

**Deliberation in New Zealand's House of Representatives:
Whether it occurs, and why it matters**

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Mankind's moral sense is not a strong beacon light, radiating outward to illuminate in sharp outline all that it touches. It is, rather, a small candle flame, casting vague and multiple shadows, flickering and sputtering in the strong winds of power and passion, greed and ideology. But brought close to the heart and cupped in one's hands, it dispels the darkness and warms the soul.

~ J Wilson, 'The Moral Sense'

Table of Contents

Chapter One: A Mysterious Lacuna, and a Route to Filling It	4
a. Disillusionment with the Legislative Branch	4
b. Waldron’s ‘Core of the Case’	5
c. Deliberative Democracy’s Ideals	7
Chapter Two: Methodology	17
a. <i>Whose</i> deliberation	17
b. <i>Which</i> deliberation	18
c. Which <i>part</i> of the deliberation	20
d. <i>How</i> to measure deliberation	21
Chapter Three: Results	31
a. Participation	31
b. Level of Justification	32
c. Content of Justification	34
d. Respect	42
e. Constructive Politics	44
Chapter Four: Concluding Remarks	46
Bibliography	53
Appendix: Data Summaries	60
Crimes (Substituted Section 59) Amendment Bill	
Human Tissue Bill	
Misuse of Drugs (Classification of BZP) Amendment Bill	
New Zealand Bill of Rights (Private Property Rights) Amendment Bill	
Sale of Liquor (Youth Alcohol Harm Reduction: Purchase Age) Amendment Bill	
Summary Offences (Tagging and Graffiti Vandalism) Amendment Bill	

Chapter One: A Mysterious Lacuna, and a Route to Filling It

The history of almost all the great councils... is a history of factions, contentions, and disappointments, and may be classed among the most dark and degraded pictures which display the infirmities and depravities of the human character. If, in a few scattered instances, a brighter aspect is presented, they serve only as exceptions to admonish us of the general truth; and by their lustre to darken the gloom of the adverse prospect to which they are contrasted.¹

Most of His Majesty's judges are much better fitted for the making of laws than the queer and cowardly rabble who are elected to Parliament for that purpose by the fantastic machinery of universal suffrage... the House of Commons be blowed!²

a. Disillusionment with the Legislative Branch

Parliament is the subject of a curious paradox. For all that we venerate its sovereignty as an institution, the embodiment of the democratic ideals for which our ancestors' blood was shed, the highest lawmaker in our land, we are perfectly comfortable with ridiculing its individual members. Though 'queer and cowardly rabble' was intended at least half in jest, commentators' general pessimism towards the motives of Members of Parliament is chilling. Legislating is a perilous business, subjecting politicians to "pressures which often incline them (unjustly or unfairly) to side with majority sentiment, or with the demands of rich, powerful minorities,"³ which "obviously" means "our legislators are the last people we should trust"⁴ with determining when they are oppressing a sector of the population. Unlike the courts', the House of Representatives' reasoning is "neither structured by requirements of an articulate consistency in the elaboration of underlying principles nor

¹ J Madison, The Federalist No. 37: 'Concerning the Difficulties of the Convention in Devising a Proper Form of Government', *The Daily Advertiser*, January 11, 1788.

² AP Herbert, 'Sparrow v Pipp: The Lords Rebel', in *Uncommon Law: Being Sixty-Six Misleading Cases* (London: Methuen & Co, 1969), 156, 158.

³ WJ Waluchow, 'Constitutional Morality and Bills of Rights', in G Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (New York, Cambridge University Press, 2008), pp. 65-92, pp. 84-5.

⁴ JH Ely, 'Toward a Representation-Reinforcing Mode of Judicial Review', 37 *Md. L. Rev.* (1977-1978), pp. 451-487, 487.

secured by institutional independence in their impartial exercise.”⁵ In the hurly-burly of Parliament hearing principled reasons for action is a serendipitous rather than deliberate event. The actual reasoning offered for its enactments ought not be invoked when interpreting them, since it cannot be trusted to be appropriately reflective.⁶

Is such invective against the legislature warranted? Ought we entrust such a ragamuffin herd of politicians with supreme lawmaking power? Or do they take their role more seriously than some academics believe?

b. Waldron’s ‘Core of the Case’

One academic who has taken Parliament’s lawmaking role seriously is Jeremy Waldron. In a recent article he outlined an argument against ‘strong’ judicial review, which hinges at one crucial juncture upon the plausibility of a legislature’s ability to give reasons for its decisions.⁷ Four basic assumptions about the institutions and character of a modern liberal democracy are made, in order to show that in such a society the legislature is the most appropriate institution to be making final determinations on rights issues. This society has:⁸

i) democratic institutions in reasonably good working order. More or less, this entails members who believe themselves to be representatives of ‘the people’ in some way, deliberating and voting responsibly on public issues within safeguards against hasty and unilateral law-making.

ii) judicial institutions, also in reasonably good working order. This entails a hierarchy of courts impervious to the popular pressures which face legislatures, responding to particular claims in an adversarial process with reasoning based on precedent cases.

iii) a widespread societal commitment to individual and minority rights. Citizens agree that certain liberties or interests should not be overridden by the mere balance of convenience but must be taken seriously, are proud of their

⁵ D Richards, ‘Moral Philosophy and the Search for Fundamental Values in Constitutional Law’, 42 Ohio St. L.J. 319 (1981), 330.

⁶ R Dworkin, *Law’s Empire*, (Cambridge: Harvard University Press, 1986), 341-3.

⁷ The argument’s roots run back over a decade (J Waldron, ‘A Right-Based Critique of Constitutional Rights’ *QJLS*, Vol. 13, No. 1 (1993), pp. 18-51), and it was developed further in *Law and Disagreement* (Oxford: Clarendon Press, 1999).

⁸ J Waldron, ‘The Core of the Case Against Judicial Review’, 115 Yale L.J. 1346 (2006), 1361-1369.

place within an international human rights culture, and who may have adopted some official instrument declaring that commitment.⁹

iv) persisting, good faith disagreement about “what rights there are and what they amount to.”¹⁰ Not just peripheral cases attract dissent; the widespread commitment in c) will generate different responses to a specific case according to different people.

Waldron’s next step is to look at the relative merits of courts or the legislature having the final say in resolving these persistent disagreements in such a society, to provide the firm basis necessary for common action. He examines these merits under two broad headings:¹¹

i) Process–Related Reasons are those independent of the actual outcome. For instance, most people would think consulting an ouija board a deficient process to decide which university to attend. It would fail to take into account what ought to be taken into account (like the relative academic ranking of the available choices, and their relative costs), fail to include people who ought to be involved in the decision (most notably the person beginning university, but perhaps her family and friends as well), and may fail to be fair (if one member of the séance pressured the planchette unbeknownst to the others). These reasons rest firmly in support of a democratic legislature: why should the opinion of 5, 7, or 9 judges take precedence over the democratic attempt to give each citizen “the greatest say possible compatible with an equal say for each of the others?”¹²

ii) Outcome–Related Reasons are those recognising the likelihood of the best answer being reached – that is, which institution is better at determining what rights we have and then enforcing them. He names a court’s orientation to the particular case before it or to the text of a Bill of Rights, and explicit reasoning, as practices said to encourage grappling with rights. But legislatures are (according to Waldron) at least as good, if not

⁹ Waldron makes this stipulation to pre-empt accusations of stacking the deck against judicial review. However, this commitment need not be proclaimed in the form of a concrete Bill of Rights instrument; an abiding judicial devotion to the rule of law may perform much the same function of protecting those values. See TRS Allan, ‘Legislative Supremacy and the Rule of Law’, 44 Cambridge LJ 138 (1988), 111-143, 137-9.

¹⁰ J Waldron, ‘The Core of the Case’, 1367.

¹¹ Ibid., 1376-95. These reasons run parallel to those suggested by Dworkin many decades earlier, that the legislature is more likely to make *sounder* decisions than the courts, and that it is *fairer* that the legislature make these decisions: *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), 141.

