antagonism rather than agonism: towards conceiving of animal activists as enemies rather than adversaries. As such, they are not only unsustainable under the demanding framework of deliberative democracy, but also for those who endorse agonism.

In principle, the critique from agonism applies to all categories of ag-gag, as they single out animal activists and hinder the flow of information about animal welfare, making it impossible for activists to take part in the ‘agonistic struggle.’ Compared to deliberative democracy, the idea of agonism is less developed and less suited to inform legal discourse. This implies that, even more than with arguments from deliberative democracy, the agonistic objection against ag-gag is a matter of legal policy rather than of the law itself. These conclusions might be unsatisfying for lawyers. Yet, they may help to re-calibrate our focus and urge us to take seriously the arguments concerned with democracy.

Finally, one should consider that ag-gag laws are not the origin, but the result of antagonism towards animal activism. A critique and attempts for improvement informed by agonism must start with a public discourse on animal activism. The existing conflict cannot be resolved through the criminal law alone. Just like the problem with ag-gag does not consist of it

272 Minkkinen 2019, 427.

being unconstitutional, the solution to the democratic challenges it raises is not within hard law. The labeling of animal activists as terrorists,²⁷³ as well as the depiction of their cause as deviating from the common good, are a necessary precondition for passing ag-gag legislation. Agonism does not require eradicating these causes, but rather argues that they must be tempered so that they do not collapse into the friend/enemy distinction envisaged by Schmitt.

11. Ag-Gag in Other Jurisdictions

So-called ag-gag laws are not a uniquely United States phenomenon. Such legislation has been considered, and in some cases passed, also in Australia and Canada. These developments are very recent, evidencing the growing relevance of the topic at hand, and the need for the comparative and normative methodology that is employed here. While legal doctrinal arguments based on the United States constitution have little to contribute to the debate in Australia, for example, appraising the legislation through the lens of democratic theory can be fruitful for other jurisdictions.

11.1 Ag-Gag in Australia

11.1.1 Ag-Gag Legislation

Several jurisdictions in Australia have recently either considered or passed legislation that critics consider to be comparable to United States ag-gag legislation.²⁷⁴ The first category of laws discussed under this headline of ag-gag in Australia are laws that operate under the paradigm of the protection of biosecurity. They could affect activists who enter animal facilities without permission, thus potentially creating risks to biosecurity. The *New South Wales Biosecurity Act 2015* includes a penalty of up to three years imprisonment for individuals creating the risk of a significant impact on

273 For more details on the connection between animal terrorism and other illegal methods of the movement see Chapter 12.

274 Gelber, Katharine/ O'Sullivan Siobhan, Cat got your tongue? Free speech, democracy and Australia's 'ag-gag' laws, *Australian Journal of Political Science* 56:1 (2021), 19–34; Whitfort, Amanda S., Animal Welfare Law, Policy, and the Threat of “Ag-Gag:” One Step Forward, Two Steps Back, *Food Ethics* 3 (2019), 77–90.

biosecurity.²⁷⁵ Similar provisions exist in the *Queensland Biosecurity Act 2014*.²⁷⁶ However, the New South Wales law further imposes a duty to report the suspected creation of such a risk by others.²⁷⁷ Legal scholar Amanda Whitfort discussed these biosecurity laws under the headline of ag-gag, while Katharina Gelber and Siobhan O’Sullivan did not include them in that category.²⁷⁸ Against this backdrop, it can be debated whether these measures should be considered ag-gag. One argument against doing so is that biosecurity is absent from the ag-gag debates in the United States, and thus constitutes a different paradigm. I will return to this issue in the comparison presented in Chapter 12.

In 2016 New South Wales passed the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Bill 2016*,²⁷⁹ amending the *Inclosed Lands Protection Act (NSW) 1901* to criminally prohibit interfering, or attempting to interfere, with a business conducted on the land.²⁸⁰ The broad term ‘interference’ reminds one of early US ag-gag laws. In 2019, the *Right to Farm Act (NSW)*²⁸¹ was passed, also amending the *Inclosed Lands Protection Act* and prohibiting *inter alia* the incitement or counselling of someone to commit the above offense.²⁸²

Similar measures were recently introduced in other states. In 2020 in Queensland, the *Agriculture and Other Legislation Amendment Act (Qld) 2020* was passed, amending Section 13 of the *Summary Offences Act (Qld)*

275 *New South Wales Biosecurity Act 2015*, Sections 23 and 279, available at: <https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/act-2015-024> (last accessed 7 September 2021).

276 *Queensland Biosecurity Act 2014*, available at: <https://www.legislation.qld.gov.au/view/whole/html/inforce/current/act-2014-007> (last accessed 7 September 2021). Specifically, section 23 introduces a ‘general biosecurity obligation.’

277 *New South Wales Biosecurity Act 2015* Sections 38–40.

278 Whitfort 2019, 83; Gelber/ O’Sullivan 2021.

279 *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Bill 2016*, available at: <https://www.parliament.nsw.gov.au/bill/files/3275/Passed%20by%20both%20Houses.pdf> (last accessed 7 September 2021).

280 *Inclosed Lands Protection Act (NSW) 1901* Section 4B, available at: <https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-1901-033> (last accessed 7 September 2021).

281 *Right to Farm Act (NSW) 2019*, available at: <https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2019-015> (last accessed 7 September 2021).

282 *Inclosed Lands Protection Act (NSW) 1901* Section 4C.

2005 and making it an offence to unlawfully enter or remain on land used *inter alia* for animal husbandry or the exhibition of animals.²⁸³

Further, Surveillance Devices Acts play an important role, although they are not limited to the agriculture industry and differ from state to state. The *South Australian Surveillance Devices Act 2016*, for example, bans the recording or publication of private activities or conversations.²⁸⁴ The maximum penalty for a breach is 3 years' imprisonment.²⁸⁵ However, the law includes a public interest exception: the prohibition does not apply to the use or installation of listening or video recording devices if it is in the public interest.²⁸⁶ Prior to the use, communication, or publication of the material, public interest must be confirmed by a judge,²⁸⁷ unless the publication is made *to or by* a media organization and is also in the public interest.²⁸⁸

Despite the public interest exception, the law has been criticized for stifling advocacy, in particular in the area of animal protection.²⁸⁹ Although the law is of a general nature and not limited to the agriculture industry or animal facilities, critics were concerned that animal advocacy would be negatively impacted.²⁹⁰ A member of the South Australia Upper House and the Greens party proposed an amendment, stating that 'issues of animal welfare will, in the absence of proof to the contrary, be taken to be in the public interest.'²⁹¹ The proposed amendment did not pass.

283 *Agriculture and Other Legislation Amendment Act (Qld) 2020* Section 13, available at: <https://www.legislation.qld.gov.au/view/html/asmade/act-2020-003#sec.133> (last accessed 7 September 2021).

284 *South Australian Surveillance Devices Act 2016*, available at: <https://www.legislation.sa.gov.au/LZ/C/A/SURVEILLANCE%20DEVICES%20ACT%202016/CURRENT/2016.2.AUTH.PDF> (last accessed 7 September 2021).

285 *Ibid.*, Sections 4 f.

286 *Ibid.*, Section 6.

287 *Ibid.*, Section 10 (1).

288 *Ibid.*, Section 10 (2).

289 MacLennan, Leah, Ag-gag bill will make exposing animal cruelty harder: Law Society, ABC News, 2 September 2015, available at: <https://www.abc.net.au/news/2015-12-03/ag-gag-bill-surveillance-devices-sa-parliament/6994516> (last accessed 7 September 2021).

290 *Ibid.*

291 Government of South Australia, *Surveillance Devices (Animal Welfare) Amendment Bill 2016*, did not become law, available at: [https://www.legislation.sa.gov.au/LZ/B/ARCHIVE/SURVEILLANCE%20DEVICE%20\(S%20ANIMAL%20WELFARE\)%20AMENDMENT%20BILL%202016_HON%20TAMMY%20FRANKS%20MLC.aspx](https://www.legislation.sa.gov.au/LZ/B/ARCHIVE/SURVEILLANCE%20DEVICE%20(S%20ANIMAL%20WELFARE)%20AMENDMENT%20BILL%202016_HON%20TAMMY%20FRANKS%20MLC.aspx) (last accessed 7 September 2021). See also Whitford 2019, 84.

Finally, legislation was attempted on the federal level. If passed, the *Criminal Code Amendment (Animal Protection) Bill 2015* would have made 'failing to report malicious cruelty to animals after recording it' an offence.²⁹² This resembles the mandatory or rapid reporting law discussed in the United States context. The proposed Bill also included new offences titled '[i]nterfering with the carrying on of animal enterprises,' through destruction or damaging of property²⁹³ or through '[c]ausing fear of death or serious bodily injury' specifically through 'threats, vandalism, property damage, criminal trespass, harassment, or intimidation.'²⁹⁴ Defenses include *inter alia* 'publishing in good faith a report or commentary about a matter of public interest.'²⁹⁵ Unlike the other Bills discussed above, the attempted legislation at the federal level was evidently targeted at animal activists. Australian animal advocacy organizations spoke out against it,²⁹⁶ and the Bill lapsed at the end of the Parliamentary session in July 2019.²⁹⁷

Later in 2019, the federal government passed the *Criminal Code Amendment (Agricultural Protection) Bill 2019*.²⁹⁸ The amendment makes it a criminal offence to use a carriage service to transmit, or otherwise make available, material with the intent of inciting trespass on agricultural land, while being reckless as to the trespass causing 'detriment to a primary production business that is carried out on the agricultural land.'²⁹⁹ There is an exception if the transmitted 'material relates to a news report or current affairs report, that: (a) is in the public interest; and (b) is made by a per-

292 Parliament of South Australia, *Criminal Code Amendment (Animal Protection) Bill 2015*, Proposed Amendment of the Criminal Code Act 1995, inserting Part 9.7 Protecting Animals and Animal Enterprises, Section 383.5, did not become law, available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s994 (last accessed 7 September 2021).

293 Ibid.

294 Ibid., Section 385.10 (1).

295 Ibid., Section 385.15 (c).

296 Voiceless, Submission to the Senate Rural and Regional Affairs and Transport Legislative Committee, 10 March 2015, available at: <https://voiceless.org.au/wp-content/uploads/2019/10/Voiceless-Submission-to-the-Senate-Rural-and-Regional-Affairs-and-Transport-Legislation-Committee.pdf> (last accessed 7 September 2021).

297 See *Criminal Code Amendment (Animal Protection) Bill 2015*, Progress, available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s994 (last accessed 7 September 2021).

298 *Criminal Code Amendment (Agricultural Protection) Bill 2019*, available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6351 (last accessed 7 September 2021).

299 Ibid., inserting 474.46 (1) into the *Criminal Code Act 1995*.

son working in a professional capacity as a journalist.³⁰⁰ The amendment contained similar provisions for incitement as were applicable to theft and property damage on agricultural land.³⁰¹ As Gelber and O'Sullivan pointed out, this law falls into a new category of 'ag-gag' as it does not target those committing trespass, but others associated with them.³⁰² They argued that it could subject one to the possibility of prosecution for being a member of a group in which someone else makes the decision to trespass.³⁰³ The concern that the law could have, at the very least, a chilling effect on the exchange of information between animal activists seems warranted.

The issues surrounding animal activism, including the creation and dissemination of undercover footage, continues to be discussed in Australia. For example, in 2020 in Victoria there was an inquiry into the impact of animal rights activism on Victorian agriculture.³⁰⁴ The report identified the risks posed by animal rights activism, and especially the risks to farming communities and to biosecurity, but it also proposed modernizing animal welfare law.³⁰⁵

11.1.2 Litigation

Animal activists Dorottya Kiss and Christopher Delforce were charged under the *NSW Surveillance Devices Act* in 2015, but the charges were dismissed in 2017.³⁰⁶ The reason for the dismissal was a procedural issue; a form had not been dated and failed to comply with police investigation and charging procedures.³⁰⁷ The case is pertinent since Christopher Delforce is a filmmaker, and one of Australia's most prominent animal activists.

300 Ibid., inserting 474.46 (2) into the *Criminal Code Act 1995*.

301 Ibid., inserting 474.47 into the *Criminal Code Act 1995*.

302 Gelber/ O'Sullivan 2021, 28 f.

303 Ibid., 29.

304 Parliament of Victoria, Legislative Council Economy and Infrastructure Committee, Inquiry into the impact of animal rights activism on Victorian agriculture, February 2020, available at: https://www.parliament.vic.gov.au/file_uploads/LCEIC_59-02_Impact_of_animal_activism_on_Victorian_agriculture_n8Zx02Bz.pdf (last accessed 7 September 2021).

305 Ibid., xvii-xx.

306 Bettles, Collin, Animal activists 'let off' charges under the NSW Surveillance Devices Act due to technicality, Farm Online National, 8 August 2017, available at: <https://www.farmonline.com.au/story/4842862/animal-activists-let-off-charges-due-to-technicality/> (last accessed 7 September 2021).

307 Ibid.

His documentary ‘Dominion’ is well known in Australia and internationally. Throughout his work, Delforce emphasizes his motivation to increase transparency in the agricultural industry.

As Executive Director of ‘The Farm Transparency Project’ (formerly ‘Aussie Farms’) Delforce is now spearheading Australia’s first legal challenge of ag-gag laws.³⁰⁸ A case has reached the High Court of Australia, arguing that the *NSW Surveillance Devices Act* is unconstitutional as it violates the right to political communication which is implied as an indispensable part of the system of representative and responsible government enshrined in the Australian Constitution.³⁰⁹ The Farm Transparency Project argues *inter alia* that the legislation covers the publication of non-private activity and, as such, it cannot be justified by the protection of privacy.³¹⁰ The plaintiff further problematizes that the legislation is an ag-gag measure³¹¹ and that the ‘disincentivisation of “farm trespass”’ could be an additional legislative purpose, which is not legitimate under the implied freedom of political communication.³¹²

The case is highly relevant for the topic of this dissertation. Precisely because the Australian Constitution does not provide a right to freedom of expression, the case will give an opportunity to explore distinctively

308 High Court of Australia, *Farm Transparency International Ltd & Anor v State of New South Wales* (ongoing) file number S83/2021, filings available at: https://www.hcourt.gov.au/cases/case_s83-2021 (last accessed 18 March 2022); see also Knaus, Christopher, High Court to hear bid to overturn New South Wales hidden camera laws, *The Guardian*, 28 June 2021, available at: <https://www.theguardian.com/australia-news/2021/jun/29/high-court-to-hear-bid-to-overturn-new-south-wales-ag-gag-laws> (last accessed 7 September 2021).

309 High Court of Australia, *Farm Transparency International Ltd & Anor v State of New South Wales* (ongoing) file number S83/2021; on the right to political communication in Australia see High Court of Australia, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; High Court of Australia, *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106. The decisions are not publicly available.

310 High Court of Australia, *Farm Transparency International Ltd & Anor v State of New South Wales* (ongoing) file number S83/2021, plaintiff outline of oral submissions, 2, available at: https://cdn.hcourt.gov.au/assets/cases/08-Sydney/s83-2021/FarmTransparency-NSW_Pltf-OOA.pdf (last accessed 18 March 2022).

311 High Court of Australia, *Farm Transparency International Ltd & Anor v State of New South Wales* (ongoing) file number S83/2021, plaintiffs’ submissions, 12, available at: https://cdn.hcourt.gov.au/assets/cases/08-Sydney/s83-2021/FarmTransparency-NSW_Pltf.pdf (last accessed 18 March 2022)

312 High Court of Australia, *Farm Transparency International Ltd & Anor v State of New South Wales* (ongoing) file number S83/2021, plaintiff outline of oral submissions, 2.

democratic challenges to ag-gag. This issue is particularly pressing in NSW as the *NSW Surveillance Devices Act*, unlike many other states' Surveillance Devices Acts, does not include a public interest exception. However, at the time of writing the case is still ongoing.

About 20 years ago, a majority within the High Court of Australia was receptive to the arguments arising from democracy for the dissemination of undercover footage from animal facilities. Long before the first ag-gag laws were passed in Australia, the High Court decided the case *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.³¹³ The Court in that case denied an interlocutory injunction against the dissemination of undercover footage from a brush tail possum meat processing plant, depicting the slaughter of possums.³¹⁴ An unknown third party created the footage without the knowledge or consent of the facility operator and did so 'in a clandestine manner.'³¹⁵ ABC, a publicly funded broadcaster, received the footage from Animal Liberation Limited and was not complicit in the creation of the footage. Yet, at least since the court proceedings, ABC was aware of how the footage had been created.³¹⁶ ABC intended to broadcast the footage on a news program.³¹⁷

This decision covers the entire range of issues typically associated with the dissemination of undercover footage, including trespass and the balancing between privacy and the public interest in free speech. Celebrated by animal activists' organizations is, in particular, the following quote by Judge Kirby, affirming animal welfare as a matter of public debate and the role of animal advocates in society:³¹⁸

'The concerns of a governmental and political character must not be narrowly confined. To do so would be to restrict, or inhibit, the operation of the representative democracy that is envisaged by the Constitution.

313 High Court of Australia, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, (hereafter *ABC v Lenah Game Meats*) full text publicly available at: <https://www.animallaw.info/case/australian-broadcasting-corporation-v-lenah-game-meats-pty-ltd> (last accessed 7 September 2021). Citations to particular paragraphs in the following refer to this source.

314 *Ibid.*, para. 3.

315 *Ibid.*, para. 1.

316 *Ibid.*, para. 24.

317 *Ibid.*, para. 69.

318 See Giuffre, Emmanuel, Case Note: *ABC v Lenah Game Meats*, Voiceless, available at: <https://voiceless.org.au/case-note-abc-v-lenah-game-meats/> (last accessed 7 September 2021).

Within that democracy, concerns about animal welfare are clearly legitimate matters of public debate across the nation [...] Many advances in animal welfare have occurred only because of public debate and political pressure from special interest groups. The activities of such groups have sometimes pricked the conscience of human beings. Parliamentary democracies, such as Australia, operate effectively when they are stimulated by debate promoted by community groups. To be successful, such debate often requires media attention. Improvements in the condition of circus animals, in the transport of live sheep for export and in the condition of battery hens followed such community debate. Furthermore, antivivisection and vegetarian groups are entitled, in our representative democracy, to promote their causes, enlisting media coverage, including by the appellant [ABC]. The form of government created by the Constitution is not confined to debates about popular or congenial topics, reflecting majority or party wisdom. Experience teaches that such topics change over time. In part, they do so because of general discussion in the mass media.³¹⁹

This statement is remarkable, as it goes to the core of the democratic argument for the dissemination of undercover footage. It not only states that animal welfare is a matter of public debate, but also engages with examples of successful advocacy for animal welfare in the past. What is noteworthy in this respect is that, in the absence of a stand-alone right to free speech in the Australian Constitution, this argument is closely tied to democracy.

More importantly, *ABC v Lenah Game Meats* sets limits to ag-gag legislation in Australia. In Australia's common law system, the decision of the High Court is law; the legislator cannot legislate against it. Thus, the pending case against the NSW law will show how the High Court squares this view on undercover footage and animal welfare with ag-gag laws.

