

On the Legality and Democratic Legitimacy of Animal Rights Activism and Undercover Footage

Katharina Braun is a PhD candidate in Law at Freie Universität Berlin, Germany. In her thesis, she analyses legal responses to animal rights activism. She holds a German law degree (1st state exam) and an LL.M. in Human Rights & Social Justice from the University of Connecticut.

Nonhuman animals are confined in factory farms and killed in slaughterhouses for human consumption. If animals are due any moral consideration at all, it needs to be ensured that animal welfare laws are respected in the process, and that existing standards are subject to public scrutiny. If you ask activists and journalists why they collect and disseminate undercover footage from animal facilities, they may answer along the following lines: When creating and disseminating undercover footage from animal facilities, we bring animal suffering closer to the public's eyes. We hold those who violate the law responsible and instigate overdue change in our relationship with nonhuman animals. Nevertheless, this advocacy strategy poses moral, political, and legal questions. In the following, I draw on the debates around deliberative democracy and civil disobedience to argue that undercover footage raises issues of distinctively democratic interest.

The popular activist strategy of collecting and disseminating undercover footage conflicts with the law of most if not all liberal democratic states. And yet, legal responses to these strategies vary greatly. In 2018, a German Court considered the necessity defense in the case of activists who trespassed to collect undercover footage.¹ The Court argued that animal welfare is a legally protected interest of society as a whole.² If activists have positive knowledge of illegal conditions in a facility, and if the authorities refuse to take action, then trespassing to collect footage can be legally justified, according to the Court.³ The activists in this case went unpunished, but that remains rather exceptional. In some jurisdictions, including in Canada, activists do not only face charges for trespass. So-called 'agriculture gag' or 'ag-gag' laws further criminalize activities such as obtaining employment at an animal facility to collect footage. Critics argue that these laws conflict with the right to freedom of expression.⁴

These diverging responses to conduct associated with undercover footage highlight a profound tension that has not received sufficient attention: given the conflict between positive law and its implementation on the one hand and ethical convictions regarding animals on the other, should the law be permeable enough to allow for the collection and dissemination of

¹ OLG Naumburg [Naumburg Regional Court] 22 February 2018, 2 Rv 157/17, NJW 2064, 2018.

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

³ Ibid.

⁴ Animal Justice, 'Fighting Canada's Dangerous "Ag Gag" Laws,' 10 September 2020, available at <https://animaljustice.ca/blog/fighting-canadas-dangerous-ag-gag-laws> (last accessed 22 January 2022).

undercover footage? How far should activists be permitted to go to make us scrutinize animal welfare law and its implementation?

Of course, the law provides nuanced legal standards to adjudicate cases involving undercover footage. The law can achieve fair outcomes without taking recourse to non-legal concepts such as deliberative democracy and civil disobedience, which I draw on in this contribution. Nevertheless, these concepts can be employed to better explain and evaluate legal reasoning on the matter of undercover footage.

One possible way to appraise the collection and dissemination of undercover footage is to ask how it relates to deliberative democracy, which can be defined as ‘a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future.’⁵ It is based on the values of ‘equal status and mutual respect.’⁶

As indicated above, undercover footage might contribute to public deliberation by giving citizens the information they need in order to assess legislation on animal welfare matters. However, in reality the footage may come with certain pitfalls. It may be just one element of a larger strategy that does not primarily aim to educate people and convince them, but to force the closure of a specific facility. Further, the way the footage is edited and presented may be misleading, and the commentary may be non-deliberative in tone. But more importantly, the collection of footage involves either trespass or at least activists concealing their goals when entering a facility.

The above concerns cast a shadow over the claim that undercover footage contributes to deliberation. But can some of these strategies still be democratically legitimate in the eyes of deliberative democrats? Authors like Iris Marion Young have shown that the traditional approach to deliberative democracy does not sufficiently account for the strategies of social movements, both historically and in the present.⁷ Social movements often resort to strategies such as sit-ins or blockages that challenge the deliberative ideal of rational, detached discussion.⁸ To what extent deliberative democracy can accommodate such strategies is up for debate. In the case of animal activists, an argument can be made that deliberative democracy should accommodate at least the dissemination of undercover footage. As mentioned above, it seems reasonable to argue that this footage can contribute to improved deliberation, provided

⁵ Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004), p. 7, citing Joseph Bessette, *The Mild Voice of Reason: Deliberative Democracy and American National Government* (University of Chicago Press, 1994), p. 13.

⁶ Andre Bächtiger et al., ‘Deliberative Democracy: An Introduction’ in Andre Bächtiger et al. (eds): *Oxford Handbook on Deliberative Democracy* (Oxford University Press, 2018), pp. 1 f.

⁷ Iris Marion Young, ‘Activist Challenges to Deliberative Democracy’ 29:5 *Political Theory* p. 670 (2001).

⁸ Ibid.

that neither the footage itself nor the commentary is misleading. However, those who seek to defend the collection of undercover footage might need to look elsewhere for arguments supporting the legitimacy of these acts.

This is where civil disobedience can play a role. It is another variable that may feature in the evaluation of undercover footage and the law's response. Civil disobedience is a desirable label for a wide range of social movements. This requires a careful and nuanced discussion of the notion. John Rawls defined civil disobedience as 'a public, non-violent conscientious yet political act contrary to law usually done with the aim of bringing about a change in law or policies of the government.'⁹ Rawls' theory requires that those acting in civil disobedience address the majority of a given society to make them aware that a certain policy or law is inconsistent with the requirements of justice.¹⁰ On this definition, those who seek to defend undercover footage as civil disobedience will have to show why the wellbeing of animals is a matter of *justice*.

Some critics find Rawls' definition and its focus on justice too narrow. They instead put a spotlight on the *communicative* dimension of civil disobedience and its democratic potential.¹¹ These approaches provide promise for animal activism: after all, many are shocked by images of factory farming and respond by demanding higher animal welfare standards. But is this discrepancy between existing and desired animal welfare standards sufficient to justify civil disobedience? Are citizens really prevented from making informed decisions about animal welfare if they do not have access to undercover footage? And, given that many films about animal suffering exist already, can more of them remedy the suggested epistemic and democratic deficits?

Finally, even if in some cases the collection of undercover footage can be defended as civil disobedience *morally*, it is not yet established that this matters *legally*. The legal dimension is crucial, given that it shapes the lived reality of animals and activists. Those who find that civil disobedience does matter to a legal assessment may argue that, as a rule, the need for punishment is minimal in those cases.¹² Against this backdrop, so-called ag-gag laws and other measures targeting animal activists should be critically examined.

⁹ John Rawls, *A Theory of Justice* (Harvard University Press, original ed. 1971, reprint 2005), p. 364.

¹⁰ *Ibid.*, p. 363.

¹¹ See e.g. William Smith, 'Deliberative Democratic Disobedience' in William E. Scheuermann (ed): *The Cambridge Companion to Civil Disobedience* (Cambridge: Cambridge University Press, 2021), pp. 105 f.

¹² See Christopher Bennett, Kimberley Brownlee, 'Punishment and Civil Disobedience' in William E. Scheuermann (ed): *The Cambridge Companion to Civil Disobedience* (Cambridge University Press, 2021), pp. 280, 283.