¹² Ibid., 1389.

slightly better, at this task. Focussing on a particular case and Bill of Rights are convincingly dismissed as ersatz advantages.¹³ But his claim that legislatures are just as good at giving reasons for their decisions as courts hardly fits with our conception of emotional, rhetorical, and petty squabbles in Parliament. Slight anecdotal evidence – the English House of Commons debates on the Medical Termination of Pregnancy Bill from 1966, contrasted with the US Supreme Court’s 1973 decision of *Roe v. Wade*¹⁴ – is all the proof relied upon.¹⁵ Waldron is far from alone in this failure to examine closely the actual reasoning of legislatures – it is a task largely untouched by the legal academic community. Which is closer to the truth, in New Zealand’s case at least: the stereotypical playground badgering and bargaining, or sophisticated analysis to rival that of the judiciary?

c. Deliberative Democracy’s Ideals

Finally, there is a still– broader question that might be answered by the same enquiry as the one to plug Waldron’s lacuna. To be in ‘good working order’ (and thus eligible for the title of ‘most legitimate final decision– maker’), a legislature ought to provide reasons for its decisions – but what else is entailed in this ‘order’? Merely citing democratic origins as the basis for a statute’s legitimacy without any further exposition of that democracy’s substance is “lazy and presumptuous,”¹⁶ but what substantive exposition would cure that lazy presumption? Theories of deliberative democracy claim to be the “morally optimal”¹⁷ way to flesh out the concept. Drawing on the work of discourse ethics, this paradigm offers a perspective from which to evaluate the moral pedigree of legislation.

Reasonable people disagree. In the aesthetic realm this poses no cause for alarm – different opinions on the artistic merit of a solid gold yogic siren¹⁸ are usually easily tolerated, if not celebrated, because artwork does not prompt the same questions of

¹³ Ibid., 1379-82. The oft-cited ‘tyranny of the majority’ fear would also come under this heading – his vindication of a legislature on this count will be passed over here.

¹⁴ 410 U.S. 113 (1973).

¹⁵ Though in an earlier work he had used examples such as the abolition of capital punishment and homosexual law reform, the supposedly laudable reasoning of the legislature is still purely hypothetical (he cites the Wolfenden *Report of the Committee on Homosexual Offences and Prostitution* (Cmd no. 247, London: HMSO, 1957), rather than the House of Commons’ debate on homosexual law reform, and no material at all to substantiate his capital punishment assertion): J Waldron, ‘Judicial Review and the Conditions of Democracy’, *The Journal of Political Philosophy*, Vol. 6, No. 4 (1998), pp. 335-355, 339-340.

¹⁶ FE Michelman, ‘Law’s Republic’, Yale L.J., Vol. 97, No. 8, *Symposium: The Republican Civic Tradition* (Jul., 1988), pp. 1493-1537, 1498.

¹⁷ A Gutmann & D Thompson, *Democracy and Disagreement* (Cambridge: Belknap Press, 1996), 67.

¹⁸ ‘Solid gold Moss statue revealed’, *BBC News*, 2008/10/02,

http://news.bbc.co.uk/2/hi/entertainment/arts_and_culture/7647947.stm (accessed 4/10/08).

practical actions that moral issues do. When society must proceed in one direction or another, disagreement over which direction to take is a grave concern. Much as it pains us to admit it, not everyone shares our perfectly considered judgments on ethical issues, and, worse still, we cannot always call them wrong for failing to share those considered moral judgments.¹⁹ Certainly some positions are not tenable in our society – a morally defensible justification for muttering insults at a Sikh colleague in the hopes of forcing him out of the workplace can scarcely be imagined. (A justification that might plausibly be accepted by the vast majority of others in our community, that is.²⁰ In a different age or culture such conduct might be perfectly acceptable; in ours, with its emphasis on tolerance for difference and respect for persons, it is not.) Other moral dilemmas are less easily resolved, however. One frequently cited example is the abortion debate;²¹ another topical conflict exists between the right of a child not to be assaulted, and the right of a parent to raise his or her children as he or she sees fit. Sincere and reasonably-held beliefs in the moral rectitude of smacking one’s children are incompatible with equally sincere and reasonably-held beliefs in its reprehensibility.²² Even in its greatest efforts to stay neutral on the issue, the law cannot sit on the fence. Whether smacking is outlawed or allowed, one sector of society will be bound by a law that conflicts with their moral intuitions.²³

Given that deep and persistent moral divisions within the population exist, and that each position warrants the respect of those opposed to it, how ought we organise our collective life? Once upon a time appeals to God’s plan for society’s organisation would have been an impregnable argument,²⁴ but such faith in an external authority is now itself the subject of disagreement. In a world where everyone seeks a “life of one’s own,”²⁵ a

¹⁹ R Dworkin, *Taking Rights Seriously*, 123; J Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 2§2.

²⁰ “In all cultures and societies what counts as a good reason will always be tied to one’s context,” says S Chambers (*Reasonable Democracy* (Ithaca: Cornell University Press, 1996), 145).

²¹ For evidence of the controversy in the United States, see V Gehring & W Galston (eds.), *Philosophical Dimensions of Public Policy: Policy Studies Review Annual, Volume 13* (New Brunswick: Transaction Publishers, 2003), Ch. 1, ‘The Abortion Dilemma’. In the wake of *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2008] 2 NZLR 825 it is currently threatening to re-ignite in New Zealand.

²² See R Adhar & J Allan, ‘Taking Smacking Seriously: The Case for Retaining the Legality of Parental Smacking in New Zealand’, 2001 NZ L. Rev. 1.

²³ Appeals to a presumption of state inaction fail when any state action or lack thereof must conclusively decide the debate; either it is legal for parents to smack their children, or it is not. There is no middle ground for a ‘tolerant’ law to occupy.

²⁴ As it was in the middle-ages (W Ullmann, *The Individual and Society in the Middle Ages* (Baltimore: Johns Hopkins Press, 1966)), but has not been since the Eighteenth Century (RH Tawney, *The Acquisitive Society* (N.Y.: Harcourt Brace & World, 1948), Ch. 2).

²⁵ U Beck & E Beck-Gernsheim, ‘A Life of One’s Own in a Runaway World: Individualization, Globalisation and Politics’, in U Beck (ed.) *Individualization* (London; Sage, 2002), pp. 22-29.

new source of legitimacy must be found.

‘Democracy’ is the source usually offered.²⁶ But not all democracies are created equal – freely and fairly elected legislators who passed their time mired in hopelessly convoluted argument based on faulty facts, attacking each others’ positions on the slightest of excuses and belittling the citizens subject to their decisions would hardly be lauded. Deliberative theories offer an account of democracy which fleshes out its bare bones with a more palpably justifiable process. Normative force depends on the conditions which establish “*how* the political will is formed”²⁷ – the sheer fact of elections is not enough to legitimate the law.²⁸

As may have been gathered already, deliberation is proposed as the addition which will provide the requisite legitimating force. Rather than dogmatically dictating what moral positions our fellow citizens must hold (or altogether abandoning the project of living together peaceably for anarchic scepticism), entering into a dialogue with those who do not share our beliefs evinces a respect for them and ourselves as autonomous citizens, each capable of holding our own rational beliefs, but equally capable of changing them should the need arise. This underpinning respect for persons cannot be equalled by purely procedural theories which eschew such substantive values. Obedience to intersubjectively recognised norms is qualitatively different from obedience to commands imposed upon the community of norm-followers,²⁹ whether by tyrannical fiat or a bare majority vote, because of the respect inherent in this process of reaching intersubjective agreement. Abiding by the correct process is the “morally optimal basis” for determining the content of the rules which govern our communal life.³⁰ Alternative processes, such as a purportedly neutral majoritarianism,³¹ or the pursuit of a single comprehensive vision of the good, cannot aspire to the same justifiability.

²⁶ J Habermas, *Between Facts and Norms: contributions to a discourse theory of law and democracy*, trans. by W Rehg (Cambridge: MIT Press, 1992), 448.