11.1.3 Public Interest and Journalism

Unlike ag-gag in the United States, at least some of the laws discussed above account for the public interest and the work of journalists. Public interest exceptions are present in Australian legislation that is applicable to undercover footage, namely in the *South Australian Surveillance Devices Act 2016* and the *Criminal Code Amendment (Agricultural Protection) Bill 2019*. The

319 High Court of Australia, *ABC v Lenah Game Meats*, (2001) 208 CLR 199, paras. 217 f.

South Australian Surveillance Devices Act 2016 is not limited to agriculture, but restricts the use of optical surveillance devices. In Subsection 5 it prohibits one to ‘knowingly install, use or maintain an optical surveillance device on or in premises, a vehicle or any other thing, (whether or not the person has lawful possession or lawful control of the premises, vehicle or thing) to record visually or observe the carrying on of a private activity without the express or implied consent of each party to the activity.’ However, it provides, in Subsection 6 (2) (a), that this rule does not apply ‘to the use of an optical surveillance device to record visually or observe the carrying on of a private activity if the use of the device is in the *public interest*’ (emphasis added). Subsection 10 (1) regulates the use of the information obtained by those means and is also subject to the public interest exception: ‘[a] person must not knowingly use, communicate or publish information or material derived from the use of [...] an optical surveillance device in circumstances where the device was used in the public interest except in accordance with an order of a judge under this Division.’ Subsection 10 (2) offers an exception from the requirement to obtain an order from a judge, stating that ‘Subsection (1) does not apply to the use, communication or publication of information or material derived from the use of [...] an optical surveillance device in circumstances where the device was used in the public interest if— (a) the use, communication or publication of the information or material is made to a media organisation; or (b) the use, communication or publication of the information or material is made by a media organisation and the information or material is in the public interest.’

The federal *Criminal Code Amendment (Agricultural Protection) Bill 2019* added Section 474.46 to the *Criminal Code Act 1995*. Subsection 474.46 (1) makes it an offence to use a carriage service to distribute material with the intent to incite another person to trespass on agricultural land and recklessness regarding any detriment caused to a production business on the agricultural land by the trespasser. According to Subsection (2), the above ‘does not apply to material if the material relates to a news report, or a current affairs report, that: (a) is in the public interest; and (b) is made by a person working in a professional capacity as a journalist.’

Again, there is an exception accommodating the public interest, and the role of professional journalists. Additionally, Subsection 174.48 (1) states that the above ‘does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.’

In a nutshell, one can say that the public interest plays a decisive role for the creation of footage, and also for its dissemination. The media are

privileged with regard to dissemination, as disclosing footage by them does not require an order. Further, they may disseminate the material themselves if it is in the public interest to do so.

In practice, the reach of these exceptions and privileges will, of course, depend on how the public interest is established, in particular, whether animal welfare is considered to be a matter of public interest at all. In the 2001 landmark case *ABC v Lenah Game Meats*, the High Court of Australia left no doubt that animal welfare was a matter of public debate.³²⁰ The Court considered this in favor of the publication of footage with had been unlawfully obtained by a third party.³²¹ Yet, whether this implies that reporting on animal welfare is in the public interest is unclear. The failed attempt to expressly state in the legislation that animal welfare qualifies as such, illustrates this difficulty. Unfortunately, this introduces an element of uncertainty, which is problematic especially in criminal law. Activists, or even freelance journalists, will certainly be held back by these laws, not knowing with any certainty whether their conduct would be covered by the public interest exceptions.

Further guidance on how to interpret the criterion of public interest in Australian legislation concerning animal activists can be found in other areas of law. The public interest test features most prominently in the law pertaining to freedom of information. In this area, the public interest test is well established.³²² The same test cannot be applied to undercover footage from animal facilities, first and foremost because the information at stake is not held by government agencies. Nevertheless, the factors considered relevant to the public interest in the context of freedom of information may be instructive for the interpretation of the public interest provisions in ag-gag laws.

The Commonwealth *Freedom of Information Act 1982 (Cth)* requires public agencies and ministers to consider the public interest when deciding on the disclosure of information.³²³ Section 11B (3) lists factors to be considered as favoring access to a document due to it being in the public interest.

320 Ibid., para. 218.

321 Ibid.

322 For an overview of the public interest test see Information and Privacy Commission NSW, What is the public interest test? Fact Sheet June 2018, available at: https://www.ipc.nsw.gov.au/sites/default/files/2019-02/Fact_Sheet_What_is_the_public_interest_test_June_2018.pdf (last accessed 7 September 2021).

323 *Freedom of Information Act 1982 (Cth)*, available at: <https://www.legislation.gov.au/Details/C2019C00055> (last accessed 7 September 2021).

It speaks in favor of public interest if access to the document promotes objects of the *Freedom of Information Act* (Section 3, 3A), such as by giving the community access to information and promoting representative democracy through ‘increased public participation’ (Section 3(2)(a)) as well as ‘scrutiny, discussion, comment and review of the Government’s activities’ (Section 3(2)(b)). Further, it is to be considered whether disclosure would: ‘inform debate on a matter of public importance’ (Section 11B(3)(b)); ‘promote effective oversight of public expenditure’ (Section 11B(3)(c)); or ‘allow a person to access his or her own personal information’ (Section 11B(3)(d)). Some of these criteria, promoting representative democracy and informing debate on matters of public importance in particular, are relevant to the public interest in the context of undercover footage from animal facilities.

Similarly, the public interest features in the access to information legislation on a state level. Queensland’s *Right to Information Act 2009 (Qld)* lists factors favoring disclosure in the public interest in Schedule 4, Part 2.³²⁴ Notably, it speaks in favor of public interest if ‘disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance the Government’s accountability’ (No. 1); ‘contribute to positive and informed debate on important issues or matters of serious interest’ (No. 2); ‘contribute to the protection of the environment’ (No. 13); ‘reveal environmental or health risks or measures relating to public health and safety’ (No. 14); or ‘contribute to the enforcement of the criminal law’ (No. 18). Depending on the case in question, these rationales could also be advanced for undercover footage from animal facilities. On the other hand, according to the *Right to Information Act 2009 (Qld)*, factors favoring nondisclosure based on lack of public interest (Schedule 4, Part 3) are, for example, if: ‘disclosure of the information could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of entities’ (No. 2); ‘prejudice the protection of an individual’s right to privacy’ (No. 3); ‘prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct’ (No. 6); or ‘prejudice trade secrets, business affairs or research of an agency or person’ (No. 15). These rationales could be invoked against the dissemination of undercover footage.

324 *Right to Information Act 2009 (Qld)*, available at: <https://www.legislation.qld.gov.au/view/html/inforce/current/act-2009-013#sch.4> (last accessed 7 September 2021).

In New South Wales, the *Government Information (Public Access) Act 2009 (GIPA Act)* contains public interest considerations.³²⁵ As example of public interest considerations in favor of disclosure it lists *inter alia* in Division 2 (12)(2)(a) the promoting of ‘open discussion of public affairs’ and contribution to ‘positive and informed debate on issues of public importance.’

Adding the criterion of public interest introduces an element of uncertainty, and discretion, into these decisions. Unlike in the context of freedom of information, the laws relevant to undercover footage do not provide guidance as to which considerations weight in favor of, or against, the public interest. This uncertainty and discretion are particularly problematic in the context of undercover footage, as the laws concerned create criminal liability. However, these concerns could be mitigated if legislation concerned clearly stated that animal welfare is a matter of public debate and importance, so that the gathering and publication of information regarding this topic is to be considered in the public interest, unless weighty arguments speak against it. Certainly, accounting for the public interest even in a vague manner is an improvement compared to not accounting for the public interest at all. Given the reasoning in *ABC v Lenah Game Meats*, the public interest considerations may act to temper concerns regarding the constitutionality of the recently introduced legislation. At the same time, however, the absence of a public interest exception in the NSW ag-gag law makes it a target for legal challenges.

11.2 Ag-Gag in Canada

Recent developments in Canada warrant a brief look into ag-gag legislation enacted there. As these developments are only just emerging, little has been written on the issue so far. However, Jodi Lazare provided an overview, and critically examined the legislation in question, pointing to interferences with freedom of expression and demanding careful scrutiny through legislators and Courts.³²⁶

325 *Government Information (Public Access) Act 2009 (GIPA Act)*, available at: <https://legislation.nsw.gov.au/view/html/inforce/current/act-2009-052#sec.12> (last accessed 7 September 2021).

326 Lazare, Jodi, Ag-Gag Laws, Animal Rights Activism, and the Constitution: What is Protected Speech?, *Alberta Law Review* 58 (2020), 83- 105.

Lazare zeroed in on legislation in Alberta and Ontario. The Alberta *Trespass Statutes (Protecting Law-Abiding Property Owners) Amendment Act 2019* reads like a common trespass law, prohibiting both the unauthorized entry onto land and the act of remaining after being directed to leave.³²⁷ However, it also deems a ‘person who obtains by false pretences permission to enter on land [...] to have entered on the land without permission.’³²⁸ This could impact undercover investigations whereby animal activists gain employment in an animal facility. It could therefore be discussed under the category of ‘employment fraud.’ Yet, one could also argue that it remains within the realm of regular trespass laws.

In 2020 Alberta passed the *Critical Infrastructure Defense Act*,³²⁹ which could arguably impact other forms of animal activism such as the practice of ‘bearing witness’ when animals are transported to slaughter, which is common in the toolkit of Canadian animal activists.³³⁰

Meanwhile, Ontario passed *Bill 156* in 2020, ‘an Act to protect Ontario’s farms and farm animals from trespassers and other forms of interference and to prevent contamination of Ontario’s food supply.’³³¹ As the name suggests, this legislation is more narrowly tailored to animal facilities, but shares features present in both of the Alberta laws described above.³³² The animal advocacy organization Animal Justice, together with a journalist, have filed a lawsuit challenging the constitutionality of the law in early 2021.³³³ It remains to be seen how the Courts approach and decide the legal questions posed by the legislation and outlined by Lazare. In particular, the Courts will have to examine the compliance of the legislation with the Section 2(b) of the Canadian Charter of Rights and Freedoms which enshrines freedom of expression.

327 *Trespass Statutes (Protecting Law-Abiding Property Owners) Amendment Act 2019, Petty Trespass Act*, Section 3(1) f., available at: https://www.qp.alberta.ca/Document/s/AnnualVolumes/2019/ch23_19.pdf (last accessed 8 September 2021).

328 *Ibid.*, Section 3(2.4).

329 *Critical Infrastructure Defense Act 2020*, available at: https://www.qp.alberta.ca/Documents/AnnualVolumes/2020/C32p7_2020.pdf (last accessed 8 September 2021).

330 Lazare 2020.

331 *Bill 156 2020 (Ontario)*, available at: https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2020/2020-06/b156ra_e.pdf (last accessed 8 September 2021).

332 See also Lazare 2020, 89.

333 Animal Justice Press Release, Animal Justice Files legal Challenge to Ontario “Ag-Gag” Law, 9 March 2021, available at: <https://animaljustice.ca/media-releases/animal-justice-files-legal-challenge-to-ontario-ag-gag-law> (last accessed 8 September 2021).

Biosecurity is salient in ag-gag debates in Canada. Another recent development is the passing of Manitoba's *Bill 62: The Animal Diseases Amendment Act*.³³⁴ This legislation focuses on biosecurity and prohibits entry into biosecurity zones without the consent of the owner (Section 13.1(a)) as well as interfering with vehicles transporting animals (Section 13.2(1)). At the federal level, *Bill C-205* was introduced as a private member's bill. If passed, it would 'amend the Health of Animals Act to make it an offence to enter, without lawful authority or excuse, a place in which animals are kept if doing so could result in the exposure of the animals to a disease or toxic substance that is capable of affecting or contaminating them.'³³⁵ Again, the aim of protecting biosecurity is central to the legislative debate.³³⁶ So far, animal activist associations have not expressed their intent to challenge these laws in Court.

11.3 Conclusion

The brief exploration of recent developments in Canada and Australia illustrates that ag-gag is of growing importance in jurisdictions beyond the United States. Further, it provides examples of the criminalization of conduct associated with undercover footage. The *Criminal Code Amendment (Agricultural Protection) Bill 2019*, creating the offence of the use of a carriage service to disseminate material with the intent of inciting trespass, is particularly illustrative of the matter. However, looking to legislation in Australia also shows that the label of ag-gag is applied broadly, and perhaps unfairly, to legislation that is not specifically targeting the agriculture industry and which accounts for the public interest. In so doing, this legislation provides more room for arguments made from democracy. Thus, it seems that the normative frameworks employed in legal responses to undercover footage in Australia are more receptive towards democracy. I will return to these issues in Chapter 12.

334 *Bill 62 2020 (Manitoba)*, available at: <https://web2.gov.mb.ca/bills/42-3/b062e.php> (last accessed 8 September 2021).

335 House of Commons of Canada, *Bill C-205*, as of February 2020 (first reading), available at: <https://www.parl.ca/DocumentViewer/en/43-1/bill/C-205/first-reading> (last accessed 8 September 2021).

336 See e.g., Statements of Pat Finnigan, Simon-Pierre Savard-Tremblay and Lianne Rood on *Bill C-205*, available at: <https://openparliament.ca/bills/43-2/C-205/> (last accessed 8 September 2021).

12. Comparison: Legal Responses to Undercover Footage in Germany and in the United States

12.1 Introduction

The previous Chapters alluded to remarkable differences between the legal responses to undercover footage in Germany and in the United States, as well as in Australia and Canada. Even in absence of the favorable decisions of German Courts discussed here, one could say that in Germany, in principle, the same sanctions apply to activists and journalists investigating and reporting on animal welfare as would apply to any other activist or journalist reporting on a matter of interest to the public. In the United States, on the other hand, legislation exists that undisputedly affects those, and only those, who investigate and report on the conditions in animal facilities.

This Chapter will examine these differences through a distinctively comparative lens. The comparison is not an end in itself. Rather, it functions to reaffirm the claim that looking at democracy can help to explain different legal responses to undercover footage. Alternatively, ag-gag could be explained by the protection of property rights, for example. But this approach would fall short of important subsequent questions, which are highlighted by a comparative lens: how is the balancing between competing values conducted? Which concepts are being employed? Why are certain arguments made in one jurisdiction, and not in the other? Where protection of property rights, for example, fails as an explanation capable of answering these questions, democratic theory can contribute to providing answers.

This Chapter is guided by questions on the different normative underpinnings, as well as legal and legal-policy arguments, that guide legislative and judicial reasoning. In identifying the relevant differences, this Chapter makes recourse to the findings of earlier Chapters, which were based on legal analysis and normative reconstruction.³³⁷ Thus, this Chapter is not a detached, stand-alone, comprehensive comparison of the legal responses to undercover footage. Rather, certain factors are chosen and illustrated because of their relevance to the core themes and arguments of this dissertation. For example, I provide a more detailed account of the role of the public interest and the criminal law, as these issues are relevant to

337 For a detailed explanation of these methods see Chapter 2.

deliberative democracy and civil disobedience. Socio-legal scholars would certainly prioritize economic and societal factors instead, and functionalist comparative lawyers might consider both approaches equally flawed. I provide a more detailed defense of my comparative method in Chapter 2 of this dissertation.

Despite the focus on the normative level, the comparison conducted here is not intended as a search for the better answer for a given societal problem or tension. Instead, it may help to develop a more critical perspective of the approaches taken in both systems. As I will acknowledge further below, which approach is ‘better’ depends, not only on answers to ethical questions (regarding animal ethics and democracy), but also on other variables such as the culture of the animal rights movement in a given jurisdiction.

The Chapter proceeds in three steps. First, it will describe the differences observed throughout the previous Chapters. Second, it will advance possible explanations for these differences. Third and finally, I will draw conclusions as to the future of legal responses to undercover footage in Germany, the United States, and other jurisdictions based on the comparison. In so doing, this Chapter responds to the question of whether ag-gag legislation could be introduced in Germany, and whether it is likely that it will continue to exist in the United States, and whether it will likely be successful in Australia and Canada also.

12.2 Relevant Differences between Legal Responses to Undercover Footage

To begin, this Chapter provides a descriptive account, which refrains from explanation or judgement.³³⁸ The account explores the differences, as indicated in previous Chapters, that exist in the legal responses to undercover footage in Germany and in the United States, as well as Australia and Canada.

12.2.1 Legislation Targeting Animal Activists

The defining difference between Germany and ag-gag jurisdictions in the United States (or between jurisdictions with and without ag-gag legislation

338 Taking recourse to the findings of previous Chapters entails some repetition. Nevertheless, the direct contrast helps to put a spotlight on the differences and examine them with greater precision.

more generally) is that the latter provides legislation specifically protecting animal facilities from conduct commonly leading to their public exposure. In Germany, legislation specifically protecting animal facilities from public exposure does not exist. As a consequence, there are no laws that could be said to single out and target animal activists who create and disseminate undercover footage.

Yet, the paradigmatic difference between the targeting of animal activists, and its absence, should not be overestimated. In some cases, it is not entirely clear whether legislation actually aims at hindering the creation and dissemination of undercover footage, or if it pursues other aims. Scholars have argued that even legislation with the declared purpose of protecting animal welfare by ensuring rapid reporting of animal abuse, or the laws protecting biosecurity, qualify as ag-gag.³³⁹ In these cases, it is up to critics to show that the legislation in question does not only affect but specifically target animal activists, based on the legislative history, for example. Legislation with the declared purpose of protecting biosecurity, such as some of the proposals which are currently prominent in Australia, is an exemplary borderline case. This includes the *New South Wales Biosecurity Act 2015* and the *Queensland Biosecurity Act 2014*.³⁴⁰ If legislation does not target animal activists, the ag-gag label is questionable.

12.2.2 The Role of the Criminal Law

Another feature distinguishing legal responses to undercover footage in Germany and those in parts of the United States is the role of criminal law. This aspect is particularly relevant to the arguments of this dissertation, as criminalization is indicative of the place assigned to animal activists and undercover footage in any given democracy.

Most ag-gag laws are criminal laws which operate to prohibit recording, misrepresentation to gain employment or access, or failure to report animal

339 On rapid reporting see Marceau, Justin F., *Ag Gag Past, Present, and Future*, *Seattle University Law Review* 38 (2015), 1317–1343, 1340 ff.; on biosecurity see Whitfort, Amanda S., *Animal Welfare Law, Policy, and the Threat of “Ag-Gag:” One Step Forward, Two Steps Back*, *Food Ethics* 3 (2019), 77–90, 83.

340 *New South Wales Biosecurity Act 2015*, available at: <https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/act-2015-024> (last accessed 7 September 2021); *Queensland Biosecurity Act 2014*, available at: <https://www.legislation.qld.gov.au/view/whole/html/inforce/current/act-2014-007> (last accessed 7 September 2021).

abuse after having recorded it. The first two categories, misrepresentation provisions (in the form of employment fraud), and recording provisions were discussed in Chapter 10 using the example of Idaho's law on interference with agricultural production, enshrined in Idaho Code § 18-7042. Someone who commits the above offence is guilty of a misdemeanor and is to be punished with imprisonment for a maximum of one year and/or with a fine of up to 5000 US Dollars, according to Idaho Code § 18-7042 (3). Another, more recent, example is *Iowa House File 755* which was passed in 2021.³⁴¹ Iowa Code 727.8A now makes the placing or using of recording devices while trespassing an aggravated misdemeanor, and in the case of a second or subsequent offence, a class D felony.³⁴² Criminalization can also affect those who disseminate undercover footage. For example, in Australia the *Criminal Code Amendment (Agricultural Protection) Bill 2019*, as discussed in Chapter 11, makes it an offence to use a carriage service for the distribute of material with the intent of inciting another person to trespass on agricultural land, and recklessness regarding detriment caused to a production business on the agricultural land by the trespasser.³⁴³ In these jurisdictions, then, criminal sanctions attach to an array of different behaviors associated with the creation and dissemination of undercover footage.