²⁷ J Habermas, ‘Private and Public Autonomy, Human Rights and Popular Sovereignty’, in Obrad Savić (ed.), *Politics of Human Rights* (London: Verso, 1999), pp. 50-66, 63.

²⁸ Note that the mere fact of deliberation will be similarly unconvincing a source of legitimacy in the absence of voting in the case of continued disagreement: J Cohen, ‘Deliberation and Democratic Legitimacy’, in J Bohman & W Rehg, *Deliberative Democracy: Essays* (Cambridge: MIT Press, 1996), pp. 67-92, 73-74. Although the British Cabinet Secretary famously closed meetings with a unilateral declaration of his overall sense of the discussion, such a procedure in a Parliament would be highly suspect: R Goodin, *Reflective Democracy* (Oxford: Oxford University Press, 2003), 192, n.92.

²⁹ J Habermas, *Legitimation Crisis*, trans. by T McCarthy (Boston: Beacon Press, 1975), 104.

³⁰ A Gutmann & D Thompson, *Disagreement and Democracy* (Cambridge: Belknap Press, 1996), 67.

³¹ Though even ‘purely’ procedural democratic theories have more substantial moral choices underlying their protestations of neutrality: *ibid.*, 30-32.

Deliberation's 'moral optimality' rests on the value of both its outcome and process.³² On one hand its outputs are demonstrably more justifiable than a bare aggregation of preferences (which cannot take into account the moral weight of the positions in question, any unfairness in the bargaining process which led to the vote, nor recognise the real possibility of agents changing their stances after reflection).³³ After a variety of perspectives have contributed to its formation, the outcome is likely to be more interesting and *better* for that preceding process.³⁴ Democratic debate is expected to produce results of "a reasonable *quality*,"³⁵ and thus to fulfil its instrumental function of social integration. On the procedural side, deliberation requires that we enter the discussion conscious of ourselves as people with partial moral values, willing to recognise others as similarly equal people with similarly dear values. Conflicts between these values must be resolved by countering moral reasons with moral reasons.³⁶ Following the principles of deliberation fosters the virtues sought by our substantive moral theories (such as respect and impartiality) as a part of its method.³⁷ In a culture where respect for the autonomy of persons is moral bedrock,³⁸ deliberative theories of legitimacy are the most clearly defensible. (This is a conditional statement to echo Waldron's: given one conception of society, devoted to certain values, this method of dispute-resolution is the best. Whether this conception of society is in fact universal, or even desirable, is a question beyond the scope of this paper.)

To understand just how deliberation would ideally proceed requires some exposition of its requirements. Equal power to participate, the provision of reasons justifying moral positions, the content of those reasons, and respect for other participants are all essential features of a 'good' debate. Each feature can be related back to the

³² S Chambers, *Reasonable Democracy*, 189; A Gutmann & D Thompson, 'Deliberative Democracy Beyond Process' in JS Fishkin and P Laslett (eds.), *Debating Deliberative Democracy* (Oxford: Blackwell Publishing, 2003), pp. 31-53, 36.

³³ J Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford: Oxford University Press, 2002), 2; F Michelman, 'Law's Republic' 97 *Yale L.J.* 1493 (1988), 1528.

³⁴ JS Mill, *On Liberty* (London: Penguin, 2006), Ch 2.

³⁵ J Habermas, *Between Facts and Norms*, 301.

³⁶ A Gutmann & D Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004), 135.

³⁷ Shapiro notes that this is only an inherent benefit of the deliberative process on neo-Hegelian philosophical psychology (which holds up intersubjective recognition as the highest state of being), and that other views of the human condition (from which deliberation's desirability is less easily derived) are still bandied about: 'Optimal Deliberation?', in *Debating Deliberative Democracy*, pp. 121-137, 127.

³⁸ As it is held to be by commentators as stylistically and geographically disparate as John Rawls (*A Theory of Justice* (Cambridge: Belknap Press, 1971)) and Emmanuel Levinas (*Otherwise than Being: or, Beyond Essence*, trans. by Alphonso Lingis (Dordrecht: Kluwer Academic Publishers, 1991)).

underlying values of respect for the rationality and autonomy of citizens.

Free participation

“The citizen is the human individual whose right to address others is recognised by those others.”³⁹ Once within a community, the door of deliberation ought to be open by definition. But the question then shifts to who counts as a citizen (or who belongs in a community). Respect for the ability of any human being to reflect on the moral questions which affect him or her may entail allowing all who are potentially affected by a decision ought to contribute its discussion.⁴⁰ Universality of discourse will ensure all viewpoints have been heard and taken into account,⁴¹ fulfilling both the instrumental and substantive reasons for deliberative democracy’s ‘moral optimality.’ However, deciding who will be excluded from a group is the necessary complement of deciding who will be included within it;⁴² refusing to hear certain voices is one of a community’s constitutive choices. Some restrictions on full participation may be implicit in the other requirements of ideal deliberation.

Justificatory Reasons

Arguments, in the technical sense, are aimed at *persuading* people of their conclusions. Appealing to someone’s emotions – whether the carrot of hope or the spurs of fear – is often considered an underhanded way to win a dispute. Reasons are fair in contrast, allowing the addressee to make a decision of his or her own free will, after carefully weighing up the pros and cons. Slogans and rhetoric designed to stir up passions are evidence that the speaker has not reflected on his own position, or that he does not respect his audience’s ability to reflect upon it.⁴³ In the absence of any transcendent God or natural law to hand down the correct answer on questions of moral and political dispute, only better or worse reasons should determine these persistent questions.⁴⁴ ‘Reasons’ which are more manipulation than reason are at the ‘worse’ end of the scale. Any other

³⁹ J-F Lyotard, ‘The Other’s Rights’, in S Shute and S Hurley (eds.), *On Human Rights*, (New York: Basic Books, 1993), pp. 135-147, 138.

⁴⁰ For Habermas, valid moral statements are those which “can reasonably be expected to meet with universal consent”: *Between Facts and Norms*, 107; *Truth and Justification*, trans. by Barbara Fultner (Cambridge: Polity Press, 2002), 261.

⁴¹ S Chambers, *Reasonable Democracy*, 197-8.

⁴² M Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).

⁴³ S Chambers, *Reasonable Democracy*, 206.

⁴⁴ J Habermas, *Truth and Justification*, 273.

approach would fail to respect the rational autonomy of community-members.

It should be noted that the arguments demanded need not be strictly logically valid, nor entirely empirically sound. “Arguments within any field can be judged by standards appropriate within that field”⁴⁵ – the types of reasons which justify moral statements (including those concerning the practical action at which deliberation aims) are different from those appropriate to empirical or evaluative ones.⁴⁶

But tension arises with the value of participation, since only those capable of participating within these strictures of rationality may take the floor.⁴⁷ Not just whose voice, but how that voice may be expressed, are governed by the procedural norms of the deliberative context. “Pictures, song, poetic imagery, and expressions of mockery and longing performed in rowdy and even playful ways aimed not at commanding assent but disturbing complacency,”⁴⁸ may be preferred by an angry activist, but are not the type of solemn reasoning a deliberative model privileges. Broadening the definition of deliberation to allow such emotion-inducing methods of persuasion is entirely possible,⁴⁹ but even then some line must be drawn between humour or style and manipulative propaganda. Deeper than the problem of where to set the border is the fact that it *must* be set and policed somewhere.

Content of Justifications

For the purposes of deliberation, only the ‘right’ reasons count.⁵⁰ First, decisions which affect everyone in a community ought not (in a rational sense) be discussed in terms of the self-interest of each participant (or those whom they represent), but of the vision each has for a shared future.⁵¹ In the search for reasons that might convince others, one person’s “interest, pleasure or caprice”⁵² will not be very persuasive, unless it can be shown to coincide with the wider good. On pain of failure to acknowledge their autonomy and

⁴⁵ S Toumlin, *The Uses of Argument* (Cambridge: Cambridge University Press, 1958), 255.

⁴⁶ J Habermas, *Truth and Justification*, 230.

⁴⁷ L Sanders, ‘Against Deliberation’, *Political Theory*, Vol. 25, No. 3 (1997), pp. 347-376.