However, it should be noted that ag-gag is not always a matter of criminal law. North Carolina's *Property Protection Act* enacted in 2013 provides a civil cause of action for employers targeted by employment based undercover investigations.³⁴⁴ Arkansas followed suit in 2017, enshrining a civil cause of action for unauthorized access to property in Arkansas Code § 16-118-113.³⁴⁵ These laws allow employers to sue for monetary damages.³⁴⁶

In Germany, legal responses to undercover footage also entail criminal law remedies. Chapters 8 and 9 discussed the possibility of criminal liability

341 Iowa Legislature, *House File 775*, available at: <https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=hf775> (13 September 2021).

342 Ibid.

343 *Criminal Code Amendment (Agricultural Protection) Bill 2019*, Subsection 474.46 (1), available at: https://www.apf.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6351 (last accessed 7 September 2021).

344 See Hanneken, Sarah, Principles Limiting Recovery Against Undercover Investigators in Ag-Gag States: Law, Policy and Logic, *The John Marshall Law Review* 50:3 (2017), 649-711, 666 ff.

345 Civil Cause of Action for Unauthorized Access to Property, Arkansas Code § 16-118-113 (2017).

346 See Hanneken 2017, 669 ff. for a critical analysis.

under § 123 of the Criminal Code (trespass). However, distinctly from the United States or other ag-gag jurisdictions, this criminality is more limited in that it generally only attached to the trespass element. Although, those who gain access to animal facilities by other means, for example by obtaining employment, or those who are already employed and later become whistleblowers after witnessing animal abuse, are not immune from criminal prosecution either. The laws that might apply to whistleblowers in all industries could be discussed here.³⁴⁷ However, in the ‘paradigmatic’ case of undercover footage, liability under these provisions seems unlikely, as it does not usually feature confidential conversations or business secrets.

Neither is criminal liability likely to arise from employment fraud in the context of undercover investigations. Employment fraud is dealt with as a subcategory of fraud, § 163 of the Criminal Code [Betrug].³⁴⁸ In short, it requires that an employee cannot perform the duties required by a given position, typically due to the employee having lied about qualifications necessary to perform the tasks in question.³⁴⁹ Absent a lack of qualification, fraud is only discussed in the context of gaining employment in fairly narrowly construed categories (e.g., hiding a criminal record or the position requiring a special level of trust), none of which seem applicable here.³⁵⁰

Finally, there exists no obligation in Germany to rapidly report animal abuse after recording it. In fact, the Naumburg Court allowed four months to pass before the activists notified law enforcement and handed over footage, arguing that time was needed in order to prepare a report.³⁵¹

To sum up, one can say that, in the absence of trespass, criminal liability for the creation of undercover footage is unlikely in Germany. If trespass has been committed, criminal liability remains possible depending

347 § 23 of the Act for the Protection of Business Secrets [Gesetz zum Schutz von Geschäftsgeheimnissen] might be invoked in these cases. In addition, § 203 of the Criminal Code (violation of private secrets [Verletzung von Privatgeheimnissen]), as well as § 353b of the Criminal Code (breach of official secrecy and special obligation of secret [Verletzung des Dienstgeheimnisses und einer besonderen Geheimhaltungspflicht]), and § 201 of the Criminal Code (violation of privacy of spoken word [Verletzung der Vertraulichkeit des gesprochenen Wortes]) would have to be discussed in this context.

348 Hefendehl, Roland, § 263 Betrug, in: Volker Erb, Jürgen Schäfer (eds.), *Münchener Kommentar zum Strafgesetzbuch* (München: C.H. Beck 4th ed., 2022), para. 667.

349 *Ibid.*, para. 668.

350 *Ibid.*, para. 669 ff.

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

on *inter alia* whether the footage depicts violations of animal protection law. Criminal liability for employment fraud in the context of undercover investigations is unlikely. Thus, there is a limited scope for the applicability of criminal law.

Contrarily, one can say that ag-gag can extend the scope of conduct that is potentially subject to criminal prosecution. In the United States, this is pertinent in the context of employment fraud. Ag-gag can extend the circle of individuals subject to criminal prosecution, as the *Criminal Code Amendment (Agricultural Protection) Bill 2019* in Australia shows.³⁵² In other words, ag-gag may extend the reach of criminal law in response to undercover footage, in terms of both the conduct covered and the persons affected. As a result, the criminal law is more salient in legal responses to undercover footage in ag-gag jurisdictions. As was discussed in Chapter 9, subjecting forms of protest to criminal prosecution limits the room for scholarly arguments from democracy, as criminal law comes with its own structure and categories which are relatively closed to considerations from constitutional law or other normative arguments from democracy. Thus, an extension of reach of the criminal law limits, or excludes, these arguments. This connects to the next point discussed below: criminal law also leaves little room to discuss animal welfare as a matter of public interest.

12.2.3 Animal Welfare as a Matter of Public Interest

For the purpose of this dissertation, one of the most interesting differences between ag-gag states in the United States and Germany is the role ascribed to the public interest, to animal welfare as a matter of public interest generally, and public debate more specifically. Is animal welfare a matter of public interest? Does undercover footage contribute to the public debate? Does it further democracy? This Section will illustrate that the differences between Germany and ag-gag jurisdictions, in terms of their approach to undercover footage on the issue of animal welfare, cannot be understood without taking recourse to democracy.

Technically, there is a difference between animal welfare being *in the public interest* and animal welfare being *of interest to the public*, in the sense

352 *Criminal Code Amendment (Agricultural Protection) Bill 2019*, available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6351 (last accessed 7 September 2021).

that the public has an interest in engaging in discussions on this matter. However, as we have seen throughout the previous Chapters, these two questions are closely linked in the reasoning of Courts and will therefore be discussed together here.

In the jurisdictions discussed in this dissertation it is clearly established that some speech enjoys an increased level of protection. In the United States, this is typically referred to as political or ideological speech.³⁵³ The ECtHR too confers a high level of protection on political speech or ‘debate of questions of public interest.’³⁵⁴ In Germany, the question of whether speech is political or contributes to a debate of public interest becomes relevant especially when freedom of expression is to be balanced against the rights of others.³⁵⁵

German Courts and the ECtHR leave no doubt that animal welfare is a matter of public interest. The ECtHR stated this most clearly in *PETA Deutschland v. Germany*,³⁵⁶ as well as in a range of other cases.³⁵⁷ German domestic Courts referred to animal welfare as a matter of public interest throughout the cases discussed in this dissertation, for example in *Tierbefreier* and in the organic chicken case.³⁵⁸ In fact, the claim that animal welfare is not a matter of public interest would be difficult to sustain, considering that Article 20a of the Basic Law enshrines animal protection as a state objective.

353 Congressional Research Service, *The First Amendment: Categories of Speech*, updated 16 January 2019, available at: <https://fas.org/sgp/crs/misc/IF11072.pdf> (last accessed 13 September 2021).

354 See e.g., ECtHR, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2), App. no. 32772/02, 30 June 2009, para. 92.

355 OLG Hamburg [Hamburg Regional Court] 19 July 2016, 7 U 11/14, BeckRS 131241, 2016 (para. 12), with reference to BGH [Federal Court of Justice], 30 September 2013, VI ZR 490/12, NJW 782, 2015 (784).

356 ECtHR, *PETA Deutschland v. Germany*, App. no. 43481/09, 8 November 2012, para. 47.

357 ECtHR, *Bladet Tromsø and Stensaas v. Norway*, App. no. 21980/93, 20 May 1999, paras. 63 f., 73; ECtHR, *Steel and Morris v. UK*, App. no. 68416/01, 15 February 2005, para. 88; ECtHR, *Verein gegen Tierfabriken Schweiz v. Switzerland*, App. no. 32772/02, 30 June 2009, para. 92.

358 OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (134); OLG Hamburg [Hamburg Regional Court] 19 July 2016, 7 U 11/14, BeckRS 131241, 2016 (para. 12). In cases unrelated to undercover footage German Courts go even further and describe animal welfare as a matter of the ‘common good’ [‘Gemeinwohl’]: BVerfG [Federal Constitutional Court] 2 October 1973, 1 BvR u. 477/72, NJW 1974, 30; BVerfG [Federal Constitutional Court] 6 July 1999, 2 BvF 3–90, NJW 1999, 3253.

The legal provisions and legal standards applied by German Courts in deciding on the dissemination of undercover footage, include a consideration of whether the matter in question is of interest to the public. As explained in Chapter 6, '[t]he basic right to freedom of opinion is assigned more weight, the more a contribution to the intellectual battle of ideas in a question considerably concerning the public is at issue' ['[d]em Grundrecht auf Meinungsfreiheit kommt umso größeres Gewicht zu, je mehr es sich um einen Beitrag zum geistigen Meinungskampf in einer die Öffentlichkeit wesentlich berührenden Frage handelt'].³⁵⁹ One can say that the question of whether the footage speaks to a debate on a matter of public interest is one of the paramount factors in deciding whether its publication is lawful. The public interest factor negotiates between free speech, privacy, and property interests on a case-by-case basis. As I explained in greater detail in Chapter 6, this focus on the question of whether the publication of something speaks to a debate of a matter of public interest is also present in the jurisprudence of the ECtHR. Finally, even in a criminal law case, the Naumburg Regional Court relied on animal welfare as a 'legal interest of society as a whole' ['Rechtsgut der Allgemeinheit'].³⁶⁰

Yet, the same cannot be said about the legal responses to undercover footage in the United States. As a rule, ag-gag laws do not account for the public interest; they do not leave room to consider whether footage contributes to a debate on a matter of public interest on a case-by-case basis.

Now, one might say that this comparison misses the point: after all, most ag-gag laws are criminal laws, they concern the creation and not the dissemination of undercover footage. In criminal law, it would be uncommon to consider the public interest. Rather, the general laws applicable to the dissemination of undercover footage may be more open to public interest considerations. And yet, we should not disregard the absence of a public interest tests from ag-gag laws as irrelevant. The relevant difference is not that ag-gag laws do not account for an assessment of whether footage contributes to a debate on matters of public interest. Rather, public interest considerations (or lack thereof) in the legislative process are telling: the very existence of ag-gag laws, their drafting and enactment, indicate that undercover investigations on animal welfare are presumed to not entail

359 BGH [Federal Court of Justice] 10 April 2018, NJW 2877, 2018 (2880).

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

speech particularly worthy of protection. Ag-gag laws imply that both the creation and the dissemination of undercover footage concerning animal welfare do not entail political speech relevant to a debate of public interest, such that that content would call for increased protection (rather than an additional burden imposed by specialist legislation).

The Courts concerned with the constitutionality of ag-gag laws have scrutinized this point to some extent. As the Court noted in *ALDF v. Otter*:

‘lies used to facilitate undercover investigations actually advance core First Amendment values by exposing misconduct to the public eye and *facilitating dialogue on issues of considerable public interest*. This type of *politically-salient speech* is precisely the type of speech the First Amendment was designed to protect³⁶¹ (emphasis added).

However, it is possible for legislation to increase the risk of legal sanctions in the context of undercover footage while accommodating public interest considerations. Legislation in Australia, in particular the *South Australian Surveillance Devices Act 2016*, does privilege conduct in the public interest.³⁶² Nevertheless, the impact of this remains unclear: it is not guaranteed that animal welfare would be considered to qualify as capable of triggering the benefits of the public interest exceptions.³⁶³

The presence of public interest arguments in legal responses to undercover footage in Germany, the absence of such considerations in US ag-gag legislation, and the ambivalent role of the public interest in emerging legislation in Australia, are all striking. These differences encapsulate the

361 *ALDF, et al. v. C. L. Butch Otter in his official capacity as Governor of Idaho; and Lawrence Wasden, in his official capacity as State of Idaho*, 118 F. Supp. 3d 1195, 1199 (D. Idaho 2015), summary judgement decision, 3 August 2015, p. 12 (*‘ALDF v. Otter, summary judgement decision’* in the following). The decision is also available at: https://www.acluidaho.org/sites/default/files/field_documents/summary_judgment_decision_0.pdf (last accessed 8/4/2021). References in the following refer to page numbers from this publicly available source.

362 *South Australian Surveillance devices Act 2016*, Section 6(2)(a), available at: <https://www.legislation.sa.gov.au/LZ/C/A/SURVEILLANCE%20DEVICES%20ACT%202016/CURRENT/2016.2.AUTH.PDF> (last accessed 7 September 2021).

363 A proposed amendment of the *South Australian Surveillance Devices Act 2016*, specifying that animal welfare was a matter of public interest did not pass. See *Surveillance Devices (Animal Welfare) Amendment Bill 2016*, available at: [https://www.legislation.sa.gov.au/LZ/B/ARCHIVE/SURVEILLANCE%20DEVICES%20\(ANIMAL%20WELFARE\)%20AMENDMENT%20BILL%202016_HON%20TAMMY%20FRANKS%20MLC.aspx](https://www.legislation.sa.gov.au/LZ/B/ARCHIVE/SURVEILLANCE%20DEVICES%20(ANIMAL%20WELFARE)%20AMENDMENT%20BILL%202016_HON%20TAMMY%20FRANKS%20MLC.aspx) (last accessed 7 September 2021). See also Whitford 2019, 84.

different conceptions of the status of animal welfare in democracy, and in law, an issue that I will return to below.

12.2.4 Privileges Conferred to the Media and Journalism

Similarly, ag-gag legislation in the United States does not account for the role of journalists and the media. In Germany, the FCJ decision in the organic chicken case suggests that the media are privileged when it comes to the dissemination of undercover footage. In Chapter 6, I highlighted how the German FCJ titled the media a ‘public watchdog,’ and allowed them to disseminate even footage illegally created by a third party.³⁶⁴

Comparable privileges do not exist in ag-gag legislation in the United States. However, this finding is not conclusive as to the role of the media, since ag-gag laws in the United States concern, first and foremost, the creation of undercover footage rather than the dissemination. In Germany, it is established that freedom of the press does not cover the unlawful creation of footage; journalists are not exempt from general laws such as those of the criminal code.³⁶⁵ This is in line with the jurisprudence of the ECtHR which does not afford immunity from general criminal law to journalists.³⁶⁶ Thus, journalists are not privileged regarding the unlawful creation of undercover footage.

Interestingly, Australian legislation does explicitly privilege media when it comes to the dissemination of undercover footage. Most significantly, the *South Australian Surveillance Devices Act 2016* allows privileges for footage disseminated to and by the media.³⁶⁷ This resonates with the reasoning of Judge Kirby in *ABC v Lenah Game Meats*, who pointed out the importance of ‘general discussion in the mass media.’³⁶⁸

364 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2880).

365 The FCC took a clear stance on this issue in its infamous Walraff-Springer decision, see BVerfG [Federal Constitutional Court] 25 January 1984, 1 BvR 272/81, NJW 1741, 1984 (1743).

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

367 Section 10 (2).

368 High Court of Australia, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, paras. 217 f. The full text is publicly available at: <https://www.animallaw.info/case/australian-broadcasting-corporation-v-lenah-game-mea>

The role ascribed to the media in legal responses to undercover footage is very relevant to the questions explored in this dissertation, as it is closely linked to the democracy enhancing function of freedom of expression. In light of the above, it can be said that, at least regarding the creation of undercover footage, there are no obvious differences between Germany and ag-gag jurisdictions. However, it is remarkable that the media are privileged when it comes to the dissemination of footage, both in Germany and in Australia.

12.2.5 Public Interest and Journalism in Australia and in the United States

The two variables above, public interest and journalism, sharply distinguish recent developments in Australia from ag-gag legislation in the United States. As explained in Chapter 11 and above, some of the legislation discussed under the headline of ag-gag in Australia actually accounts for both public interest and journalism, which also corresponds to the jurisprudence of the High Court on this matter in the case *ABC v Lenah Game Meats*.³⁶⁹ At the same time, public interest exceptions and privileges for the media, and the work product of professional journalists, are absent from ag-gag legislation in the United States. These features of the Australian approach rather bring to mind the legal responses to undercover footage in Germany; where the public interest in animal welfare, and information related thereto, militated in favor of activists and the media to continue disseminating footage in Chapters 5 and 6. I raised the issue of the privileging of the media over activists when it came to the dissemination of footage. The arguments from deliberative democracy that speak against formal distinctions between journalists and activist, made in Chapter 6, are applicable here as well. Media reporting can be false, or on-deliberative, as it can be sensationalist, polarizing, and can exaggerate disagreement on moral questions. Further, a formal distinction based on institutional affiliation does not do justice to the broad spectrum of journalism and activism. Particularly, a categorical distinction between activists and journalists cannot be maintained in an increasingly indeterminate media landscape, and especially not in the online sphere.

ts-pty-ltd (last accessed 7 September 2021). Citations to particular paragraphs in the following refer to this source.

369 Ibid.

Finally, it is worth mentioning that the public interest, although absent from ag-gag legislation in the United States, at least does feature in the associated scholarly debate. Marceau and Chen defend the claim that there should be a right to record even on private property without consent, but place this right under the limitation that the recording must ‘pertain to a matter of public concern or at least have a strong connection to public discourse. That is, the recordings must somehow relate to a general matter of political, social, or moral significance that is an appropriate subject of public debate.’³⁷⁰ Through this limitation, Marceau and Chen coupled the right to record to the First Amendment via the rationales of ‘democratic self-governance and the search for truth.’³⁷¹ The focus on matters of public concern is supported by the jurisprudence of the United States Supreme Court, which affords speech on such matters of public concern the highest protection.³⁷² The authors apply these considerations to ag-gag laws, and conclude that they ‘would be unconstitutional to the extent that the recordings were of activities that would implicate the legal regulation of factory farms and the ethical choices our society makes about the treatment of nonhuman animals.’³⁷³ As such, the issue of public interest is essential and calls for explanations from democracy, advanced below.

12.2.6 Differentiating Between Legal and Illegal Conditions in Animal Facilities

Ag-gag laws in the United States do not attach any relevance to whether the animal welfare conditions revealed by secretive recording were lawful or unlawful. In Germany, on the other hand, both civil and criminal Courts grappled with this aspect in the course of the cases discussed in this dissertation. In the *Tierbefreier* case, for example, the Courts explained that the fact that the footage did not depict unlawful conditions implied that the grievances revealed by the publication were not sufficient to trigger increased public interest.³⁷⁴ This standard was not always decisive; in the

370 Marceau, Justin/ Chen, Alan K., Free Speech and Democracy in the Video Age, Columbia Law Review 116 (2016), 911–1062, 1038.