⁴⁸ IM Young, ‘Activist Challenges to Deliberative Democracy’, *Political Theory*, Vol. 29, No. 5 (2001), pp. 670-690, 687.

⁴⁹ J Dryzek, *Deliberative Democracy and Beyond*, pp. 50-51; W Rehg, ‘Reason and Rhetoric in Habermas’s Theory of Communicative Action’, in W Jost & M Hyde (eds.), *Rhetoric and Hermeneutics in Our Time* (NY: New Haven, 1997), pp. 358-377.

⁵⁰ J Rawls, *Theory of Justice*, 13; J Habermas, ‘Private and Public Virtue’, 60.

⁵¹ B Ackerman & JS Fishkin, ‘Deliberation Day’, in *Debating Deliberative Democracy*, pp. 21-23. Even if originally taken as window-dressing, this stance is likely to encourage an actual change in preferences towards a more public-minded orientation: R Goodin, *Motivating Political Morality* (Cambridge: Blackwell, 1992), Ch. 7.

rationality, only reasons that “*merit* recognition among those to whom they apply,”⁵³ or that participants can reasonably expect to be accepted by other reasonable citizens,⁵⁴ should be offered. Second, impartiality is fundamental to morality,⁵⁵ and thus ought to feature in the criteria for moral reasoning.

Third, to be acceptable to others, reasons must be transparent and challengeable. Unless and until others query the arguments put forward, those arguments have no more force than a bare assertion. Reasons for a decision which are not themselves disputable merely push back a step the stark appeal to authority behind an incontestable decision. Sometimes the information upon which a speaker’s argument is based may simply be false, prompting another participant to enlighten her (about incorrectly calculated costs for instance, or a non-existent mischief which needs no remedying, or potentially misleading statistics⁵⁶). Sometimes a proposal’s moral implications may not have been thought through, compelling another participant to point out the unjustifiable invasion of rights about to be perpetrated.

Again, tension with full participation can be seen. On the eve of the September 1996 elections in Bosnia, American diplomat Richard Holbrooke asked himself a question:

“Suppose the election was declared free and fair, and those elected are racists, fascists, separatists, who are publicly opposed to [peace and reintegration]. That is the dilemma.”⁵⁷

Those incapable of sincerely employing arguments based on the common good are excluded from participating. Neo– Nazis may genuinely balk at the idea of sharing a community with black immigrants, let alone of wishing them common prosperity.

⁵² JS Mill, *Considerations on Representative Government* (London: Longmans, 1919), Ch. 10.

⁵³ J Habermas, *Truth and Justification*, 261.

⁵⁴ J Rawls, ‘Idea of Public Reason Revisited’, in *Law of the Peoples* (Cambridge: Harvard University Press, 2001), 137.

⁵⁵ “[I]t is part of the concept . . . of morality that no person is simply to be excluded from moral consideration, and furthermore . . . that if he is to be considered differently from some other person, the difference made must be justified by some morally relevant ground of distinction”: GJ Warnock, *The Object of Morality* (London: Methuen, 1971), 149.

⁵⁶ For an example of the latter, see Tariana Turei, Substituted Section 59 Bill, 637 NZPD 7579. “Littlies Lobby research tells us, 97 percent of over 1,300 parents of preschoolers who were surveyed did not believe that physical discipline was highly effective” – but this figure does not disclose what proportion thought it was ‘very effective’, or ‘effective’ simpliciter.

⁵⁷ Quoted in Z Fareed, ‘The Rise of Illiberal Democracy’, *Foreign Affairs*, Vol. 76, Iss. 6 (Nov/Dec 1997), pp. 22-44, 22.

Unfortunately, in the conflict between liberal ideals of respect for all people qua people, and communitarian ideals of a pre-existing community which values its own common future, the choice must be made. Some ‘unreasonable’ views must be excluded in order to save the debate for those willing to enter on ‘reasonable’ terms.⁵⁸ Despite their seeming neutrality, the labels of ‘rational’ or ‘reasonable’ conceal hidden depths of subjective and substantive content,⁵⁹ and are only meaningful insofar as the decision on what that content will be is made.

(One way to characterise this difference is between opting to base respect for persons on “recognition” or “appraisal” respect.⁶⁰ If the former, people *as people* merit consideration in deliberation and restrain our actions⁶¹ (participation is protected to the fullest extent, and we trust that the procedure of deliberation will tidy up unsavoury positions without our intervention). If the latter, only people who display certain qualities (reasonableness or reciprocity, say) merit positive appraisal and the benefits (like equal participation rights) that accompany it.⁶² But examining the hidden core of the problem does not assist its resolution.)

Perhaps deliberation’s application of its methods to its own principles might counteract this need for “stipulative” domain restriction,⁶³ if the conditions that underlie debate are themselves open to debate. Provisionality subject to the outcomes of ongoing deliberation will ensure the current reasonableness of a restriction on speech at any particular point in time.⁶⁴ But again it does not solve the intractable problem of defining ‘reasonableness’ at that particular point in time – potential participation in the future can hardly relieve the sting of being refused entry into the debate in the present. Full participation must remain a dream while substantive qualifications are placed on the acceptable type of participation.

⁵⁸ As Gutmann and Thompson note (*Disagreement and Democracy*, 55), “a deliberative perspective does not address people who reject the aim of finding fair terms for social cooperation; it cannot reach those who refuse to press their public claims in terms accessible to their fellow citizens.” This ‘deliberative perspective’ must be a value even above the value in achieving consensus amongst all who are affected by a decision.

⁵⁹ See, for instance, S Fish, ‘Liberalism Doesn’t Exist’, *Duke Law Journal*, Vol. 1987, No. 6 (1987), pp. 997-1001.

⁶⁰ S Darwall, ‘Two Kinds of Respect’, *Ethics*, Vol. 88, No. 1, (1977), pp. 36-49.

⁶¹ *Ibid.*, 39.

⁶² *Ibid.*, 41. Gutmann and Thompson, who would rule out certain arguments altogether, explicitly base their account of mutual respect on this ‘appraisal’ form (*Disagreement and Democracy*, 376, n.30 and *Why Deliberative Democracy?*, 196, n.16).

⁶³ J Dryzek, *Deliberative Democracy and Beyond*, 45-6.

Respect

Listening to another's arguments implies that you consider them worthy of being heard. Apart from the obvious link with encouraging the sort of behaviour a culture founded on respect for other human beings decrees,⁶⁵ interacting with one's debating partners respectfully makes a consensus (or at least a decision everyone feels is justified) more likely. Participation is not worth its salt unless it is accompanied by reciprocal respect amongst the participants. Unless they are willing to recognise each others' genuine moral beliefs as such, there is little value in the debate; they will simply talk past each other without addressing the substantive issue of reasonable disagreement. Similarly, unless their positions are flexible in the light of others' arguments there is little value in those arguments being heard; without respect counter-arguments may end up ignored. Finally, if sincere arguments from the common good are being made, respect for the targets of the proposed law, for those whose lives must be improved for the common good to be achieved, might be expected. Patronising diktats from on high would be difficult to synthesise with the justifiability claimed by deliberation.

Constructive Politics

Again, it is inherent in the practice of deliberation that positions may be altered. Without this possibility rational persuasion is futile. Unlike strategic bargaining, where pre-established preferences are clutched to the actors' breasts,⁶⁶ deliberative discussion is a more fluid model. A "rationally motivated *consensus*"⁶⁷ can thus be the ideal, although it is far from certain or even possible in all cases.⁶⁸ However, a vote held after deliberation is quite a different creature from one without it.⁶⁹ Even if the ideal of agreement cannot be achieved, continuing the procedure is not inconsequential. Deliberative theory need not say the objectively and immutably 'right' answer to moral questions will be discovered by following its precepts.⁷⁰ Its aim is more modest – to find the best, or most justifiable,

⁶⁴ A Gutmann & D Thompson, 'Deliberative Democracy Beyond Process', 42-47.

⁶⁵ Universal moral respect and egalitarian reciprocity foster the sort of subjectivity we admire: S Benhabib, *Situating the Self* (Cambridge: Polity Press, 1996).