371 Ibid.

372 Ibid.

373 Ibid., 1039.

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

organic chicken case, the FCJ found that interest in publication prevailed despite the depicted conditions being lawful.³⁷⁵

The distinction between lawful and unlawful animal welfare conditions is also relevant in criminal law. In the Naumburg case, it was essential to the necessity justification. Although the Court left open whether the conditions in the facility were sufficient to give rise to criminal charges, it also found that the operator of the facility had put the wellbeing of animals at risk, and thus had to tolerate interferences with their rights to a larger extent than someone not responsible for such conditions.³⁷⁶

Ag-gag laws do not make such distinctions. If anything, it matters rather whether the activists capture something they *believe* to be animal abuse, which could have the effect of working to their disadvantage. Missouri's ag-gag law provides that anyone employed at an agricultural animal facility who records what she believes to be abuse or neglect of a farm animal under the relevant legal provisions must submit the recording to law enforcement within 24 hours.³⁷⁷ To be clear, it seems to be irrelevant here whether the scenes depicted do constitute animal abuse. It cannot be excluded that Courts would take breaches of animal welfare law into account in favor of activists in applying ag-gag laws as well, but in absence of published decisions this question cannot be answered.

12.2.7 Rights and Values Invoked in the Context of Undercover Footage

A variety of legally protected values and rights feature in the legal discourse surrounding undercover footage from animal facilities. As will be shown below, property and privacy rights, along with freedom of expression (to varying degrees), feature in Court decisions in both Germany and the United States. However, based on the cases discussed in this dissertation, it seems that German Courts were more inclined to engage with values other than those of individual rights.

375 However, even in this case the Court explained in detail why the depicted conditions being lawful was not decisive, BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2880 ff.).

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

377 Revised Statutes of Missouri § 578.013 (2012); see also Shea, Matthew, Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-Gag Laws, *Columbia Journal of Law and Social Problems* 48:3 (2015), 337–371, 355.

In Germany, the so-called domiciliary right [‘Hausrecht’] plays an essential role in legal responses to the creation of undercover footage. The domiciliary right is the legal value that the prohibition of trespass contained in § 123 of the Criminal Code seeks to protect. It describes the interest in exercising one’s own will in one’s home or other protected area without being interfered with by unauthorized persons.³⁷⁸ In the words of the Frankfurt Regional Court, it confers the ‘freedom to decide who shall have access to the dwelling, business premises, or pacified possession’ [‘Freiheit der Entscheidung darüber, wer zur Wohnung, zu Geschäftsräumen oder zu einem befriedeten Besitztum Zutritt haben soll’].³⁷⁹ It should be noted that the domiciliary right is not congruent with ownership: even the owner of a property can commit trespass against a tenant.³⁸⁰ As the breach of the prohibition of trespass enshrined in § 123 (1) of the Criminal Code forms the basis of criminal liability for the creation of undercover footage, the domiciliary right must be considered as the central value militating for criminal sanctions against undercover footage in Germany.³⁸¹

In addition, courts invoke other values without linking them to specific legal provisions. For example, risks to the state’s monopoly on the use of force are mentioned in the Naumburg decision, although in passing.³⁸² In addition to the mention by the Court, legal commentators criticized the lenient approach of the Court *inter alia* for allowing animal activists to circumvent the state’s monopoly on the use of force.³⁸³ Chapter 8 explained

378 Heger, Martin, § 123 Hausfriedensbruch, in: Karl Lackner, Christian Kühl (eds.), Strafgesetzbuch Kommentar (München: C.H. Beck 29th ed., 2018), para. 1.

379 OLG Frankfurt [Frankfurt Regional Court] 16 March 2006, 1 Ss 189/05, NJW 1746, 2006.

380 Heger 2018, para. 2.

381 This assessment is based on the dominant view on trespass and the domiciliary right in legal literature. However, a minority of voices in the literature conceive of trespass as protecting a multitude of different values. They call for an approach based on sociological considerations that would account for the different social functions of the protected entities, for example differentiating between homes and workplaces. See Schall, Hero, Die Schutzfunktionen der Strafbestimmung gegen den Hausfriedensbruch: Ein Beispiel für die soziologisch fundierte Auslegung strafrechtlicher Tatbestände (Berlin: Duncker & Humblot 1974). This minority view might warrant a different conclusion regarding the domiciliary right in agricultural facilities.

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

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

how the Heilbronn District Court further invoked democracy, and specifically the importance of accepting majority decisions as arguments against a possible justification for trespass.³⁸⁴ Hypothetically, in specific constellations, the right to free development of one's personality [freie Entfaltung der Persönlichkeit], enshrined in Article 2 (1) of the Basic Law, and the right to informational self-determination, derived from Article 2 (1) in conjunction with Article 1 (1) of the Basic Law, could also be invoked.³⁸⁵

With regard to the dissemination of undercover footage, rather than its creation, Courts further consider a range of different rights and values. In the organic chicken case discussed in Chapter 6, the FCJ noted that the dissemination of the footage interfered with the farming collective's general right to personality³⁸⁶ [allgemeines Persönlichkeitsrecht]. More specifically, the 'social claim to validity as business enterprise' ['sozialer Geltungsanspruch (...) als Wirtschaftsunternehmen'] as derived from Article 2

384 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 36).

385 As explained above, other criminal law provision could be invoked against the creation of undercover footage. No decisions applying these provisions to the creation of undercover footage have been published. If footage includes the spoken words of for example facility employees, § 201 of the Criminal Code (violation of privacy of spoken word [Verletzung der Vertraulichkeit des gesprochenen Wortes]) would be pertinent. In this case – which thus far remains a hypothetical – the right to free development of one's personality [freie Entfaltung der Persönlichkeit], enshrined in Article 2 (1) Basic Law, would be a stake; see Graf, Jürgen-Peter, § 201 Verletzung der Vertraulichkeit des gesprochenen Wortes, in: Volker Erb, Jürgen Schäfer (eds.), *Münchener Kommentar zum Strafgesetzbuch* (München: C.H. Beck Verlag, 4th ed. 2021), para. 2. If § 203 of the Criminal Code (violation of private secrets [Verletzung von Privatgeheimnissen]) was applied, the right to informational self-determination derived from Article 2 (1) in conjunction with Article 1 (1) of the Basic Law would be at stake; see Heger, Martin, § 203 Verletzung von Privatgeheimnissen, in: Volker Erb, Jürgen Schäfer (eds.), *Münchener Kommentar zum Strafgesetzbuch* (München: C.H. Beck Verlag, 4th ed. 2021), para. 1. Finally, if activists were charged with a violation of § 353b of the Criminal Code (breach of official secrecy and special obligation of secrecy [Verletzung des Dienstgeheimnisses und einer besonderen Geheimhaltungspflicht]), the values at stake could include the protection of the secrets in question as well as the trust of the general public in the discretion of public services; see Puschke, Jens, § 353b Verletzung des Dienstgeheimnisses und einer besonderen Geheimhaltungspflicht, in: Volker Erb, Jürgen Schäfer (eds.), *Münchener Kommentar zum Strafgesetzbuch*, (München: C.H. Beck Verlag 3th ed., 2019), para. 2. Yet, it is hardly conceivable how these norms could be infringed by undercover footage from animal facilities.

386 The more common term in English would be 'right to privacy,' however, the translation employed here better corresponds to the German Basic Law.

(1) in conjunction with Article 19 (3) of the Basic Law, as well as Article 8 of the ECHR.³⁸⁷ The footage was capable of impacting the reputation of the farmer's collective as it differed from how the collective chose to present itself.³⁸⁸ Further, the FCJ noted that the dissemination of the footage touched upon the plaintiff's right to an established and operated business enterprise, enshrined in Article 12 (1) in conjunction with Article 19 (3) of the Basic Law.³⁸⁹ The footage in question depicted the circumstances of production, and thus impacted the interest of a business enterprise to shield its internal sphere from the public.³⁹⁰

Additionally, and in favor of the creation of undercover footage, courts considered animal welfare and often did so with reference to Article 20a of the Basic Law.³⁹¹ In the context of dissemination, Courts predominantly relied on the freedom of expression enshrined in Article 5 of the Basic Law, sometimes enhanced by animal welfare through Article 20a of the Basic Law.³⁹² Although not explicitly named as such, consumer protection also played a role in the organic chicken case:³⁹³ the FCJ took issue with the discrepancy between what consumers would expect organic farming to entail, and the conditions under which animals were kept in the facility in question.³⁹⁴

Differently from the German cases, in the United States cases concerning the constitutionality of ag-gag focus rather on individual rights. The rights most clearly advanced by supporters of ag-gag laws are privacy and property. These rights are prominent when Courts assess the compliance of ag-gag laws with the constitution, for example in the *Wasden* and *Otter*

387 BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2879).

388 Ibid.

389 Ibid.

390 Ibid.

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

392 On the interplay between animal welfare and freedom of expression see OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005 (134 f.); without freedom of expression see BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2879).

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

394 Ibid.

decisions covered in Chapter 10.³⁹⁵ Both property and privacy are advanced as legitimate government interests warranting ag-gag legislation.³⁹⁶

Notably, some ag-gag provisions which were found to be unconstitutional were located amongst offences against property in criminal codes, such as, for example, Utah's 'agricultural interference' offence which was held unconstitutional in *ALDF v. Herbert* in 2017.³⁹⁷ Property interests also featured prominently in the case against North Carolina's version of ag-gag which provided civil remedies for interference with property *inter alia* by entering non-public areas of a business as an employee and creating recordings.³⁹⁸

As I showed in Chapter 10, Courts critically questioned whether the ag-gag laws examined were tailored to privacy and property interests. The Court indicated that the Idaho ag-gag law also sought to prevent exposure of the animal industry to the 'court of public opinion'.³⁹⁹ Tentatively, one could say that the Courts seemed to point to the protection of animal facilities as another interest backing ag-gag legislation. It seems that ag-gag, unlike trespass or protection of privacy laws, protects these facilities comprehensively, and for their own sake, not just as property or as a site of risks to privacy. This is particularly clear in the titles of the laws that enshrine early ag-gag provisions: *Farm Animal and Field Crop and Research Facilities Protection Act* (Kansas)⁴⁰⁰ and the *Farm Animal and Research Facilities Protection Act* (Montana).⁴⁰¹ It is also present in more recent ag-gag legisla-

395 See e.g., *ALDF v. Otter* 7, 19, 20; *ALDF v. Wasden* 30, 34.

396 See e.g., *ALDF v. Wasden* 8, 31.

397 *ALDF et al. v. Gary R. Herbert in his official capacity as Governor of Utah, and Sean D. Reyes, in his official capacity as Attorney General of Utah*, 2:13-cv-00679RJS (D. Utah 2017), memorandum decision and order, 7 July 2017. The decision is publicly available at: <https://www.animallaw.info/case/animal-legal-defense-fund-v-herbert-t-0> (last accessed 5 August 2021).

398 *PETA et al. v. Josh Stein, in his official capacity as Attorney General of North Carolina, and Dr. Kevin Guskiewicz, in his official capacity as Chancellor of the University of North Carolina-Chapel Hill*, (4th Cir.). Briefs are available at: <https://food.publicjustice.net/case/peta-et-al-v-cooper-et-al/> (last accessed 5 August 2021).

399 *ALDF v. Wasden* 25.

400 Kansas Statutes Annotated § 47-1825 – 1830 (1990), available at: <https://www.animallaw.info/statute/ks-ecoterrorism-Chapter-47-livestock-and-domestic-animals#sl825> (last accessed 13 September 2021).

401 Montana Code § 81-30-101- 105 (1991), available at: <https://www.animallaw.info/statute/mt-ecoterrorism-Chapter-30-protection-farm-animals-and-research-facilities#sl101> (last accessed 13 September 2021).

tion, for example in Missouri's *Animal Research and Production Facilities Protection Act*.⁴⁰²

The only value not traceable to individual rights that was invoked in favor of ag-gag laws in the United States, is that of animal welfare, which is advanced to support rapid reporting.⁴⁰³ Although presented as animal welfare measure, critics suspect adverse effects on animal activism.⁴⁰⁴

In Australia and Canada, yet another interest, namely biosecurity, is salient. Biosecurity features prominently in debates surrounding Australian legislation,⁴⁰⁵ such as both the *Queensland Biosecurity Act 2014* and the *New South Wales Biosecurity Act 2015*. The same can be said for Canada, for example, the most recent legislative measures affecting animal activists are contained in Manitoba's *Bill 62*, the *Animal Diseases Amendment Act*.⁴⁰⁶ *Bill 62* does not mention video recording at all. Instead, it prohibits entry into biosecurity zones without the consent of the owner (Section 13.2(1)). Other recent legislative proposals point into the same direction. At the federal level, *Bill C-205* was introduced as a private member's bill. If passed, it would 'amend the Health of Animals Act to make it an offence to enter, without lawful authority or excuse, a place in which animals are kept if doing so could result in the exposure of the animals to a disease or toxic substance that is capable of affecting or contaminating them.'⁴⁰⁷ The aim of protecting biosecurity is also salient in the legislative debate on this bill.⁴⁰⁸

Canadian animal advocacy associations have spoken out against biosecurity-oriented laws that target animal activists, arguing *inter alia* that infectious diseases are linked to common practices in animal agriculture,

402 The Animal Research and Production Facilities Protection Act, Revised Statutes of Missouri § 578.405 (2017).

403 Revised Statutes of Missouri § 578.013 (2012).

404 Marceau, Ag Gag Past, Present, and Future, 2015, 1341.

405 Whitfort discussed these biosecurity laws under the headline of ag-gag, Gelber and O'Sullivan do not include them. Whitfort 2019, 83; Gelber, Katharine/ O'Sullivan, Siobhan, Cat got your tongue? Free speech, democracy and Australia's 'ag-gag' laws, Australian Journal of Political Science 56:1 (2021), 19–34.

406 *Bill 62 2020 (Manitoba)*, available at: <https://web2.gov.mb.ca/bills/42-3/b062e.php> (last accessed 8 September 2021).

407 House of Commons of Canada, *Bill C-205* (at the time of writing at report stage in the House of Commons), available at: <https://www.parl.ca/DocumentViewer/en/43-1/bill/C-205/first-reading> (last accessed 8 September 2021).

408 See e.g., statements of Pat Finnigan, Simon-Pierre Savard-Tremblay and Lianne Rood on *Bill C-205*, available at: <https://openparliament.ca/bills/43-2/C-205/> (last accessed 8 September 2021).

rather than animal activism.⁴⁰⁹ However, as will be explained further below, enlisting biosecurity as rationale for ag-gag laws is interesting in that it shifts the debate from relatively abstract values and rights towards more concrete interests which require debate on a factual rather than normative level.

In conclusion, one can say that in Germany the so-called domiciliary right (related to, but distinct from property), privacy, the state's monopoly on the use of force, and democracy are invoked against the creation and dissemination of undercover footage. In ag-gag jurisdictions, on the other hand, property, privacy, the protection of animal businesses as such (beyond the property and privacy dimension) including from exposure to the 'court of public opinion,' and – more recently – biosecurity and animal welfare are advanced in favor of strict legal responses to the creation and dissemination of undercover footage. Across the board, freedom of expression or freedom of speech are invoked in favor of lenient approaches, and in Germany these arguments are enhanced by animal welfare. As such, the debates in Germany are not limited to individual rights, but are also guided by other values affecting society.

12.2.8 Connection to Animal and Environmental Terrorism

In the United States, specialized legislation on animal terrorism is enshrined in the federal *Animal Enterprise Terrorism Act* (AETA) which was adopted in 2006. As Steve Cooke points out, in that context, the discourse on illegal activities of animal activists is intertwined with the discourse on environmental and animal terrorism.⁴¹⁰ Amongst legal scholars, disagreement exists as to whether the AETA could apply to activists who create and disseminate undercover footage.⁴¹¹ While this matter cannot be resolved

409 Animal Justice, Animal Advocacy or Animal Agriculture? Disease Outbreaks & Biosecurity Failures on Canadian Farms, 13 May 2021, available at: <https://animaljustice.ca/wp-content/uploads/2021/05/Disease-Outbreaks-Biosecurity-Failures-on-Canadian-Farms-May-202021.pdf> (last accessed 13 September 2021).

410 Cooke, Steve, Animal Rights and Environmental Terrorism, *Journal of Terrorism Research* 4:2 (2013), 26–36, 27.

411 Landfried, Jessalee, Bound & Gagged: Potential First Amendment Challenges to “Ag-Gag” Laws, *Duke Environmental Law & Policy Review* 23 (2013), 377–403, 393 f. (arguing that the AETA could be applied to the creation of undercover footage); Hill, Michael, The Animal Enterprise Terrorism Act: The Need for a

here, it can be said that an application of the AETA to cases of undercover footage seems, at least, highly unlikely, given that, as Michael Hill argues, it was not the drafter's intention for the legislation to be used in this way.⁴¹² In any case, the AETA and public and academic discourse related to animal activists as terrorists may have some influence, which will be discussed below. At the very least, an overlap exists in so far as it is the same groups who may be affected by both ag-gag and animal terrorism legislation.⁴¹³

In public and legal discourse in Germany, references to animal activists as terrorists are absent. Neither does there exist specific legislation on animal terrorism, nor would acts typically discussed under this headline be likely prosecuted as terrorism under the definition of § 278c of the Criminal Code.

12.2.9 Deliberative Democracy vs. (Ant)agonistic Politics

The previous Chapters normatively reconstructed legal responses to undercover footage. In doing so, they unpacked extra-legal notions invoked by Courts and linked them to streams of democratic theory. This process identified, in the reasoning of German Courts, references to deliberative democracy and civil disobedience. With regard to deliberative democracy, Chapter 5 highlighted the rules of deliberation or – in the words of the Court – the ‘rules of the intellectual battle of ideas,’ while Chapter 6 identified the role of the media as ‘public watchdog.’ Additionally, the elements of civil disobedience were present in debates around the necessity justification for trespass to create undercover footage covered in Chapters 8 and 9.

In the United States, such references were largely absent, not only from the law and the reasoning of Courts, but also from the literature and legal debates on animal activism and undercover footage. The focus in the legal discourse on ag-gag rather rested on the competing interests at stake: property and privacy, as well as the protection of animal businesses as such, which are pitted against free speech and (at least in the literature) animal welfare. Importantly, except for animal welfare, the interests invoked

Whistleblower Exception, *Case Western Reserve Law Review* 61:2 (2010), 649–678, 653, 678 (arguing that application of the AETA to these cases is unlikely).

412 Hill 2010, 653, 678.

413 Leamons, Josh W., *Eco-Terrorism: A Legal Update on the Laws Protecting Scientific Research from Extremist Activists*, *Journal of Biosecurity, Biosafety and Biodefense Law* 6:1 (2015), 3–45, 39 f.

in legal discourse on this matter in the United States can all be linked to individual rights: property, privacy, free speech.

In addition, the law as well as the legal discourse on undercover footage, is linked to the law and legal discourse on environmental and animal terrorism. This speaks to a different underlying conception of appropriate legal responses to moral disagreement on animal and environmental issues in a democracy. As such, the deliberative ideal advocated by German Courts can be contrasted against the antagonistic position displayed in the United States.

The factors described above make for a more polarized, even antagonistic legal and public debate in the United States. This extends beyond legislation and the reasoning of Courts. As discussed in Chapter 10, it is also reflected in scholarly contributions to the debate. This points to different conceptions of democracy behind legal responses to undercover footage: instead of deliberative democracy, an agonistic account of politics is needed to capture these findings.

One could go so far as to say that animal activists are denied a proverbial 'seat at the table' in the formation of public opinion in ag-gag jurisdictions in the United States. Yet, in this respect, the risk of projecting the values of the German system on other jurisdictions is high. The absence of mechanisms enhancing the formation of public opinion in legal responses to undercover footage in the United States only becomes visible in comparison to the German system. While the formation of public opinion does not feature in legal responses to undercover footage in the United States, its absence is not a deficit; it merely indicates a different conception of democracy, and of the place of moral disagreement particularly regarding animals, in a democracy.

Finally, it should be said that the above does not necessarily apply to all ag-gag jurisdictions, especially outside of the United States. Comparable legislation in Australia and in Canada has not yet been subject to constitutional challenges and, as a result, normative frameworks cannot be identified in the reasoning of Courts. However, precedent in Australia, as well as the prevalence of public interest exceptions, point towards a more deliberative approach.

I will return to these points below when looking for possible explanations of the differences observed and when arguing that doctrinal and even socio-legal explanations are not sufficient to account for these differences. Instead, to understand these differences, one needs to look at democracy.

12.3 Possible Explanations

A variety of cumulative factors may explain the different legal responses to undercover footage from animal facilities in Germany and in the United States. In the following, I will point to several possible explanations, but focus most on those related to democracy and to the different political cultures. Again, it cannot be stressed enough that this should not be read as a search for which system does ‘better.’ Neither will the explanations cover deeply rooted structural differences between the German and the United States’ legal system, or common law and civil law systems more generally. Rather, this Section explains the different legal responses to undercover footage from animal facilities by taking into account the underlying normative frameworks in general, and democracy in particular.

12.3.1 Socio-Legal Explanations

Socio-legal factors play an essential role in explaining legal responses to undercover footage. The importance of agriculture in a given region, lobbyism, traditions of animal activism, and public discourse on animal activism are pertinent. The impact of these factors on legal responses to animal activism is better assessed by social science methods, and thus cannot be covered comprehensively. Nevertheless, the following points provide a roadmap for further studies in this area. In any case, these socio-legal factors cannot account for some of the legal differences described above: most importantly, they neither explain German Courts’ reliance on public debate, nor the absence of such references in the United States.

12.3.1.1 *Importance of Agriculture*

The importance attached to agriculture, and in particular animal agriculture, varies between Germany and ag-gag jurisdictions in the United States. In Germany in 2019, according to the federal government’s agriculture report, the agriculture sector generated only 0.7 percent of gross value added and just 1.4 percent of the employable population works in this sector.⁴¹⁴

414 Bundesministerium für Ernährung und Landwirtschaft, Agrarpolitischer Bericht der Bundesregierung 2019, Deutscher Bundestag Drucksache 19/14500, 24 October

However, as the report also notes, these numbers do not accurately reflect the importance of the industry to the economy. For example, employment in other sectors, especially the food trade, is dependent on agriculture.⁴¹⁵ If these sectors are considered, agriculture can be said to make up 6.6 percent of the gross value added.⁴¹⁶ In Idaho, on the other hand, agriculture is ‘the single largest contributor’ to the state’s economy.⁴¹⁷ It is considered essential not only to the state’s economy, but also to its ‘way of life.’⁴¹⁸ Agriculture and food processing together generate 18 percent of the state’s total economic output in sales, and 13 percent of gross domestic product.⁴¹⁹

These parameters are those advanced by the respective governments, and they are not entirely comparable, not only because they are not the same, but also because it cannot be ensured that in calculating these numbers, the same factors were considered. In the absence of a comparative economic study, a correlation between the importance of agriculture and ag-gag legislation remains largely speculative. Still, these indicators may suggest that the importance of agriculture in a given society is a contributing factor.

12.3.1.2 Lobbyism and the American Legislative Exchange Council

Voices in the literature stress the corporate interests behind ag-gag, and their influence on legislation.⁴²⁰ They refer especially to the role of the American Legislative Exchange Council (ALEC).⁴²¹ ALEC describes itself as ‘America’s largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free mar-

2019, 51, available at: <https://www.bmel-statistik.de/fileadmin/daten/DFB-0010010-2019.pdf> (last accessed 13 September 2021).

415 Ibid.

416 Ibid.

417 Idaho State Department of Agriculture website, available at: <https://agri.idaho.gov/main/about/about-idaho-agriculture/> (last accessed 13 September 2021).

418 Idaho State Department of Agriculture, Idaho Agriculture Facts and Statistics, updated October 2020, available at: <https://agri.idaho.gov/main/idaho-agriculture-facts-and-statistics/> (last accessed 13 September 2021).

419 Ibid.

420 Frye, Joshua, Big Ag Gags the Freedom of Expression, *First Amendment Studies* 48:1 (2014), 27–43, 28; McCoy, Kimberly, Subverting Justice: An Indictment of the Animal Enterprise Terrorism Act, *Animal Law* 14 (2007), 53–70, 57.

421 Ibid.

kets and federalism.⁴²² ALEC's main mission is to draft model legislation for state legislators.⁴²³ According to their website, ALEC comprises almost 'one-quarter of the country's state legislators.'⁴²⁴ Further, representatives of the private sector are members of ALEC.⁴²⁵ In the media, ALEC appears as socially conservative and as furthering industry friendly policies.⁴²⁶ Scholars have criticized ALEC arguing that it erodes the policy-making process by advancing legislation that reflects corporate interest.⁴²⁷

ALEC was also involved in the development of ag-gag and animal terrorism legislation. It produced its seminal draft of an ag-gag bill in 2004.⁴²⁸ Titled the Animal and Ecological Terrorism Act (AETA), it states in § 3 (A) (2) (b):

'An animal or ecological terrorist organization or any person acting on its behalf or at its request or for its benefit or any individual whose intent to commit the activity was {optional language insert "politically motivated"} is prohibited from: [...] Obstructing or impeding the use of an animal facility or the use of a natural resource without the effective consent of

422 American Legislative Exchange Council (ALEC), About ALEC, available at: <https://www.alec.org/about/> (last accessed 13 September 2021).

423 American Legislative Exchange Council (ALEC), About ALEC; for a critical perspective see Mabry, Brittany Lauren, *The Influence and Impact of the American Legislative Exchange Council (ALEC)*, thesis for Masters of Professional Studies, submitted at The George Washington University, (ProQuest: Ann Arbor) 2016, 6, available at: <https://www.proquest.com/docview/1845316972?accountid=11004> (last accessed 25 October 2021).

424 American Legislative Exchange Council (ALEC), About ALEC.

425 Ibid.

426 Controversies arose in particular regarding its stance on climate change. Mathiesen, Karl/ Pilkington, Ed, Royal Dutch Shell cuts ties with Alec over rightwing group's climate denial, *The Guardian*, 7 August 2015, available at: <https://www.theguardian.com/business/2015/aug/07/royal-dutch-shell-alec-climate-change-denial> (last accessed 13 September 2021); Hamburger, Tom/ Warrick, Joby/ Mooney, Chris, This conservative group is tired of being accused of climate denial – and is fighting back, *The Washington Post*, 5 April 2015, available at: <https://www.washingtonpost.com/news/energy-environment/wp/2015/04/05/this-conservative-group-is-tired-of-being-accused-of-climate-denial-and-is-fighting-back/> (last accessed 13 September 2021).

427 Mabry 2016, 71.

428 ALEC, Draft Legislation: The Animal and Ecological Terrorism Act (AETA), finalized 1 January 2004, amended 28 February 2013, available at: <https://www.alec.org/model-policy/the-animal-and-ecological-terrorism-act-aeta/> (last accessed 13 September 2021).

the owner by: (b) entering an animal or research facility that is at the time closed to the public.⁴²⁹

Section 3 (A) (3) proposes prohibiting supporting acts of ‘animal terrorism,’ for instance, by providing ‘resources’ that will be used to ‘publicize’ or ‘promote’ animal terrorism. In § 5 the draft suggests creating a ‘registry of animal and ecological terrorists’ with the Attorney General.

Clearly, some of the language and the overarching target of this draft legislation resembles ag-gag legislation introduced throughout the country. And yet, ALEC cannot be credited with the invention of ag-gag. As explained in Chapter 10, the first ‘wave’ of ag-gag dates back to the early 1990s and predates the ALEC draft. Nevertheless, it is a strong indicator of the corporate interests and sustained lobbying that have fueled the increase of ag-gag laws across the United States.

In Germany, it is not as common for model legislation to be drafted by an entity comparable to ALEC. Nevertheless, lobbying is a part of the political reality. NGOs allege that representatives of the federal ministry for food and agriculture are more inclined to meet with representatives of the food and agriculture sector than with other actors concerned with consumer and environmental protection.⁴³⁰ In early 2021, the NGO Foodwatch brought a lawsuit in administrative Court seeking access to information regarding meetings between the minister for food and agriculture, at that time Julia Klöckner, and representatives of the food industry.⁴³¹ Critics argue that the close ties between industry and politics hinders meaningful reforms towards transparency and healthier food choices, as well as in the area

429 Ibid., Section 3 (A) (2) (b).

430 Pontius, Jakob, interview with representatives of Foodwatch, Julia Glöckner stellt sich schützend vor die Zuckerlobby, *Die Zeit*, 5 February 2021, available at: <https://www.zeit.de/zeit-magazin/wochenmarkt/2021-02/foodwatch-klage-julia-kloeckner-rauna-bindewald-transparenz-gesunde-ernaehrung> (last accessed 13 September 2021).

431 Foodwatch, Geheime Lobbytreffen von Julia Glöckner: Foodwatch klagt, 2 February 2021, available at: <https://www.foodwatch.org/de/aktuelle-nachrichten/2021/geheime-lobbytreffen-von-julia-kloeckner-foodwatch-klagt/> (last accessed 13 September 2021). *Zeit online/ dpa*, Foodwatch reicht Klage gegen Ernährungsministerin ein, *Die Zeit*, 2 February 2021, available at: <https://www.zeit.de/wirtschaft/2021-02/julia-kloeckner-foodwatch-agrarministerin-klage-lobbyismus-verbraucherschutz> (last accessed 13 September 2021).

of animal welfare.⁴³² Again, a comparative study based on social science methods could be enlightening here.

12.3.1.3 Traditions of Animal Activism

Differences in the history and methods of animal activism may be a further factor shaping legal responses to undercover footage. Social science literature comparing the methods of animal activists in the United States and in Germany (or in Europe generally) does not exist.⁴³³ In the absence of a comprehensive comparative study on this issue, the assessment of animal activism by the FBI and the European Union's law enforcement agency Europol may be able to shed some light.

In 2004, the FBI named 'animal rights extremists and ecoterrorism matters' as the 'highest domestic terrorism investigative priority' of the FBI.⁴³⁴ According to an FBI estimate of 2004, the Animal Liberation Front, Earth Liberation front 'and related groups' have caused damages of approximately 110 million US Dollars between 1976 and 2004 alone.⁴³⁵ Besides threats, intimidation tactics and property destruction, arson is also among the repertoire of some animal activists in the United States.⁴³⁶ The classification

432 Winter, Sabrina, wie die Zuckerlobby eine Steuer auf Limonade verhindert, Abgeordnetenwatch, 5 July 2019, available at: <https://www.abgeordnetenwatch.de/blog/lobbyismus/wie-die-zuckerlobby-eine-sondersteuer-auf-limonade-verhindert> (last accessed 13 September 2021); Balsler, Markus/ Geier, Moritz/ Heidtmann, Jan/ Liebrich, Silvia, Wie Lobbyisten bestimmen was wir essen, Süddeutsche Zeitung, 15 September 2017, available at: <https://www.sueddeutsche.de/wirtschaft/report-hegen-und-pflegen-1.3668000> (last accessed 13 September 2021).

433 For a comparative study of repressive action against animal activists within Europe (in the United Kingdom, Austria, Spain and Italy) see Josse, Melvin, Repression and Animal Advocacy, PhD thesis submitted at the University of Leicester, School of History, Politics, and International Relations, 2021, available at: https://leicester.figshare.com/articles/thesis/Repression_and_Animal_Advocacy/18319376 (last accessed 6 April 2022).

434 Statement of John E. Lewis (Deputy Assistant Director), Counterterrorism Division, FBI, in a hearing before the committee on the judiciary United States Senate May 2004, Serial No. J-108-76, available at: <https://www.govinfo.gov/content/pkg/CHRG-108shrg98179/html/CHRG-108shrg98179.htm> (last accessed 13 September 2021).

435 Ibid.

436 Ibid.

as terrorism has raised some criticism,⁴³⁷ yet the appraisal of these activities as constituting a severe threat is plausible, especially considering the risk that arson poses, not only to property, but also to human life, and the fear that it spreads in farming communities.

Data on the activities of animal activist groups in Germany is scarce.⁴³⁸ Europol and its annual EU Terrorism Situation & Trend Report (TE-SAT) provide the most promising insights, and the category of ‘crimes in furtherance of animal rights’ first appeared in the report in 2002.⁴³⁹ The report maintains that ‘several successful law enforcement operations have been carried out’ in this regard in EU countries.⁴⁴⁰ Further, it mentions convictions of ALF members in Belgium, who received prison sentences between 30 months and five years.⁴⁴¹

Only since 2008 has animal rights extremism been listed as single-issue terrorism in the reports.⁴⁴² The 2008 report lists threats against those associated with companies considered responsible for animal abuse as well as ‘arson attacks, letter bombs, [...] product contamination,’ and ‘wide-spread acts of vandalism’ as acts committed by animal activists in 2007.⁴⁴³ In 2008 and the following years, the ALF and SHAC (up to 2014) are explicitly noted in the report.⁴⁴⁴ Recent developments indicate that the threat posed by animal activists is considered to be limited. In the 2020 report, it is noted that single issue extremism, including animal rights extremism, ‘continued

437 Steve Cook criticizes that even academic literature sometimes conflates a range of illegal activities of the animal and environmental movement with terrorism. Cooke 2013, 26 f.

438 Some information on this topic has been subject to an inquiry by members of parliament to the government in 2012. Deutscher Bundestag, Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Andrej Hunko, Ulla Jelpke, Jan Korte, weiterer Abgeordneter und der Fraktion DIE LINKE, Internationale Polizeizusammenarbeit zur Kontrolle politischer Gruppen am Beispiel Umwelt- und Tierrechtsaktivismus, Drucksache 17/8962, 9 March 2012, available at: <https://dserver.bundestag.de/btd/17/089/1708961.pdf> (last accessed 22 September 2021).

439 Terrorist Activity in the European Union: Situation and Trend Report (TE-SAT) October 2001 – mid October 2002, The Hague, 14 November 2002, File No. 2566–21. The report has been made available to the author by Europol upon request.

440 Ibid., 12.

441 Ibid.

442 Europol, European Union Terrorism Situation and Trend Report, Publications Office of the European Union, Luxembourg, 2008, 8, available at: <https://www.europol.europa.eu/activities-services/main-reports/te-sat-2008-eu-terrorism-situation-trend-report> (last accessed 13 September 2021).

443 Ibid., 40.

444 See e.g., *ibid.*

to pose a limited threat to public order' and that most of the activities were non-violent (protests, etc.).⁴⁴⁵ This may indicate a trend towards the risk posed by animal activists being perceived as lower.

The assessment by Europol is not necessarily congruent with that of the member states of the EU. Interestingly, the 2008 TE-SAT report notes that the majority of member states reported 'single issue activities' as extremism and not as terrorism.⁴⁴⁶ When asked about the classification of the activities of militant animal activists, the German government answered in 2012 that the activities of militant animal activists in Germany are considered a matter of politically motivated crime.⁴⁴⁷ The government further answered that it was not aware of the acts of animal activists being classified as terrorism in any member state of the EU.⁴⁴⁸ This indicates that the threat posed by militant animal activists may be considered lower by authorities in the member states than it is by Europol. If extremist animal activism is not classified as terrorist activity by member states, the EU system seems to consider the threat posed by activists to be lower than in the United States where the perceived threat is considered more significant.

Melvin Josse also explains different degrees of repressive action against animal activists within Europe depending on the level of threat. In the United Kingdom, where clandestine and, in part, violent strategies of animal activists are more prominent, animal activists face more repressive legal responses than in other European countries analyzed by Josse.⁴⁴⁹ As such, similar trends may be at play in the present comparison indicating that the different level of threat posed by animal activists in Germany and in the United States may have an influence on legal responses to undercover footage in the two jurisdictions.

Yet, ag-gag legislation has also been passed in jurisdictions where animal activists have employed less violent strategies, especially in Australia. This has been shown by Gelber and O'Sullivan who point out that ag-gag in Australia is particularly questionable as animal activism there has a less

445 Europol, European Union Terrorism Situation and Trend Report, Publications Office of the European Union, Luxembourg, 2020, 80, available at: <https://www.europa.eu/publications-events/main-reports/european-union-terrorism-situation-and-trend-report-te-sat-2020> (last accessed 5 February 2022).

446 Europol, TE-SAT 2008, 41.

447 Deutscher Bundestag, Drucksache 17/8962, 2012, 4.

448 Ibid.

449 Josse 2021, 145 ff.

violent reputation than in the United States.⁴⁵⁰ The correlation between violent animal activism and legal and institutional responses to it on the one hand, and undercover footage and legal and institutional responses to it on the other, could be the subject of further research.

12.3.1.4 Public Discourse on Animal Activism and Undercover Footage

The above showed that crimes committed by animal activists are considered to be politically motivated crime in Germany, but not terrorism. Neither are animal activists commonly referred to as terrorists in the context of undercover footage. However, the societal debate on animal activism is heated. The questionable term ‘Stalleinbrüche’ [stable break-ins] to describe trespass on animal facilities is symptomatic of that.⁴⁵¹ We also find the metaphor ‘an den Pranger stellen,’⁴⁵² which might, in some cases, be the most sensible translation for prosecuting someone in the ‘court of public opinion.’ The motives of animal activists are called into question when it is said that they are ‘self-appointed’ for animal protection.⁴⁵³ Both the first and the last one of these expressions have made their way into Court decisions on undercover footage. The public discourse on undercover footage would be an interesting subject for a comparative study. But again, without such a study, precise conclusions as to the differences in the public discourse and its influence on legal responses to undercover footage cannot be drawn. However, it seems that the tensions described above have not reached the same level as in the United States, given that animal activists are not commonly associated with terrorism in Germany.

Interestingly, in Germany, animal activists have also successfully taken legal action to defend themselves against allegations made by opponents in the context of undercover footage. In 2015, the Münster District Court had to decide a case in which an animal activist association successfully sued the publisher of a magazine and online publications for the agricultural sector.⁴⁵⁴ The Court prohibited the publisher, *inter alia*, from claiming that

450 Gelber/ O’Sullivan 2021, 29.

451 Scheuerl/ Glock 2018, 451.

452 Sebald, Christian, Wiesenhof am Pranger, *Süddeutsche Zeitung*, 11 September 2013, available at: <https://www.sueddeutsche.de/bayern/strafanzeige-gegen-huehnermaester-wiesenhof-am-pranger-1.1767417> (last accessed 22 September 2021).