⁶⁶ GA Almond, 'Rational Choice Theory and the Social Sciences', in KR Mona (ed.), *The Economic Approach to Politics* (New York: Harper Collins, 1991).

⁶⁷ J Cohen, 'Deliberation and Democratic Legitimacy', 74.

⁶⁸ J Bohman, 'Survey Article: The Coming of Age of Deliberative Democracy', *The Journal of Political Philosophy*, Vol. 6, No. 4 (1998), pp. 400-425, 422.

⁶⁹ G Smith & C Wales, 'Citizens' Juries and Deliberative Democracy', *Political Studies*, Vol. 48, Iss. 1 (2000), pp. 51-65, 60.

⁷⁰ Such an 'epistemic' thesis "sets an unrealistically high standard for political decision-making": D Miller,

answer available to us.

Deliberation carries contradictions at its heart, but is the form of rule that works best for a society founded on respect for human rights.⁷¹ If a legislature *is* to be the best institution to make final determinations on rights issues, as Waldron's argument would have us believe if the legislature is in 'good working order', it ought to be the kind of legislature that conforms to this model. Deliberative democratic theories' ideals of 'good working order', of reason giving, and of solemn contemplation of what would be best for the entire country (while never losing sight of the respect due to each individual in his or her own right), fit neatly into Waldron's argument to flesh out his 'outcome related reasons' for preferring the legislature over courts.

'Deliberative Democracy and Social Choice', *Prospects for Democracy: Political Studies Special Issue*, Vol. 40 (1992), pp. 54-67, 56-57.

⁷¹ Even if it is not, and Rawls is correct to believe no clear winner will emerge from the competing conceptions of democracy (*Political Liberalism*, 4), it is at least a sufficiently established theory to warrant this project's investigation of it.

Chapter Two: Methodology

Does Parliament do a good job of giving reasons for its decisions concerning rights? Boiling down the preceding inquiry into this succinct question hides the complexity which its answer will entail. Testing a steel bar for strength is a straightforward task with the right equipment. Discourse is a far more nebulous affair, and its superiority or inferiority a far more contentious matter than whether or not a bar will contort under pressure. Like every social phenomenon, deliberative quality does not lend itself easily to objective analysis. No authority exists on what criteria must be satisfied, nor how to tell if they are (though a growing body of empirical literature is aiming to rectify that).⁷²

To begin the task of evaluating the quality of Parliament's discourse, one must choose a discourse to evaluate, and criteria according to which it will be evaluated. That is:

- a. Whose deliberation will be evaluated
- b. The subject matter under deliberation
- c. Which part of the deliberation process
- d. How deliberative quality will be measured.

Within the parameters of the discussion in the previous chapter, the range of possible answers to these questions is narrowed. Those answers will form the basis of this project's method.

a. *Whose deliberation*

Although deliberative democratic models that range beyond professional politicians to the wider public sphere are persuasive,⁷³ a focus on the institutions creating law demands a narrower gaze. New Zealand's Parliament has been criticised for its procedure's unseemly laxity,⁷⁴ and also carries the benefits of proximity to the researcher (parochialism bears the

⁷² T Sulkin & AF Simon, 'Habermas in the Lab: A Study of Deliberation in an Experimental Setting', *Political Psychology*, Vol. 22, No. 4 (2001), pp. 809-826, 809.

⁷³ For examples, see B Ackerman & JS Fishkin, 'Deliberation Day', or R Goodin, 'Democratic Deliberation Within', in *Debating Deliberative Democracy*.

⁷⁴ For example, G Palmer, 'The Fastest Law-Makers in the West', 28/5/77, 13 *New Zealand Listener*; S France, 'Retrospectivity and Legislative Interference in Existing Criminal Trials – The West's Fastest Lawmaker Strikes Again', (1990) 16 UQLJ 103; J Waldron, 'Compared to What? Judicial Activism and New Zealand's Parliament' [2005] NZLJ 441; C Charters, 'Responding to Waldron's Defence of Legislatures: Why New Zealand's Parliament Does Not Protect Rights in Hard Cases', 2006 NZ Law Review 621. One past President of the Electoral Commission and Chair of the Royal Commission on the Electoral Systems has a "vivid memory of a member of the Parliament of Norway speaking to [him] after observing the New Zealand

advantage of inhabiting the same political world as the subjects of study, making understanding their talk a simpler task).

But Parliament's – or rather, the House of Representatives' – main function is to talk. Volume upon volume of Hansard is filled with the record of that talk, as is an entire television channel. Amongst that talk not all can be expected to be, nor desired to be, deliberation. Random sampling methods are as likely to deliver administrative marginalia, Question Time (when reaching a common position is the least likely aim), or analysis of a consolidating Act as they are methodologically-useful debate. Restricting the sample to the passage of original legislation winnows out the dross of Parliamentary business.

b. Which deliberation

Since it is issues of reasonable disagreement over rights that are supposed to be best addressed by Parliament, typological sampling to find Bills with such issues is permissible.⁷⁵ Using case studies is no substitute for statistical sampling. However, when our knowledge of a topic is limited a handful of examples can teach us the most.⁷⁶ In addition to subject-matter, factors in the Parliamentary process itself narrow the range of potential Bills to study.

'Rights' for the purposes of this project cannot solely mean those affirmed in the New Zealand Bill of Rights Act 1990. Though those rights are obviously important to New Zealanders, the list is not presumed to be closed.⁷⁷ Similarly, courts characteristically adjudicate on the existence of 'rights' in a narrow, technical sense, but the concept of 'rights' is wider than the binary-oppositional legal entities to which lawyers are trained to immediately jump.⁷⁸ According to Waldron a rights-conscious community ought not restrict its concerns to those rights enshrined in some higher law document or the existing

Parliament in session. After indicating that he had been surprised by the behaviour he had seen, he said 'You would find our parliamentary debates very boring – we discuss the *issues*'" (J Wallace, 'Reflections on Constitutional and Other Issues Concerning Our Electoral System: The Past and the Future', 33 VUWLRev. (2002), pp. 295-320, 304).

⁷⁵ Though the courts could be given the highly-important function of naming of a Farmers' Group Co-operative, such suggestions are unsurprisingly not the topic of heated scholarly debate.

⁷⁶ JS Sekhon, 'Quality Meets Quantity: Case Studies, Conditional Probability, and Counterfactuals', *Perspectives on Politics*, Vol. 2, No. 2 (2004), pp. 281-293, 291.

⁷⁷ According to s28 "an existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights." Indeed, the list has been added to already by the courts – a privacy right in *Hosking v Runting* [2005] 1 NZLR 1, for instance. It is not illegitimate for institutions other than Parliament to name rights which are important to the community, even on the reasoning followed by this paper, so long as Parliament retains the ability to overrule that naming.

⁷⁸ L Fuller, 'The Forms and Limits of Adjudication', 92 Harv Lev 353 (1978), 368-70.

law, and the Bills chosen for their impact on ‘rights’ touch on interests in this broad sense.⁷⁹

A stereotypical debate in the House lies somewhere between shouting matches and dull-as-dishwater monotones. Various institutional and external factors might push a debate towards one extreme or the other. The choice of cases is therefore driven by where each is situated along these dimensions within the population of interest. Choosing cases which exemplify diverse variables (or degrees of those variables) will feed “exploratory or confirmatory” research aims.⁸⁰

Party discipline may be strong, relaxed by certain parties, or entirely absent (in a personal or conscience vote). A Bill may meet more or less opposition within the House (which might be evidenced by the unanimity or lack thereof of the responsible Select Committee). Opposition or support outside the House (hinted at by the number of submissions to the Select Committee, or by the number of contemporaneous media reports on the Bill’s passage) will impact on the visibility of the debate to the public eye. Finally, the attachment of a Section 7 Notice by the Attorney-General⁸¹ is intended to bring rights implications to the Parliamentarians’ attention which might otherwise have been overlooked. Choosing Bills that verge on causing a constitutional crisis might skew the results towards ‘good’ deliberation as Opposition members scurry to fight this outrage of decency.