453 Scheuerl/ Glock 2018, 451.

454 LG Münster [Münster District Court] 8 July 2015, 012 O 187/15, BeckRS 2015, 15818.

it was part of the animal welfare association's 'business model' to generate images of staged animal welfare violations.⁴⁵⁵ This was found to be untrue, as in the scenario in question the plaintiff association had received footage from an independent third party.⁴⁵⁶ The case thus illustrates how the communication relating to undercover footage is subject to legal challenges. Although public discourse on animal activism, and undercover footage in particular, shows signs of polarization, it is overall less polarized than in the United States. Further, as the above case shows, the legal system provides remedies to counter excessive mobilization against animal activists in public discourse.

12.3.2 Doctrinal Legal Explanations

Doctrinal legal factors shape different legal responses to undercover footage. Again, a comprehensive account including all relevant doctrinal differences is not the goal of this dissertation. I will focus instead on the most salient issues that promise to shed light on the main questions explored here. In particular, the next Section will consider the legal status of animals, the structure of the criminal code, and private/public boundaries in the law.

12.3.2.1 The Legal Status of Animals and the Animal Welfare State Objective

The German Basic Law enshrines the state objective of animal protection in Article 20a. This constitutes one of the most evident differences in animal law between Germany and the United States. In the United States, a norm comparable to Article 20a of the Basic Law does not exist. Animal welfare is not a value of constitutional rank. Against this backdrop, the question arises as to whether Article 20a of the Basic Law shapes the more favorable legal responses to undercover footage in Germany.

In deciding cases on the dissemination of undercover footage from animal facilities, German Courts regularly refer to the Basic Law. This means that, besides freedom of expression and the legal interests of the facility operator, they must also take the animal protection state objective (Article

455 Ibid.

456 Ibid.

of the 20a Basic Law) into account. Although it does not confer subjective rights, this norm comprises a value of constitutional rank which may add weight to basic rights. In the *Tierbefreier* case, for example, the Hamm Regional Court considered Tierbefreier's right to freedom of expression enshrined in Article 5 (1) of the Basic Law, as reinforced by the state objective on animal protection in Article 20a of the Basic Law.⁴⁵⁷ However, in Chapter 6, the landmark decision of the FCJ in favor of the dissemination of undercover footage, did not mention Article 20a of the Basic Law. Nevertheless, the potential role of Article 20a of the Basic Law as supporting Article 5 (1) of the Basic Law (freedom of expression) is clear in cases on the dissemination of undercover footage.

Article 20a of the Basic Law is also discussed in the context of criminal law. In the Heilbronn case discussed in Chapter 8, the defendants considered the act of trespass justified in light of Article 20a of the Basic Law.⁴⁵⁸ The Heilbronn District Court rejected this idea.⁴⁵⁹ Regardless of whether animal protection as enshrined in Article 20a of the Basic Law is 'another legal interest' in the sense of § 34 of the Criminal Code (necessity), it is, the Court found, not up to animal activists but the state to achieve that objective.⁴⁶⁰ Voices in the literature are critical of this decision: Hans-Peter Vierhaus and Julian Arnold criticize the conclusion of the Heilbronn District Court, especially in light of Article 20a of the Basic Law.⁴⁶¹

Other Courts ascribed more relevance to Article 20a of the Basic Law in cases concerning trespass to create undercover footage. The Magdeburg Court invoked Article 20a of the Basic Law to conclude that an act of trespass was justified pursuant to § 32 of the Criminal Code (self-defense/ third party defense) and § 34 of the Criminal Code (necessity). The Court considered Article 20a of the Basic Law in finding that the Animal Protection Act created a 'right of the animals to a keeping according to the requirements of the Animal Protection Act and the Farm Animal Protection Regulation' ['das Recht der Tiere auf eine Haltung nach den Vorgaben des Tier-

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

458 LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017 (para. 106).

459 Ibid., para. 116, 123.

460 Ibid., para. 123.

461 Vierhaus, Hans-Peter/ Arnold, Julian, Zur Rechtfertigung des Eindringens in Massentierhaltungsanlagen, NuR 41 (2019), 73–77, 74, 76.

schutzgesetzes und der Tierschutz-Nutztierhaltungsverordnung’].⁴⁶² This is the, so far, furthest reaching interpretation of Article 20a of the Basic Law relevant to undercover footage. However, this interpretation was rejected in the literature.⁴⁶³

The Naumburg Regional Court took a different approach, but also considered the act of trespass justified pursuant to § 34 of the Criminal Code (necessity). It conceded that Article 20a of the Basic Law does not apply directly between private parties [‘keine unmittelbare Drittwirkung’].⁴⁶⁴ Yet, Article 20a of the Basic Law is binding for the state and its organs.⁴⁶⁵ From this, the Court concluded that the judiciary must interpret indeterminate legal concepts [‘unbestimmte Rechtsbegriffe’] giving due regard to Article 20a of the Basic Law.⁴⁶⁶ According to the Naumburg Court, this has bearings on the interpretation of § 34 of the Criminal Code (necessity), with the result that it is applicable to animal welfare.⁴⁶⁷ This approach seems the most convincing so far. However, it remains to be seen how it is received in future cases.

To sum up, one can say that the role of Article 20a of the Basic Law in cases arising from the creation and dissemination of undercover footage is far from clear. In civil disputes, it can play a role in favor of allowing the dissemination of footage. Yet, it is not decisive: in 2018 the FCJ decided in favor of continued dissemination without making recourse to Article 20a of the Basic Law. Against this backdrop, progressive decisions in civil law disputes cannot be credited to the state objective alone. In criminal cases, the role of Article 20a of the Basic Law is much contested. As we have seen above, at least three different approaches exist. What can be said with certainty, however, is that the justification of trespass pursuant to § 34 of the Criminal Code (necessity) crucially depends on the state objective. Specifically, the Naumburg Court found that the judiciary must interpret indeterminate legal concepts [‘unbestimmte Rechtsbegriffe’] giving due regard to

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

463 Ritz, Julius-Vincent, *Das Tier in der Dogmatik der Rechtfertigungsgründe*, JuS (2018), 333–336, 336.

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

465 Ibid.

466 Ibid.

467 Ibid.

Article 20a of the Basic Law.⁴⁶⁸ According to the Naumburg Court, this has bearings on the interpretation of § 34 of the Criminal Code (necessity): animal protection qualifies as ‘legal interest of society as a whole’ [‘Rechtsgut der Allgemeinheit’] which may trigger a necessity justification.⁴⁶⁹

Finally, Article 20a of the Basic Law has implications for legal policy. Any criminal law amendment aimed at imposing harsher punishments for trespass to create undercover footage from animal facilities would be difficult to sustain in light of Article 20a of the Basic Law. Ag-gag laws would contravene the expressed intent to work towards more effective animal protection.

12.3.2.2 Structure of the Criminal Code

Criminal law provisions specifically protecting a particular private industry are alien to the German Criminal Code. Against this backdrop, an offence protecting animal facilities and only animal facilities from trespass or employment fraud would be rather unusual, but not entirely inconceivable. Yet, as I will explain below, introducing such a specialized offence tailored to the agriculture industry would not render justifications, and in particular the necessity justification advanced by the Naumburg Court (see Chapter 8), inapplicable. The justifications and excuses enshrined in the general part of the Criminal Code apply to all offenses of the non-general part. In other words, while it is at the discretion of the legislator to pass a law making it a criminal offense to trespass on animal facilities, this would not rule out the applicability of the necessity justification.

12.3.2.3 Private/ Public Boundaries, Criminal Law, and the Public Interest

Recall that above I listed the prevalence of criminal sanctions in response to undercover investigations as distinctive feature of ag-gag, and argued that criminalization narrows the room for public interest considerations on a case-by-case basis. Approaches in Australia differ on this matter and account for the public interest, which brings these cases closer to the legal responses to undercover footage advanced by German Courts. Against this

468 Ibid.

469 Ibid.

backdrop, the question is: which arguments can explain the prevalence of criminalization and absence of public interest considerations in the United States?

Criminalization indicates that the legislator considered the question of public interest and answered it in the negative. Public interest is always relevant to the criminal law at the stage of law-making: the question of whether undercover footage from animal facilities contributes to public debate in a way sufficient to render it in the public interest has been answered in the negative by legislators in US ag-gag jurisdictions.

The absence of the public interest element and the legislator's clear decision for criminalization could be considered a strength of the ag-gag approach, as it reflects the distinctively public nature of the issue at stake. What is at stake in the creation and dissemination of undercover footage is a distinctively public matter. The ethical treatment of animals is not (only) a matter of individual food choices. Rather, it concerns society as a whole and constitutes an issue that is, and that should be, debated publicly. At a minimum, it relates to the way in which food is being sourced; an issue that directly affects consumers. Undercover footage, which aims to bring these issues closer to the public's eyes, is likewise, or even more so, a distinctively public matter. As such, it is plausible that legal responses to undercover footage are primarily a matter of public law, even if this is the criminal law.

Given the public nature of undercover footage from animal facilities, and the fact that it concerns every consumer of animal products, one could argue that grappling with this issue primarily in civil Court is inappropriate. It should be up to the democratically elected legislator, and not only to the Courts, to decide whether undercover footage is in the public interest. In other words, the interference by Courts in political matters should be kept to a minimum.

Considering the public interest introduces a high level of uncertainty that is problematic when criminal sanctions are at stake. In Germany, and also in Australia, significant legal uncertainty exists for those who create and disseminate undercover footage. The Courts are left to make difficult decisions on a case-by-case basis although the matter in question is undisputedly of a public and democratic relevance. As such, one may argue, the democratically elected legislator is better placed to attend to the matter and is called upon to make the legal consequences of creation and dissemination of undercover footage more foreseeable.

To be clear, these claims are not substantive about which response to undercover footage is appropriate. They are merely about who gets to de-

cide. If these issues are centered, they can support the United States ag-gag approach. In ag-gag jurisdictions, democratically elected legislators have decided that undercover investigations at animal facilities do not contribute to public debate in a way significant enough to consider them in the public interest. In so doing, the legislators in question realized the distinctively public nature of these acts and therefore considered it appropriate to address them through the criminal law, thus contributing to legal certainty.

This more favorable explanation should not be considered to exclude the more commonly advanced socio-legal explanations pointed out above. Critics of ag-gag may argue that these legislators foregrounded the protection of businesses in the agricultural industry and did not attach due weight to the public interest. However, this explanation reduces the law to economic factors and is thus overly simplistic. The above considerations regarding the public interest paint a more nuanced picture.

12.3.3 Explanations from Political Culture and Context

After looking at socio-legal and legal doctrinal factors, some aspects of the different legal responses to undercover footage remain unexplained. For example, why do German Courts assess the contribution of undercover footage to public debate, while Courts in the United States remain more legalistic? Why do they invoke free speech without considering its democratic dimension? Varying support for deliberative democracy, different views on the relationship between fundamental rights and democracy, as well as different conceptions of the role of Courts in a democracy may contribute to answering these questions. Yet, these general explanations should not distract from the fact that legal responses to undercover footage do not necessarily align with legal responses to (other) political extremism.

To be clear, it is not my claim that the factors explored in the following are *causal* for different legal responses to undercover footage. This would require an in-depth empirical analysis. Rather, it is argued that the political cultures and contexts support different legal responses to undercover footage. The aim is to better understand both systems, and to shed light on the political cultures and contexts that support different responses to undercover footage.

12.3.3.1 Varying Support for Deliberative Democracy

The reasons given above explain, in part, why the legal responses to undercover footage are stricter in ag-gag jurisdictions in the United States. However, they do not explain the different underlying normative frameworks that are present, not just in legislation, but also in the reasoning of Courts and in the literature. Chapter 10 found that even legal literature on ag-gag focuses on free speech, while glossing over the challenges to democracy that undercover footage and its regulation raise. Often, scholars and Courts appeal to competing values, most importantly animal welfare and free speech vs. property and industry interests. If they do appeal to democratic principles, most do not explore them fully.

Support for the difference may be found in the fact that deliberative democracy is less influential in the United States in practice, than it is in the German context. Some of the most prominent scholars in political science and political theory writing on deliberative democracy are situated in the United States, such as James Fishkin, Joshua Cohen, Amy Gutmann and Dennis Thompson. However, in practice, the German political system may be more inclined towards deliberative democracy. Studies indicate that deliberation is slightly more prevalent in the German political system than in the United States.⁴⁷⁰ In particular, communication scholars find that television is slightly more deliberative in Germany than in the United States.⁴⁷¹ They link this finding to the ‘consensus-oriented political culture’ present in Germany, contrasted against the more majoritarian political system in the United States.⁴⁷² However, it should be noted that other communication scholars who research deliberation in German and US television do not necessarily share this conclusion: in a study on the public debate on abortion, communication scholars found that the discourse in Germany and the United States was, despite differences, overall similarly deliberative.⁴⁷³ The authors find that, on the issue of abortion in public discourse the ‘clash of absolutes’ is more salient in Germany, although public discourse

470 Wessler, Hartmut/ Rinke, Eike Mark, Deliberative Performance of Television News in Three Types of Democracy: Insights from the United States, Germany, and Russia, *Journal of Communication* 64:5 (2014), 827–851.

471 *Ibid.*, 837 ff.

472 *Ibid.*, 843.

473 Marx Frerree, Myra/ Gamson, William, *Shaping Abortion Discourse: Democracy and the Public Sphere in Germany and the United States* (Cambridge: Cambridge University Press 2002).

on the same matter in the United States is ‘tempered [...] by the wave of anti-abortion violence found in the United States.’⁴⁷⁴

A comparable study on the issue of animal activism in public discourse in Germany and in the United States does not exist. The findings of this dissertation clearly indicate a higher level of deliberation in Germany than in ag-gag jurisdictions in the United States. However, this is based on an analysis of legal rather than public discourse, and thus is not necessary indicative for the latter. A comprehensive study comparing the level of deliberation in public discourse on animal activism in Germany and in the United States could lead to different and surprising results, similar to those findings in the case of abortion. Therefore, an explanation for the different legal responses drawing on the prevalence of deliberation in practice, or deliberative democracy in its theoretical dimension, remains speculative.

12.3.3.2 *The Relationship Between Democracy and Fundamental Rights in Law*

It seems that Courts in the United States have refrained from invoking considerations from deliberative democracy in examining ag-gag laws: we rarely find references to democracy at all in these cases. This is surprising considering that they engage constitutional law to a much higher degree than, for example, the decisions in criminal cases in Germany. Constitutional law tends to invite more reflections on the rationales behind free speech, including that of democracy. Against this backdrop, it is surprising that the Courts hardly engaged with these matters.

The absence of explicit references to democracy may be related to the focus on individual rights and autonomy that is typically associated with the United States constitution.⁴⁷⁵ Unlike more recent constitutions, it does not account for ‘communal purposes’ such as for example group rights or guarantees of a decent standard of living.⁴⁷⁶ Democracy – beyond its institutional and procedural dimension – and animal welfare, could also be

474 Ibid., 59.

475 Graber, Mark, *A New Introduction to American Constitutionalism* (New York: Oxford University Press 2013), 183 f.; Kommers, Donald P., *The Grundgesetz, An American Perspective*, in: Knud Krakau, Franz Streng (eds.), *Konflikt der Rechtskulturen?, Die USA und Deutschland im Vergleich* (Heidelberg: Universitätsverlag Winter Heidelberg 2003), 37–47, 40.

476 Graber 2013, 183 f.

considered such ‘communal purposes’ which are less prevalent in constitutional law debate in the United States.

In addition, US Courts are generally reluctant to address political questions. Doing so risks a conflict with the so-called ‘political question doctrine,’ an arguably rather vague concept according to which federal Courts do not address questions that fall into the political, rather than the legal, realm.⁴⁷⁷ This doctrine, albeit vague, does influence the United States legal culture.⁴⁷⁸ As such, it may contribute to the reluctance to engage with democracy, especially in relation to political groups (such as animal activists).

Future cases will show how different the situation is in Australia. Just recently, a case was brought at High Court of Australia, arguing that the *NSW Surveillance Devices Act* is unconstitutional as it violates the right to political communication, which is a right implied as an indispensable part of the system of representative and responsible government enshrined in the Australian Constitution.⁴⁷⁹ Precisely because the Australian constitution does not provide a right to freedom of expression, the case will give an opportunity to explore distinctively democratic challenges to ag-gag. This is so as a result of the fact that a clear distinction between democracy and the rights at stake will not be possible in the Australian context.

However, it remains to be seen whether, and how, the right to political communication relates to legislation operating under the paradigm of biosecurity. Biosecurity may shift the debate from one of relatively abstract values and rights towards one of more concrete interests requiring debate on a factual, rather than normative, level. Biosecurity is doubtlessly a legitimate aim. As such, it is widely accepted as a reason for far reaching

477 The doctrine was first established in *Marbury v. Madison*, 5 U.S. 137 (1803). The decision is also publicly available at: <https://supreme.justia.com/cases/federal/us/5/137/> (last accessed 13 September 2021).

478 Flümman, Gereon, *Streitbare Demokratie in Deutschland und in den Vereinigten Staaten im Vergleich. Der staatliche Umgang mit nicht gewalttätigem politischem Extremismus im Vergleich* (Wiesbaden: Springer 2015), 143.

479 Knaus, Christopher, High Court to hear bid to overturn New South Wales hidden camera law, the *Guardian*, 23 June 2021, available at: <https://www.theguardian.com/australia-news/2021/jun/29/high-court-to-hear-bid-to-overturn-new-south-wales-ag-gag-laws> (last accessed 7 September 2021) (last accessed 7 September 2021). On the right to political communication in Australia see High Court of Australia, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; High Court of Australia, *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106. The decisions are not publicly available online.

governmental regulation, especially in Australia, which is home to rich and sensitive ecosystems, the protection of which is placed high on the national priority list. Against this backdrop, the discussion of the legislation requires examining the risks to biosecurity posed by the conduct prohibited in these laws, and perhaps animal activism more generally. In this context, taking recourse to democracy and fundamental rights is less productive, and may hamper constitutional challenges of laws operating under the paradigm of biosecurity.

12.3.3.3 *The Role of Courts*

Additionally, in search of explanations for different legal responses to undercover footage in Germany and in the United States, one can turn to the debate on the role of Courts and deliberative democracy. The most comprehensive account of the role of Courts in a deliberative democracy has been written by Christopher Zurn.⁴⁸⁰ Zurn's work is primarily associated with judicial review and its compatibility with democracy, but Zurn also critically examines the view that judicial reasoning is a form of principled, rational reasoning on moral questions.⁴⁸¹ As explored in Chapter 2 regarding the methods and theoretical underpinnings guiding the present dissertation, the view that judicial reasoning is a form of principled and rational reasoning is endorsed here, and forms the basis on which I analyzed and normatively reconstructed Court decisions. However, it is possible that this conception of legal, and in particular judicial, reasoning as rational discourse is more suited to the German context than to the United States context.

Zurn criticizes Rawls and others who advocate a close connection between the rational principled argument and legal reasoning.⁴⁸² He employs examples from the jurisprudence of the United States Supreme Court to show that significant 'disanalogies' exist between judicial reasoning and what he refers to as 'principled moral discourse.'⁴⁸³ He found that decisions of Appeals Courts, and even the United States Supreme

480 Zurn, Christopher, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge: Cambridge University Press 2009).

481 *Ibid.*, 163 ff.

482 *Ibid.*

483 *Ibid.*, 163, 187 f.

Court, 'are not, in the main, concentrated on the principled moral-political reasoning [...] but, rather, on the *technicalia* of legal argument: jurisdiction, precedent, consistency, authorization, distinguishability, separation of doctrine from dicta, justiciability, canons of construction, and so on.'⁴⁸⁴ This corresponds to the observations made in this dissertation. Court decisions from the United States were ill-suited for normative, rational reconstruction through the lens of (deliberative) democracy. Even the *ALDF v. Wasden* and *ALDF v. Otter* decisions, which explicitly employed an extra-legal reference of high relevance to democracy being namely the 'court of public opinion,' barely provided resources for normative reconstruction as this extra-legal notion played a marginal role for the outcome of the case.

Zurn further argued that:

'juristic discourse, at least in the United States, is a language of reasons tailored to maintaining the rule of law in a complex Court system with constitutional review performed throughout the regular appellate Court hierarchy, not a language of reasons well suited to public political disagreements about which collective decisions should become binding for fellow citizens and the basic terms of our political consociation.'⁴⁸⁵

The above finding is relevant in two distinct ways. First, it requires critically questioning the methodological choices made in the decisions of the Courts, and the reasons underlying them. The risk associated with comparative law is not just that associated with the lack of knowledge of a legal system that the author is less familiar with. There is also a risk of being influenced by a particular legal culture – in this case a culture of legal reasoning – that the author has been educated in: the theoretical underpinnings of this dissertation stem from a continental European civil law context.

Does this imply then that the method of normative reconstruction was futile in the Chapter on ag-gag laws? After all, it reached its limits due to the prevalence of '*technicalia* of legal argument'⁴⁸⁶ which Zurn so compellingly identified. Nevertheless, I do not consider it to have been futile. Rather, it highlighted a paramount difference between the legal systems of Germany and the United States, including, but not limited to, legal responses to animal activism and undercover footage.

484 Ibid., 184.

485 Ibid.

486 Ibid.

This brings me to the second way in which the above quote is relevant: the role of Courts in shaping legal responses to undercover footage differs between Germany and in the United States. At least in the decisions featured in this dissertation, namely those pertaining to undercover footage from animal facilities, Courts employed arguments that alluded to, and could be explained and examined through, the lens of deliberative democracy. The Courts play a proactive role in determining the legal responses to undercover footage. The same cannot be said about US Courts, which, although they have considered some ag-gag laws to be in part unconstitutional, remained within the boundaries of legalistic argument by centering individual rights. This finding has important implications for the future of ag-gag in the United States. For example, it seems highly unlikely that Courts would take issue with more carefully crafted ag-gag laws that do not raise the same doctrinal challenges. This lack of scrutiny concerns, for example, legislation on employment fraud, civil damages, and rapid reporting. Thus, a paradigm shift in response to undercover footage cannot be expected to occur in the courtroom, as it arguably did in Germany in the decision of the Naumburg Court. In the United States, Courts have made no attempt to interfere in this politicized realm.

12.3.3.4 *Animal Activism in Comparison to (Other) Non-Violent Political Extremism*

The explanations advanced above (support for deliberative democracy; relationship between democracy and fundamental rights; the role of Courts) are not specific to animal rights activism and undercover footage. This raises the question of to what extent the strikingly different legal responses to animal activism and undercover footage are but a product of different legal cultures. In other words, one might question what is special about undercover footage and animal rights activism as compared to other contentious causes and strategies of political activism.

Gereon Flümman compares the responses to non-violent political extremism in Germany and in the United States.⁴⁸⁷ A short summary cannot do justice to the nuanced and detailed findings of the study. However, Flümman finds that compared to Germany, the United States system pro-

487 Flümman 2015.

vides fewer legal resources to counter political extremism.⁴⁸⁸ For example, in Germany it is possible to prohibit associations and even political parties (although only after a strict procedure including a decision of the Federal Constitutional Court), which is not an option in the United States.⁴⁸⁹ Limitations on the right to freedom of assembly are also more common in Germany than they are in the United States, according to Flümman.⁴⁹⁰ In Germany, the criminal law is employed more to counter not physically violent political extremism, than in the United States.⁴⁹¹ The most prominent example is § 130 of the Criminal Code (incitement of hatred [Volksverhetzung]).⁴⁹² In the United States, political extremism from the Left was subject to criminal law measures during the early years of the Cold War.⁴⁹³ However, Flümman argues that, since then, the United States has moved away from criminal law sanctions for political extremism so long as the actions remain non-violent.⁴⁹⁴ Overall, Flümman identified Germany as the more repressive system and attests to the greater degree of tolerance in the United States towards political extremism.⁴⁹⁵

This dissertation illustrates that, in the United States, criminal law in the form of ag-gag is deployed against animal activists and journalist who engage in the non-violent practice of creating undercover footage. The legal responses to undercover footage, when a comparison is conducted between Germany and the United States, are not synchronized with legal responses to (other) forms of political extremism, in particular those forms of extremism from the left and from the right.

Consequently, the case of animal activists and undercover footage remains somewhat extraordinary. The general explanations for this, drawn from the political context given above, are important, and yet they should not conceal the fact that legal responses to animal activism in the United States are distinct from legal responses to other non-violent extremist protest movements. To explain these differences comprehensively, one must include the legal and socio-legal factors outlined above in the analysis.

488 Ibid., 403.

489 Ibid.

490 Ibid.

491 Ibid., 404.

492 Ibid., 405.

493 Ibid., 404.

494 Ibid.

495 Ibid., 406.

12.4 Future Developments

Above I compared the legal responses to undercover footage in Germany, the United States and – to a lesser extent – Australia and Canada. Is there a potential for these different approaches to inform each other? Is ag-gag a concept that might inspire future legislation in Germany? Or could Courts in the United States adopt some of the arguments made in the German context?

12.4.1 Future Legal Responses to Undercover Footage in Germany

Could legal measures resembling US ag-gag legislation be adopted in Germany, as has already been seen in Australia and Canada? From 2018 to 2021 it seemed possible, as the government coalition between the conservative CDU/CSU and the social democratic SPD addressed the issue in their coalition treaty which stated: ‘[w]e want to effectively penalize break-ins in animal agriculture facilities as a criminal offence’ [‘Wir wollen Einbrüche in Tierställe als Straftatbestand effektiv ahnden’].⁴⁹⁶ However, there have not been any attempts to pass new legislation in this regard. Considering the frequent uncovering of animal welfare violations at German animal facilities and slaughterhouses through undercover footage, as well as the spotlight put on working conditions in these facilities, introducing legislation further criminalizing undercover investigations does not seem politically viable. Nevertheless, the issue remains pertinent as tensions between representatives of animal agriculture on the one hand and animal activists on the other continue to boil high.

Chapters 7–9 on civil disobedience pointed to several reasons speaking against further criminalizing the creation of undercover footage. This Chapter will avoid repeating these normative arguments to promote a forward-looking perspective. This Section draws on the findings of this Chapter to ask, not whether the further criminalization of the creation of undercover footage in the form of ag-gag law is desirable, but whether it would be possible in Germany. In so doing, it systematically explores the

496 Coalition Treaty: Koalitionsvertrag zwischen CDU, CSU und SPD. Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt für unser Land, 19th Legislative Period, 2018, 86, available at: <https://www.bundesregierung.de/resource/blob/974430/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1> (last accessed 10 February 2022).

explanations for the differences between the German and the United States ag-gag approach.

First, the socio-legal factors explored above would not prevent implementing legislative measures comparable to ag-gag in Germany. The tentative comparison conducted above indicated that agriculture may be considered economically less important on the federal level in Germany than it is in those US states like Idaho and Kansas with ag-gag laws. Accordingly, the agriculture lobby may have less influence on federal politics in Germany than in those states. However, this factor should not be overestimated. After all, other economic sectors, and especially food security, depend on agriculture in Germany too. Further, Europol documents suggest that animal activism is a terrorism threat, similar to the appraisal of US authorities. However, this view is not necessarily shared by authorities in member states of the EU. In Germany, animal activists are not commonly referred to as terrorists in public or legal discourse, providing support for legislation targeting them specifically. Nevertheless, the tone in public debates on animal activism and undercover footage is harsh and may also penetrate legal discourse. In a nutshell, one can say that factors, such as the importance of agriculture and the tradition of the animal rights movement, do display relevant differences. However, these differences are not sufficiently strong to render the possibility of introduction of ag-gag like legislative measures in Germany inconceivable.

Second, legal doctrine provides the most robust safeguards against the introduction of legislation that hinders the creation of undercover footage in Germany. Here, criminal law doctrine and Article 20a of the Basic Law warrant a mention. Yet, both come with certain caveats. The animal protection state objective enshrined in Article 20a of the Basic Law speaks against taking legislative steps against undercover footage. Doing so could be conceived as further increasing the enforcement gap in animal welfare law which would be difficult to reconcile with the objective of protecting animals. However, the state objective does not confer individual rights, and it is difficult to hold the legislator legally accountable for not sufficiently taking the state objective into account. Article 20a of the Basic Law provides a strong ground for favorable decisions about undercover footage. But the fact that, for example, the Naumburg Court understood the state objective as speaking in favor of letting activist go unpunished is not binding upon the legislator. Concerns about animal welfare could be mitigated if other measures increasing animal welfare and closing the enforcement gap would

be passed simultaneously. For example, the frequency of mandatory checks by veterinary authorities could be increased.

A more robust protection against ag-gag laws lies in the structure of the German criminal code through the necessity justification. The necessity justification, like other defenses, is enshrined in the general part of the German Criminal Code. Criminal offenses are listed in the non-general part of the Criminal Code. The justifications and excuses enshrined in this general part apply to all offenses captured in the non-general part equally. In other words, the legislator may pass a law making it a criminal offense to trespass on animal facilities, but the necessity justification could still apply as illustrated in the decision of the Naumburg Court. Within this structure, introducing a new criminal offense and saying that the necessity justification would not be applicable would break with established criminal law doctrine.⁴⁹⁷ As such, it would be undesirable even from a purely legal perspective.

On the other end of the spectrum, some may advocate for legislation to minimize the risk of criminal prosecution for animal activists. Tobias Reinbacher suggests discussing the introduction of a § 32a of the Criminal Code, a specialized justification for defense of animals, applicable if, and only if, the conditions in the facility are in violation of § 17 of the Animal Protection Act.⁴⁹⁸ This reform would lead to more legal certainty for animal activists. However, so far, it has not been taken up by major political actors.

Finally, explanations from democracy can be considered. Here it is essential to note that while deliberative democracy is reflected in established jurisprudence of German Courts, most importantly in assessing the contribution of undercover footage to public debate, it remains an extra-legal framework. As such, it is a weak safeguard against ag-gag legislation. While it may explain the current state of legal responses to undercover footage, it might not be able to prevent the legislator from imposing higher sentences for trespass on animal facilities.

In a nutshell, one can say that there are fewer safeguards against possible ag-gag legislation in Germany than existing legal responses might lead one

497 This assessment is in line with the position of the research service of the German parliament. Deutscher Bundestag, wissenschaftliche Dienste, Sachstand: Strafbarkeit sogenannter „Stalleinbrüche“, WD 7 – 3000 – 206/180, 20 September 2018, p. 11, available at: <https://www.bundestag.de/resource/blob/581224/b3e8432c09685c55877ec2085daba37e/WD-7-206-18-pdf-data.pdf> (last accessed 22 September 2021).

498 Reinbacher, Tobias, Nothilfe bei Tierquälerei?, *Zeitschrift für internationale Strafrechtsdogmatik* 11 (2019), 509 -116, 516.

to believe. A shift in social factors, first and foremost a polarization of the debate on animal activism, should be considered warning signs, as they could pave the way for harsher legal responses to undercover footage.

12.4.2 Future Legal Responses to Undercover Footage in the United States

Whether ag-gag laws continue to exist in the United States in some form is a matter of politics. Legal challenges may have been successful or partly successful, but they would likely be futile in the face of more carefully drafted ag-gag laws that do not raise the same First Amendment concerns. Opponents of ag-gag often argue that ag-gag laws are politically unpopular. However, this could change if jurisdictions in the United States learn from the Canadian and Australian example and add biosecurity to the rationales behind ag-gag; supplementing or replacing the rationales of privacy and property.

However, the existence of ag-gag laws as such does not preclude the possibility of innovative legal responses to undercover footage. For example, one might ask whether activists in the United States could invoke a necessity defense against trespass charges. This matter was briefly considered in Chapter 9. Although there may be compelling legal arguments in favor of it, a necessity defense would likely be unsuccessful. One reason for this assessment, in comparison to Germany, is that neither animal protection nor any other value that could be made fertile for the protection of animals such as environmental protection, is enshrined in the United States constitution. As we have seen in the comparison above, the animal protection state objective in the German Basic Law featured prominently in the decisions considering trespass to create undercover footage justified. Without Article 20a of the Basic Law, these decisions would be difficult to sustain. In the United States, the absence of a comparable provision makes more favorable responses to the creation of undercover footage – even in absence of ag-gag laws – rather unlikely.

Further, as we have seen above, the role of Courts is conceived of differently in the United States legal system as compared to that of Germany. They are more reluctant to engage with (deliberative) democracy as an evaluative framework for undercover footage from animal facilities. Favorable decisions on the dissemination of undercover footage in Germany reflected defining features of deliberative democracy. Although elements of deliberative democracy were not found to be decisive in most of the cases

analyzed here, they are clearly informative for the standards that the Courts apply, and their overall approach. They make room for arguments from democracy in favor of undercover footage. This is not the case, at least not to the same extent, in cases from the United States; presumably due to the fact that deliberative democracy is less prominent in the United States, and because Courts in the Anglo-American system are less receptive to deliberative democracy. This further hinders the line of reasoning that led to favorable decisions in Germany from being used in United States Courts.

12.4.3 Future Legal Responses to Undercover Footage in Australia and in Canada

Activists are only now beginning to challenge ag-gag laws in Canada and Australia. As such, it is too early to speculate about the future of these laws. This task must be left instead to legal scholars situated in those respective systems who are better placed to speak to the distinctive legal challenges that can be made against ag-gag in those contexts. Neither of the jurisdictions in question have a constitutional law provision raising animal welfare to a value of constitutional rank. Agriculture may be prevalent in rural areas in Australia and Canada as well.

In the case of Australia, the right to political communication, which is implied as an indispensable part of the system of representative and responsible government enshrined in the Australian constitution as well as the compelling reasoning of the High Court in *ABC v Lenah Game Meats*,⁴⁹⁹ may put animal activists in a favorable position. If the High Court decides the case currently being brought by activists in New South Wales, this could become the site for deciding the future of Australian ag-gag laws. Finally, one should not underestimate the culture of animal activism. As Gelber and O’Sullivan argued, the animal rights movement in Australia is embedded in a non-violent tradition, distinguishing it from the United States counterpart.⁵⁰⁰ In this context, legitimizing ag-gag by framing activists as terrorists is less convincing.⁵⁰¹ If one ascribes weight to the socio-legal explanations for differing legal responses to undercover footage, it seems likely that the future of ag-gag in Australia will be distinct from that of United States.

499 *ABC v Lenah Game Meats*, (2001) 208 CLR 199.

500 Gelber/ O’Sullivan 2021, 29.

501 *Ibid.*

13. Conclusion

13.1 Main Findings

This dissertation has analyzed, explained, and evaluated a carefully selected number of cases concerning animal activists in Germany and the United States. The following presents the main findings of the dissertation based on the central research questions set out in the Introduction (Chapter 1): first, how do freedom of expression, democracy, and animal law interact in cases arising from the creation and dissemination of undercover footage; second, how does democracy conceptually relate to the Courts' reasoning in cases concerning undercover footage; and third, what are the differences between legal responses to undercover footage in Germany and in the United States, and how can they be explained?

13.1.1 Interactions Between Freedom of Expression, Democracy, and Animal Law

Animal activists' enjoyment of freedom of expression is limited by existing animal welfare law. In the cases discussed in this dissertation, both the legality of the creation of undercover footage and its dissemination hinged, to quite a large extent, on the question of whether the conditions displayed in the footage were legal or illegal.⁵⁰² This distinction has challenging consequences.

13.1.1.1 Animal Activists' Enjoyment of Freedom of Expression

The distinction between legal and illegal conditions depicted by undercover footage inevitably impacts on animal activists' enjoyment of the right to freedom of expression. The decision on whether undercover footage is lawful depends, *inter alia*, on whether it uncovers unlawful conditions or conduct.⁵⁰³ If it does not, the assumption is that public interest in the

502 See e.g., the discussion of OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018 (2065) in Chapter 8.

503 See e.g., the discussion of the *Tierbefreier* case, especially OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005, in Chapter 5.

footage is lacking. Thus, in those cases, the interests of animal facility operators may prevail over animal activists' right to freedom of expression.

The FCJ has recently problematized the above standard: in the organic chicken case, the Court emphasized that the illegality of conditions in a facility is not always a necessary precondition to the legality of the dissemination of footage depicting them.⁵⁰⁴ Following the example of the FCJ in that case, Courts should consider ways to temper the dependence of animal activists' enjoyment of free speech on existing animal welfare law. This dissertation offered some guidance on how Courts might achieve this: rather than taking the illegality of the uncovered conditions as a requirement, Courts should critically question whether the applicable animal protection law may be in need of reform, and whether democratic engagement leading to such reform can be instigated by the footage in question.

13.1.1.2 Criminal Sanctions

The distinction between illegal and legal animal welfare conditions can determine whether activists are convicted as criminals or vindicated as guardians of the law. Significantly, the German Courts' progressive application of the necessity defense in cases against activists who trespass to create undercover footage⁵⁰⁵ does not seem to apply if the conditions in an animal facility are considered legal, regardless, it seems, of how unethical they may be.

Consequently, advocates should not only rely on the necessity defense, but should also explore other legal avenues to defend animal activists against criminal charges. Prosecutorial discretion and the application of lower sentences should be explored as they are less reliant on the distinction between illegal and unethical conditions in animal facilities. An avoidable error of law (caused by the ethical dimension of the subject, diverging jurisprudence and the multilayered structure of animal protection law) may also achieve an appropriate mitigation of the sentence.⁵⁰⁶

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

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

506 See Chapter 9.

13.1.1.3 Democratic Engagement

The distinction between legal and illegal conditions hampers democratic engagement with animal law and with industry standards. Activists may effectively target the enforcement gap in animal law, but rarely criticize existing legal standards as unethical.

The law rarely approves of transgressions by appealing to extra-legal – in this case, moral – norms on animal ethics, but it may protect those who transgress *in the same way* to improve the enforcement of existing law. As such, the law distinguishes between transgressions aiming at legal change, and transgressions aiming at improved enforcement of existing law. The latter transgressions are more likely to be vindicated.

This distinction is problematic in the special case of animal activists. Due to the multilayered nature of animal law, it may not always be clear where the boundary lies between law and industry standards. Further, what activists find incompatible with Article 20a of the Basic Law is not necessarily incompatible with lower norms.