The data collected ought to evince a broad idea of the quality of Parliamentary debate in New Zealand, on questions where citizens’ rights (in a wide sense) are at stake, across a variety of variables which might alter the odds of witnessing high-quality deliberation. From these desiderata six Bills were chosen for evaluation:

Sale of Liquor (Youth Alcohol Harm Reduction: Purchase Age) Amendment Bill

2006:⁸² unanimous Select Committee, no s7 report (though Ministry of Justice vet was wary of its discriminatory effects⁸³), personal vote.

⁷⁹ J Waldron, ‘Core of the Case’, 1365. A similarly wide sense of ‘rights’ has been taken by other academics – for instance, J Feinberg, ‘In Defence of Moral Rights’, *OJLS*, Vol. 12, No. 2 (1992), pp. 149-169; J Allan, ‘Bills of Rights and Judicial Power - A Liberal’s Quandary’, *OJLS*, Vol. 16, No. 2 (1996), pp. 337-352; K Dowding & M van Hees, ‘The Construction of Rights’, *The American Political Science Review*, Vol. 97, No. 2 (2003), pp. 281-293.

⁸⁰ J Seawright & J Gerring, ‘Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options’, *Political Research Quarterly*, Vol. 61, No. 2 (2008), pp. 294-308, 297.

⁸¹ Under s7 NZBORA 1990.

⁸² Henceforth referred to as the Sale of Liquor Bill.

⁸³ Ministry of Justice, ‘Consistency with New Zealand Bill of Rights Act 1990: Sale of Liquor (Youth Alcohol Harm Reduction) Amendment Bill’, 10 May 2005.

Crimes (Substituted Section 59) Amendment Bill 2007:⁸⁴ one minority view on Select Committee, no s7 report, relaxed party discipline (save for Labour).

New Zealand Bill of Rights (Private Property Rights) Amendment Bill 2007:⁸⁵ unanimous Select Committee, no s7 report, party vote.

Human Tissue Bill 2008:⁸⁶ two minority views on Select Committee, no s7 report (though several minor concerns noted in Ministry of Justice vet⁸⁷), party vote.

Misuse of Drugs (Classification of BZP) Amendment Bill 2008:⁸⁸ two minority views on Select Committee, a s7 report,⁸⁹ party vote.

Summary Offences (Tagging and Graffiti Vandalism) Amendment Bill 2008:⁹⁰ unanimous Select Committee, no s7 report (though several concerns noted in Ministry of Justice vet⁹¹), party vote.

c. Which *part* of the deliberation

Again, Parliament's time is filled with talk. Bills have three readings in the House, each preceded by speeches discussing their subject-matter. In the Second Reading debate the principles of the Bill are discussed,⁹² the Select Committee's report is available to guide discussion, and the Committee members are able to provide considered contributions.⁹³ Whereas the First Reading debate may be unfocussed and ill-informed, and the Committee of the Whole House and Third Reading too closely involved in finalising the text to concentrate on its sweeping motivations,⁹⁴ the Second Reading is an opportunity for

⁸⁴ Henceforth referred to as the Substituted Section 59 Bill.

⁸⁵ Henceforth referred to as the Private Property Bill.

⁸⁶ Henceforth referred to as the Human Tissue Bill.

⁸⁷ Ministry of Justice, 'Consistency with New Zealand Bill of Rights Act 1990: Human Tissue Bill', 21 September 2006.

⁸⁸ Henceforth referred to as the BZP Bill.

⁸⁹ M Cullen, 'Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Misuse of Drugs Act (Classification of BZP) Amendment Act 2007' (Wellington: Government Printer, 2007).

⁹⁰ Henceforth referred to as the Tagging and Graffiti Bill.

⁹¹ Ministry of Justice, 'Summary Offences (Graffiti) Amendment Bill (PCO 8118/5): Consistency with New Zealand Bill of Rights Act 1990', 15 February 2008.

⁹² This debate is about "the principles and objects of the bill": G Palmer & M Palmer, *Bridled Power: New Zealand's constitution and government* (Auckland: Oxford University Press, 2004), 195.

⁹³ W Iles, 'New Zealand Experience of Parliamentary Scrutiny of Legislation' (1991) 12 Stat L Rev 166, 178.

⁹⁴ Its purpose is "to determine whether the bill properly incorporates the principles or objects of the bill" (SO 297(1)), requiring a textual analysis of the "nuts and bolts of the bill" rather than consideration of those principles or objects: *ibid.*

Parliament to see if the idea behind the piece of legislation is a good one. The regularity of the speaking time allotted to each party also acts as a natural control on the length of the debate under scrutiny.⁹⁵ The number of speeches range from seventeen to nine:

Sale of Liquor Bill: 17 Speeches⁹⁶

Substituted Section 59 Bill: 12 Speeches

Private Property Rights: 12 Speeches

Human Tissue: 11 Speeches

BZP Bill: 9 Speeches

Tagging and Graffiti Bill: 10 Speeches

d. *How to measure deliberation*

Quantitative content analysis is the commonsense method to analyse the quality of a discourse. Translating the theoretical requirements of ideal discourse into a workable empirical instrument has been attempted recently by a trans-Atlantic group of researchers comparing discourse quality across different countries. Steenbergen, Bächtiger, Spörndli and Steiner constructed a Discourse Quality Index (DQI) which measures the quality of deliberation along various axes (which mirror the features of deliberation outlined in the preceding chapter). Sub-categories within each differentiate low- and high-quality discourse. Together these indicators place the debate along a continuum running from ideal deliberation to none at all. Reliability testing showed this coding scheme to have a reasonable rate of inter-coder agreement, even when the coders were unfamiliar with its use.⁹⁷ Employing a coding instrument known to be reliable (rather than inventing one afresh) improves the validity of the dataset created. However, some amendments to the Swiss DQI were necessary to tailor it to the more specific set of concerns of this study.

The unit of analysis is a single speech act which proposes what ought or ought not be done during a wider debate.⁹⁸ Normative demands, which call for some change in the world from the status quo, or for that status quo to remain intact, are at the heart of

⁹⁵ Each member has 10 minutes to make their speech; the debate is limited to 12 speeches (SO Appendix A, p 119). Two members may share a single speaking time if their party or parties agree: SO 117(2).

⁹⁶ Due to the level of interest generated by this debate, several parties split their calls, giving two five minute speeches in the place of a single ten minute address.

⁹⁷ The mean ratio of coding agreement between pairs of coders and the number of codes allocated was 0.700, with a standard deviation of 0.141. J Steiner et al., *Deliberative Politics in Action: analysing parliamentary discourse* (Cambridge: Cambridge University Press, 2004), 67-73.

⁹⁸ More precisely, a 'speech' is "the public discourse by a particular individual delivered at a particular point in a debate": J Steiner et al., *Deliberative Politics in Action: analysing parliamentary discourse*, 55.

discourse ethics. In a debate on whether or not a law would be desirable for New Zealand, all the speeches are making normative demands. Speakers cannot remain neutral, in the face of the upcoming vote at its close. Therefore every speech in each debate was coded: 71 in total.

The axes of deliberation tested are as follows:

i) Participation

Participation is an all-or-nothing affair: either speakers are able to announce their position and rationale to their peers, or they are not. As was found in the Swiss study, no variation occurred between the debates on this indicator – given the highly regulated environment of Parliamentary debate this is unsurprising. However, many speakers expressed irritation at interruptions during their floor time. In a supplementation of the original DQI the number of interruptions, and their amicability or animosity, were noted for each speech.

ii) Level of Justification

To convince other participants in a debate, one needs reasons. Emotional manipulation is frowned upon, since only attempts at rational persuasion respect the rationality of one's interlocutors. Four levels of justification are separated out by the DQI:

(0) Lack of Justification

The speaker says that X should or should not be done, but no reasons whatsoever are given to support that claim.