The distinction between legal and illegal standards is further complicated by the idiosyncrasies of democratic discourse and lawmaking on animal issues. When Courts rely on the legality of conditions in animal facilities to determine the public interest in revealing them, they do not question the relationship between legality and democratic legitimacy.⁵⁰⁷ The standards set by animal welfare laws and industry practice may not always enjoy continuing democratic legitimacy. Especially as societal attitudes to the matter change, not least due to animal agriculture's contribution to the growing threat of climate change, the way we relate to animals in agriculture requires further public debate.

13.1.2 Democratic Cultures and Practices in Cases Against Animal Activists

Democratic cultures and practices significantly shape legal responses to undercover footage. Deliberative democracy helps to explain and evaluate civil cases against animal activists concerning the dissemination of undercover footage, while the democratic approaches to civil disobedience can help to explain and evaluate cases concerning criminal charges related to the creation of undercover footage.

507 See in particular LG Heilbronn [Heilbronn District Court] 23 May 2017, 7Ns 41 Js 15494/15, BeckRS, 132799, 2017, discussed in Chapter 8.

13.1.2.1 *The Value of Employing Democratic Theory to Explain and Evaluate Legal Responses to Animal Activism*

Animal activism can be assessed through the lens of democratic theory. In particular, deliberative democracy can usefully explain, evaluate, and further develop legal thought on the issue of animal activism and the creation and dissemination of undercover footage.⁵⁰⁸ More precisely, deliberative democracy offers a compelling political, rather than moral, theory that can give guidance on how to argue about animal ethics and to address disagreement on this issue which is to be taken seriously. Further, deliberative democracy has a close relationship with the law, as it is also a theory on the legitimacy of legal norms and arguments.

Animal activists who create and disseminate undercover footage exhibit an ambivalent relationship with law and democracy: to create footage, activists break the law and, thus, the democratically sanctioned norms that those laws represent. And yet, they also rely on footage for bringing about legal change via democratic procedures.

13.1.2.2 *Insights from Deliberative Democracy*

In the jurisprudence of German Courts, animal activists' enjoyment of freedom of expression is shaped by references to democracy; most significantly in the form of a general public interest assessment that is carried out in the balancing of rights, but also in the form of extralegal notions such as 'the intellectual battle of ideas'⁵⁰⁹ and 'public watchdog'⁵¹⁰ in the Courts' reasoning.

508 See Chapters 2 and 3.

509 See Chapter 5 *Tierbefreier* case OLG Hamm [Hamm Regional Court] 21 July 2004, 3 U 116/04, ZUM-RD 131, 2005.

510 See Chapter 6 organic chicken case, BGH [Federal Court of Justice] 10 April 2018, VI ZR 396/16, NJW 2877, 2018 (2880).

13.1.2.2.1 Going Beyond the Traditional Conception of Deliberative Democracy

References to democracy in the reasoning of German Courts are indicative of a traditional account of deliberative democracy. As shown in the *Tierbefreier* case, in the jurisprudence of German Courts and of the ECtHR, the speech of militant animal activists is less protected than that of other citizens.⁵¹¹ A traditional theory of deliberative democracy can support this approach, as it prescribes rational, detached discourse. The ‘rules’ of this stream of deliberative democracy provide an obstacle for animal activists.⁵¹²

Courts should be more attentive to arguments from more inclusive streams of deliberative democracy. Political minorities should not be deterred from taking part in the public debate. Further, undercover footage, even if it is obtained by non-deliberative means, may lead to improved public deliberation on animal welfare in the long term.⁵¹³ Legal responses to undercover footage must balance any repercussions of the undemocratic means of animal activists against inclusiveness and any democratic potential which may be realized downstream. However, caution is warranted when activists are more committed to animal protection than to democratic principles.

13.1.2.2.2 Mitigating Distinctions Between Journalists and Activists

The jurisprudence of German Courts indicates a divide between the public watchdog role of journalists, and the role of activists. This became clear in the 2018 decision of the FCJ in the organic chicken case.⁵¹⁴ It seems that this beneficial decision could favor only established media outlets and may not extend to animal activists, as the Court relied on the function of the press as public watchdog.⁵¹⁵ Unlike the ECtHR, German Courts do not apply this

511 See Chapter 5.

512 Humphrey, Mathew/ Stears, Marc, *Animal Rights Protest and the Challenge to Deliberative Democracy, Economy and Society* 35:3 (2006), 400–422; for activists generally see Young, Iris Marion, *Activist Challenges to Deliberative Democracy, Political Theory* 29:5 (2001), 670–690, 672.

513 See e.g., Chapter 5.

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

515 *Ibid.*, 2880.

notion of public watchdog, nor the privileges that come with it, to NGOs and individuals.⁵¹⁶

Animal activists who disseminate undercover footage should not be treated as categorically different from journalists. Legal decisions on the dissemination of undercover footage should not be made on the grounds of *who* disseminates it, but rather on *how* it is disseminated. Support for a distinction between established media and activists can be found in a traditional conception of deliberative democracy, as the media are expected to report more objectively than do activists. Yet, this assumption is not always justified, particularly given that in the online sphere, it is increasingly difficult to establish which news sources qualify as objective journalism. In such an indeterminate media landscape, the distinction between journalists and activists is difficult to maintain.

13.1.2.3 *Insights from Democratic Approaches to Civil Disobedience*

The creation of undercover footage by means of trespass can be vindicated in deliberative democracy if characterized as civil disobedience. The deliberative account of civil disobedience developed by William Smith provides some promise for animal activists, as it makes the moral status of an act of civil disobedience contingent upon democratic deficits in the deliberative process.⁵¹⁷ In this conception, it is crucial that the creation of undercover footage is employed to remedy democratic deficits in the debate and decision-making process on animal matters.

When Courts invoke the democratic legitimacy of practices in animal agriculture, they should critically engage with shortcomings of public debate and decision-making on animal law. When the Heilbronn District Court found animal activists guilty of trespass in 2017, it argued that factory farming was socially accepted and that the activists attempted to impose their political aim on the majority.⁵¹⁸ The deliberative account points out the weaknesses of this line of argument. It challenges the assumption that the existence of certain practices in animal agriculture always implies their democratic legitimacy.

516 See Chapter 6.

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

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

13.1.2.4 Recognizing Civil Disobedience in Cases Against Animal Activists

Contrary to claims made by Courts and many legal theorists, civil disobedience can be legally justified.⁵¹⁹ In some cases, trespass to create undercover footage can be legally justified as necessity: the Naumburg Court's necessity justification⁵²⁰ was legally sound. It further finds support in democratic approaches to civil disobedience, as a protest against the policy of non-enforcement of animal welfare standards.

However, the necessity defense is not a *carte blanche* for activists: it only applies where activists trespass to urge authorities to enforce existing law. It fails where activists seek to criticize unethical but legal practices. As mentioned above, there are other legal mechanisms that could be employed to let animal activists go unpunished, including the error of law, and (in some jurisdictions) the safeguarding of legitimate interests.

Moreover, arguments from civil disobedience can be considered at the sentencing stage and when exercising prosecutorial discretion. The rationales for punishment are rarely applicable in cases of civil disobedience, resulting in minimal public interest in prosecution. However, justifications for civil disobedience from constitutional law or extralegal necessity should be rejected.⁵²¹

13.1.2.5 Addressing Tensions between Moral and Legal Evaluation through Civil Disobedience

The law can take defining features of and arguments arising from civil disobedience into account without replacing legal with moral evaluation. Legal reasoning can address factors such as the importance and urgency of causes like animal welfare, without using the notion of civil disobedience. And yet, civil disobedience matters to the law as it allows one to evaluate the law and legal decisions, and to place them in the context of societal and political change.

Decisions which harshly sentence those acting in civil disobedience should not be accepted simply because the law seemingly mandates doing

519 See Chapter 9.

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

521 See Chapter 9.

so. Nor should decisions which let activists go unpunished without sound legal reasoning be celebrated. Instead, both extremes prompt us to ask how the law and its application could be reformed to enable legal actors to reach just outcomes through the law's application. The law should not capitulate and, for example, let a jury acquit activists on extralegal grounds, as occurred in the case of Extinction Rebellion activists in the United Kingdom recently.⁵²² If the law seems inadequate to address these cases, we must question how it can be improved. In so doing, the findings of this dissertation can be instructive. It is not necessarily the letter of the law that requires adjusting, but its interpretation. In times of increasing concerns for animals, the environment and the climate, a broader interpretation of necessity is warranted.

13.1.3 Differences between Germany and the United States

Legal responses to undercover footage differ significantly in Germany and in the United States. Some jurisdictions in the United States have so-called ag-gag laws on the books. These laws hinder the creation and, as a consequence, the dissemination, of undercover footage from animal facilities.⁵²³

The criticism advanced against ag-gag in the United States does not necessarily apply to legislation discussed under the same term in other jurisdictions. In Australia, for example, some legislation denounced as ag-gag is sensitive to public interest considerations, which could make a significant difference in practice.⁵²⁴

13.1.3.1 Explaining the Relevant Differences

Ag-gag legislation marks the defining difference between Germany and some jurisdictions in the United States.⁵²⁵ Other salient differences include the reach of the criminal law, the weight assigned to animal welfare as

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

523 See Chapter 10.

524 See Chapter 11.

525 See Chapter 12.

a matter of public interest, privileges conferred to the media, and legally protected values invoked in the debate.

Socio-legal explanations for these differences include the importance of agriculture in a given region, the influence of lobby groups on the legislative process, different strategies and traditions of animal activism, and public discourse on animal activism, which all may have a significant influence. Doctrinal explanations include the legal status of animals, the structure of the criminal code and finally, different private/public boundaries in the law.

Different approaches to democracy and political cultures are relevant, too. Varying support for deliberative democracy, different views on the relationship between fundamental rights and democracy, and the different conceptions of the role of Courts in a democracy may contribute to explaining legal responses to undercover footage. Yet, legal responses to undercover footage do not align with legal responses to (other) political extremism. With regard to extremism from the left and right, the United States has been attested a more lenient approach.

13.1.3.2 Agonism vs. Deliberative Democracy

Courts, and even scholars, in ag-gag jurisdictions approach the topic of ag-gag primarily as a matter of free speech, and rarely engage with the distinctively democratic dimension.⁵²⁶ In cases on the constitutionality of ag-gag, Courts tend to focus on free speech without delving deeper into democracy as rationale for the protection of free speech, or democratic implications of ag-gag laws. Even the most theoretical contributions in the literature fall short of a fuller engagement with democracy.

The debate on undercover footage is more adversarial in the United States than it is in Germany. The notion of the ‘court of public opinion,’ which featured in *ALDF v. Wasden*, reflects distinctively democratic concerns around ag-gag.⁵²⁷ Proponents of ag-gag argue that ag-gag is necessary to prevent activists from prosecuting law-abiding farmers in a ‘court of

526 See Chapter 10.

527 *ALDF et al. v. Lawrence G. Wasden, in his official capacity as Attorney General of Idaho*, 878 F.3d 1184 (9th Cir. 2018), Ninth Circuit Appeal Decision, 4 January 2018 (‘*ALDF v. Wasden*,’ in the following). The decision is also available at: https://www.acluidaho.org/sites/default/files/field_documents/92._opinion.pdf (last accessed 4 August 2021).

public opinion.’ On the other hand, critics insist that this is not a legitimate aim for legislation. Unlike the ‘intellectual battle of ideas’ on which German Courts rely, the ‘court of public opinion’ is adversarial and judges people rather than ideas.

Instead of deliberative democracy, agonism can help to explain and evaluate legal responses to undercover footage in the United States.⁵²⁸ But even under the framework of agonism, which is more open to conflict and less focused on consensus-finding and reason-giving than deliberative democracy, ag-gag laws can be criticized. Ag-gag turns animal activists and animal facility operators from adversaries to political enemies. Agonism does not condone this, as, according to Chantal Mouffe’s agonistic approach, the role of the enemy should be reserved for those who ‘reject the very basic idea of pluralist democracy.’⁵²⁹ This may be the appropriate response to some forms of animal activism. However, it is not suitable in the case of those activists who create and disseminate undercover footage precisely to take part in what Mouffe calls the ‘agonistic struggle,’⁵³⁰ to fight for their ideas through persuasion.

13.2 Outlook

Animal activism will continue to give rise to difficult legal cases in the future, which will polarize the public and legal debate alike. Undercover footage remains a popular activist strategy. It features in documentaries broadcasted by established media outlets, such as the airing in early 2022 of the BBC Panorama ‘A Cow’s Life: The True Cost of Milk’ which led to a heated discussion, not only about animal cruelty in the dairy industry but, interestingly, also about whether the BBC should have aired the documentary in that form.⁵³¹ This debate highlights the continuing tensions in the realm of animal activism and undercover footage.

A consensus about the substantive ethical question at stake, namely how we ought to treat animals, is not in sight. Nevertheless, the law must attend

528 See Chapter 10.

529 Mouffe, Chantal, *By Way of a Postscript*, *Parallax* 20:2 (2014), 149–157, 151.

530 *Ibid.*

531 Grant, James, ‘Don’t Tar All Farmers with the Same Brush’: Fury as BBC Panorama uses vegan activist’s secret video of cows being abused on ONE farm in Wales to paint the whole industry as cruel, *Daily Mail*, 15 February 2022, available at: <https://www.dailymail.co.uk/news/article-10514479/Fury-BBC-Panorama-uses-vegan-activists-secret-video-cows-abused-ONE-farm.html> (last accessed 16 August 2022).

to the way in which public debate on these issues is conducted. Democratic theory can assist in this difficult task by helping to explain and to evaluate legal responses to undercover footage. Now is the time to turn to the question of how these findings could inform legal responses to undercover footage in the future. Certainly, democratic theory should not dictate how the law approaches undercover footage, but especially deliberative democracy already corresponds to nascent ideas in legal reasoning with which this dissertation engaged in more extensive exploration.

Animal activists who create and disseminate undercover footage operate at the margins of law and democracy. Their conscientious motivation and potential contribution to democratic deliberation places their actions in a point of tension between legality and legitimacy. Activists invoke animal ethics and, at times, argue that if consumers and voters could only know about the suffering involved in certain animal industries, they would oppose them. Interestingly, the tension between legality and legitimacy mirrors some typical features of animal law and its enforcement. At times, both animal law and animal activism operate in a space of tension between legality and (democratic) legitimacy. In animal law, some practices continue to exist for years after the democratic legislator has chosen to ban them, and enforcement of animal welfare standards is lacking. As such, both animal law and animal activism are nested between legality and legitimacy. This makes responding to animal activism a difficult, but crucial, task for the law.

In Germany, the most pressing legal challenges with regard to undercover footage are those associated with providing more legal certainty and addressing existing inequalities in the protection of the right to freedom of expression. The problem of legal certainty is most prominent in cases concerning the creation of undercover footage. Although the decisions of the Heilbronn Court and the Naumburg Court are not contradictory as such, they create a certain level of legal uncertainty for animal activists. New legislation is not necessarily needed to address this problem. The Naumburg Regional Court has developed convincing criteria for a restrictive application of the necessity defense in these cases.⁵³² If other Courts, and in particular the FCJ, were to apply the same standards in the future, much certainty could be gained. The standards developed by the Naumburg Court are not just legally sound, they can also be supported by an

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

assessment through the lens of democracy and democratic approaches to civil disobedience. Taking this dimension into account does not push aside legal standards. Rather, it offers a complimentary framework which is helpful to placing the creation of undercover footage in a social, political, and distinctively democratic context.

The second most pressing challenge, that of increasing equality, mainly concerns the dissemination of undercover footage. Activists may be disadvantaged as compared to journalists. Even within the category of animal activists, distinctions along the lines of ‘rules’ of the intellectual battle of ideas have been drawn. Doing so may find support in a traditional conception of deliberative democracy, but it fails to take compelling arguments of other deliberative democrats into account, particularly those who invoke the disadvantages position of political minorities and the democratic potential of non-deliberative acts such as the ones associated with undercover footage. To remedy these concerns, Courts would have to place a greater emphasis on how undercover footage is disseminated and its potential risks and effects, rather than taking the status of the individual or entity disseminating it as indicative of these more nuanced standards.

In jurisdictions with ag-gag laws, other challenges are pertinent. Most ag-gag laws are problematic from the perspective of deliberative democracy, and even from the perspective of agonistic pluralism. In the United States, it seems unlikely that ag-gag laws will cease to exist in the foreseeable future. One reason for this is that Courts, even when ultimately finding that some ag-gag provisions violate free speech, remain comparatively formalistic in their assessment of free speech. More likely, ag-gag laws will be refined in the future to temper First Amendment concerns without addressing distinctively democratic problems. In Australia on the other hand, ongoing litigation on the NSW ag-gag law provides promise: in lieu of an explicit right to free speech in the constitution, the High Court will have to grapple with distinctively democratic concerns such as the ones raised in this dissertation.⁵³³

In Germany, legislation comparable to ag-gag was briefly on the public agenda in 2018 when the at that time newly formed government expressed intent to punish those who break into agriculture facilities more effectively.⁵³⁴ Unsurprisingly, this plan was not put into action. Any legislation of

533 See Chapter II.

534 Coalition Treaty: Koalitionsvertrag zwischen CDU, CSU und SPD. Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt

this kind would severely affect the doctrinal coherence of the criminal code, as it would have to deem the necessity justification inapplicable.

Whether ag-gag legislation may, in some contexts, be necessary to protect farming communities, is up for debate. To be more sensitive to democratic concerns, ag-gag could include public interest exceptions. Without public interest exceptions, ag-gag further criminalizes activists and risks pushing them into the role of an ‘enemy,’ rather than an ‘adversary,’ in the public debate or ‘agonistic struggle.’⁵³⁵ Therefore, criminalization should be approached with the utmost caution.

A follow-up question is: to what extent are the findings of this dissertation applicable to other activists, in particular those protesting climate change and environmental destruction? Conflating the agendas and strategies of the different movements would not do their distinctiveness justice. To what extent animal and climate activists are comparable in their strategies is a question for further research. Nevertheless, the findings of this dissertation can be instructive for legal responses to other activism, in particular in the context of climate change, too. Most importantly, legal scholars should look at actions of climate activists in a democratic and political context.

Both climate and animal activists sometimes circumvent democratic procedures to instigate democratic change. In addressing these protest movements, the law can play different roles. If law criminalizes the strategies of activists and prevents their message from being heard, it can perpetuate the status quo. At the same time, those sympathetic to the goals that activists pursue might be tempted to consider the law as a powerful driver of change. And yet, both images of the law seem rather bleak. In a liberal democracy, change requires a democratic process. With regard to legal responses to animal activism and related protest movements, this means that the law should accompany change by protecting its democratic credentials and filtering those elements that are not conducive to an open and fair public debate. This role is a difficult one, particularly where activists are acting on behalf of others whose rights are not fully recognized by the law, and when they employ strategies with an ambivalent relationship to democracy. In these cases, the law's role is more complex than one of hindering or driving

für unser Land, 19th Legislative Period, 2018, 86, available at: <https://www.bundesregierung.de/resource/blob/974430/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1> (last accessed 10 February 2022).

535 Mouffe 2014, 151.

societal change, because it requires reflection on democratic theory, culture, and practice. It is hoped that this dissertation succeeded in illuminating how law can fulfill this function when mobilized in response to animal activism.