(1) Inferior justification

A reason is provided (often evidenced by some illustration), but no link is made between that reason and the demand on the table. The speaker's conclusion does not follow logically from the premise given. For example, Gordon Copeland committed the fallacy of *argumentum ad populum* when recommending his amendment to the Bill of Rights Act on the grounds that it would "align the position in New Zealand with the position adopted by a majority of the world's nations,"⁹⁹ and failed to explain why aligning ourselves with that majority position would be desirable.

⁹⁹ Private Property Bill, 643 NZPD 12914.

(2) Qualified justification

A reason which does link to the conclusion is given. An inference which would be clear to everyone listening to the speaker may be included under this head. Nandor Tanczos, when opposing the Tagging and Graffiti Bill, suggested a counter-example to show the absurdity of the Act's consequences, linking that example directly to the words of the legislation:

“The Good Water Company recently did a promotion that promoted its product by using a water blaster and a stencil to blast its company logo—it cleaned the pavement in the shape of the company logo. That would actually be in breach of this legislation, because the company ‘marked a thing’.”¹⁰⁰

(3) Sophisticated justification

Two or more complete reasons for the same demand are provided.

iii) Content of Justification

Deliberation undertaken in the name of society ought to aim at society's interests – the collective good, under some description or another – rather than those of a narrow segment of the population. Because determining the common good is such a fuzzy task, it is left to politicians (against whom the public has a right of recourse in the even that they disagree) to sort out. But Parliament also wields great power over its citizens' rights. In New Zealand we expect these to be taken into account when Parliament is legislating – surely we satisfy Waldron's stipulated 'rights-culture' if anyone does. Struggling to juggle the dual roles of guardian of the common good and upholder of individual rights ought to be reflected in the reasons given for a bill's desirability. Though protecting rights is a part of the collective good, in the context of a debate over Parliament's suitability to do so it is a part that deserves to be singled out.

Again the original DQI was supplemented, this time to spell out what aspects of the public interest are appealed to by debaters. In addition to the 'common good' in utilitarian and Rawlsian terms, references to the pragmatic efficacy of the Bill, and for the legal or moral

¹⁰⁰ Tagging and Graffiti Bill, 647 NZPD 16076.

rights upon which it intrudes or which it furthers, have been coded. A third level of explicitly balanced rights against other values or interests rounds out this indicator. Codes in this group are not exclusive; several may be assigned to the same speech if several such justifications are used.

(0) Group or Constituency Interests

Justifying a piece of legislation that will encompass everyone in a society by reference to its effects on a single sector of that society runs counter to the spirit of deliberation. If one or more groups or constituencies are mentioned, a code of 0 is assigned. For instance, Dr Pita Sharples (of the Maori party) focussed on the Maori experience of alcohol in the Sale of Liquor debate:

The health services research centre at Victoria University, in its 1999 study *Te Iwi Maori me te Inu Waiapiro*, said everything we need to know about our rationale for supporting this bill. The first two sentences of that resource are definitive: ‘Prior to contact with Pakeha, Maori lived in one of the few parts of the world that had never developed alcoholic beverages.’¹⁰¹

(1) Neutral

Neither specific groups nor the wider public good are explicitly called upon.

(2a) Common Good in Utilitarian Terms

An explicit reference is made to the common good, in terms of the “greatest good of the greatest number”.¹⁰² For instance, when justifying the existence of a right to private property Heather Roy turned to the beneficial effects of such a right for the whole community:

Individual property rights actually save environments. In the “tragedy of the commons” we have seen so many instances of communally owned assets simply being destroyed, and at some points being turned into

¹⁰¹ Sale of Liquor Bill, 635 NZPD 6346.

¹⁰² J Bentham, *An Introduction to the Principles of Morals and Legislation* xxxviii, J Burns & HLA Hart (eds.) (London: Athlone Press, 1970), 158.

deserts...¹⁰³

(2b) Common Good in Terms of the Difference Principle

Here the common good is again explicitly referred to, but in terms of the benefit to the least advantaged in society.¹⁰⁴ For instance, when decrying the proposed abolition of the defence of parental control, Judith Collins appealed to the harm it would cause to the most vulnerable in society:

the people who are most at risk from this legislation being passed are the poor, the brown, the people who are often marginalised, the people who are picked on in society, and the people who are easy prey to the State. Those are the people who are most likely to be arrested and prosecuted.¹⁰⁵

(2c) Practical Considerations

Often it is not the common good in terms of utility or welfare, but of practical implementation or administrative appropriateness, that is espoused. Whether the Bill will have the effect its supporters claim, or whether society and the government will be bogged down in a morass of technical difficulties, are matters which deserve independent consideration. In acknowledgement of their use as rationale for supporting or opposing a Bill, pragmatic concerns are added to the original DQI. For instance, when discussing the operation of a reduced minimum age for the purchase of alcohol Meteria Turei worried “how on earth will this practically work? Will pubs be required to see a marriage licence or a birth certificate that names a former guardian before they supply a person with a drink?”¹⁰⁶

(2d) Legal or Moral Rights

Reference is made to rights, as principles that ought not be compromised whether or not enshrined in law. For instance, in the context of organ donation Dr Jonathon Coleman argued that “if an individual makes a decision about what he or she wants his or her body to be used for after passing on, that decision should be respected and no one should be

¹⁰³ Private Property Bill, 643 NZPD 13348.

¹⁰⁴ J Rawls, *A Theory of Justice*.

¹⁰⁵ Substituted Section 59 Bill, 637 NZPD 7585.

able to overrule that.”¹⁰⁷

(3) Explicit Balancing of Rights and Other Considerations

Individual rights do occasionally conflict with the greater good and with each other. When they do some sort of prioritising must take place, though preferably one which recognises the qualitatively different character of a rights claim compared to one of social utility.¹⁰⁸ Reason-giving that is worth most explicitly balances rights against other interests; takes rights seriously, but does not shirk its duty towards the greater good. For instance, Meteria Turei recognised that raising the alcohol purchasing age was:

stripping away the existing legal rights of adults. At 18 a person in this country is an adult. He or she can raise a mortgage, die in defence of our country, become a Member of Parliament, own and use a firearm, and, like all adults, go to a bar and buy a beer or go to a bottle store and get a bottle of wine. If we are going to strip away these legal rights from adults, we need to do it on the basis of very sound evidence and proven efficacy.¹⁰⁹

iii) Respect

There are three objects towards which respect can be directed. First, the **group affected** by the policy may be treated with disdain or empathy. In some cases there were several groups targeted, and sometimes with polarised attitudes (the Anti-Tagging Bill would affect both the bestial taggers¹¹⁰ and the “very good people”¹¹¹ whose property was defaced, for instance). In these cases two values were given. The **demands** of others can also be treated with more or less respect. While in purely instrumental bargaining mere acceptance of others’ demands will suffice, valuing them as genuine alternative points of view signals a willingness to enter the deliberative process.

These two aspects of respect were coded under the same indicator schema; with the addition of a third level of respect for others’ demands, if the speaker agreed with them

¹⁰⁶ Sale of Liquor Bill, 635 NZPD 6345.

¹⁰⁷ Human Tissue Bill, 643 NZPD 12622.

¹⁰⁸ J Waldron, ‘Rights in Conflict’, *Ethics*, Vol. 99, No. 3 (1989), pp. 503-519, 507-509; R Dworkin, *Law’s Empire* (Cambridge: Harvard University Press, 1986), 285-91.

¹⁰⁹ Sale of Liquor Bill, 635 NZPD 6346.

¹¹⁰ Literally likened to “tom-cats” by the Hon David Benson-Pope: Tagging and Graffiti Bill, 647 NZPD 16070.

wholeheartedly.

(0) No Respect

The speech contains only negative statements about the groups or demand in question. Often these are the most entertaining passages of Hansard. Witness Hone Harawira's creative use of alliteration, for instance: "This bill... is punitive, it is pointless, it is unproductive, and it represents a paucity of intelligent thought."¹¹²

(1) Neutral

There are neither explicitly negative nor explicitly positive statements about the groups or demand.

(2) Explicit Respect

There is at least one positive statement about the groups or demand. For instance, Judy Turner praised the doctors at the frontline of the organ donation programme: "these amazing medics".¹¹³

(3) Demand Accepted

The speaker values and agrees with others' demands. For instance, although expressing a preference for a different proposal, Jo Goodhew did admit that the Human Tissue Bill would "move our laws forward to acknowledge a more modern era and the need to bring our laws into line with technology."¹¹⁴

Finally, **counter-arguments** may be ignored or degraded. On the other hand, they can be included and answered, or explicitly acknowledged as a sensible objection to make, or even wholeheartedly accepted. This is only recorded if counterarguments have been raised, or are anticipated by the speaker.

(0) Counterarguments Included – Degraded

¹¹¹ Judith Collins, *ibid.*, 16071.

¹¹² *Ibid.*, 16078. Five weeks earlier inspiration had also struck: "it would take a great dose of duplicitous, deceitful, and dishonest double-dealing for anyone to allow this bill to go any further" (BZP Bill, 645 NZPD 14660).

¹¹³ Human Tissue Bill, 'Second Reading', 643 NZPD 12619.

Counterarguments are included, but only negative statements are made about them. For instance, Jim Anderton claimed that “ignoring clear evidence-based expert advice is tantamount to voting for more harm to be caused to more people.”¹¹⁵ He summarily dismissed all arguments against that expert advice with a strawman that shows little respect for their actual position. Negative comments about those who pose the counter-arguments are included under this code, since both signal a general lack of respect for the opponents in the debate.

(1) Counterarguments Ignored

One or more counterarguments have been raised in the debate, but are not addressed by the speaker.

(2) Counterarguments Included – Neutral

Counterarguments are acknowledged, but neither explicitly positive nor explicitly negative statements are made about them. For instance Damien Connor placed a different statistics mustered by his opponents, without claiming his was the only true interpretation available:

We are told that 80 percent—or thereabouts—of the country would like to see the purchase age for alcohol increased. I say that 80 percent of the country want to see the harm from alcohol reduced. That would be, perhaps, a better reflection of public opinion.¹¹⁶

(3) Counterarguments Included – Valued

At least one counterargument is explicitly valued. For instance, Christopher Finlayson recognises the support present in the community for the counterarguments to rejecting the enactment of a right to private property:

There is no real debate, I would have thought, from any party in this Parliament about whether there is significant support for further legal protection of private property rights in this country; nor do I think there is any

¹¹⁴ Human Tissue Bill, 643 NZPD 12626.

¹¹⁵ BZP Bill, 645 NZPD 14649.

¹¹⁶ Sale of Liquor Bill, 635 NZPD 6336.

real debate about the proposition that in many jurisdictions private property rights have been enshrined in legislation, or, moreover, that the right to compensation for loss of property is widely supported.¹¹⁷

(4) Counterarguments Agreed With

As the demands of others can be accepted, so can criticisms of the proposal currently on the table. For instance, Tariana Turia “appreciated the insights of submitters to the select committee who have shared their frustrations around the apparent State interference in the autonomous right of parents to care for their children,” despite her support for the Bill.¹¹⁸

iv) Constructive Politics

A willingness to compromise, to change one’s own position in light of others’, is integral to the idea of deliberation. In a Parliamentary chamber where party lines are drawn up in advance, and legislation usually only enters the room because those lines are anticipated to hold, consensus-building may be an aspiration which asks too much. To test this potentially unfair intuition, four levels of ‘constructive politics’ are separated out:

(0) Positional Politics

The speaker makes no motion towards reconciliation or consensus, but merely holds to his or her position.

(1) Alternative Proposal

A proposal which is relevant to a different agenda is made. For instance, during the debate on a Bill intended to reduce alcohol-related harm to young people by raising the age limit for its legal sale, the Hon David Parker made this suggestion:

Cars ought to be a means of transport, not party venues. At the moment it is completely legal for people to use them as a party venue and, to be honest, I think that pissing up large in the car and rarking each other up is dangerous behaviour that we should protect young people from.¹¹⁹

¹¹⁷ Private Property Bill, 643 NZPD 12916-7.

¹¹⁸ Substituted Section 59 Bill, 637 NZPD 7579.

¹¹⁹ Sale of Liquor Bill, 635 NZPD 6355.

(2) Consensus Appeal

A call for reconciliation of the participants' differences and signalled openness to others' ideas is made. For instance, during the debate on Tagging and Graffiti Bill National was "keen to look carefully at amendments and improvements that may be offered during the Committee stage, and [would] do that with an open mind."¹²⁰

(3) Mediating Proposal

A proposal which fits the current agenda, and would form a compromise between positions currently held by the participants, is made. For instance, Chester Borrows's plan to introduce an amendment to the Substituted Section 59 Bill.¹²¹

Having determined the sample of discourse to study, and criteria by which to study it, the results of the research follow.

¹²⁰ Simon Power, Tagging and Graffiti Vandalism Bill, 647 NZPD 16069.

¹²¹ Substituted Section 59 Bill, 637 NZPD 7571.

Chapter Three: Results

As a purely exploratory, only quasi-objective, work, focussing on a small number of cases, statistical validity is not a virtue of these results. However, the reasons for looking at Parliament's credentials do not require that such an aspiration to universality be achieved. In order to refute those critics who claim legislatures are hopeless, only some hope need be found. Similarly, substantiating Waldron's intuition that legislatures can be rational and respectful decision-makers demands only some corroborating cases. This chapter will look at whether the cases studied do bolster that claim.

a. Participation

	Number of Interjections	
	Total	Hostile
Private Property	17	9
Sale of Liquor	7	7
Tagging & Graffiti	7	5
BZP	6	2
Human Tissue	0	0
Section 59	0	0

No speaker was ever prevented from participating in the debate – although the Chamber can be rowdy at times Members were never literally shouted down. Interruptions are fairly common, but do not necessarily impede participation. Helpful suggestions and friendly banter may improve the quality of the debate: for instance, Barbara Stewart interrupted Rodney Hide during the BZP debate, in reply to statements he was making about her own, earlier, speech.¹²² Participation may require a certain level of understanding, which cannot be gained unless some to-and-fro dialogue within a speech is possible.¹²³ Respect for another speaker's time ought not prevent disruptions if such are necessary for one's continuing contribution to the debate. It counts towards deliberative quality that Members feel able to ask productive questions.¹²⁴

¹²² BZP Bill, 645 NZPD 14660.

¹²³ Speech in any setting depends on interaction to ensure an intended meaning is understood, and vice versa: J Lacan, 'Function and Field of Speech and Language', in *Ecrits: A Selection*, trans. Alan Sheridan (NY: Norton, 1977), 93.

¹²⁴ Debate in the House is fairly relaxed, despite the strict words of rls. 115 ("If any offensive or disorderly words are used, whether by a member who is speaking or by a member who is present, the Speaker

On the other hand, hostile interjections are likely to impede the quest for a respectful consensus which motivates deliberation. Sarcastic laughter¹²⁵ might be supposed to discourage constructive attitudes and signal a failure to consider the merits of another’s proposal. The familiarity of interrupting in good humour may breed contempt for the rule against interruption. Its relaxed interpretation may then be misused in a way contrary to good deliberation.

Conversely, the liveliness of debate could prompt an improvement in participation. Dover Samuels had not been “going to speak on this bill, but I thought I would take a short call. When colleagues get up and speak they make me enthusiastic about their perceptions, and certain things happen—my springboard legs automatically stand up and I take a call.”¹²⁶ A sign that Members are following the discussion with interest, and can be roused into speaking for purely deliberative reasons (that is, to have their voice heard and perhaps persuade others), is encouraging evidence that they do consider themselves participants in a free debate.

b. Level of Justification

	None	Inferior	Qualified	Sophisticated
Section 59	0	0	42	58
Sale of Liquor	0	19	50	31
Private Property	8	17	25	50
BZP	11	33	33	22
Tagging & Graffiti	0	40	60	0
Human Tissue	0	55	45	0
Mean	3	26	43	29

Table entries are percentages (which add up to 100 percent in each row)

Generally, at least attempts at full justification were made. Almost three-quarters of the speeches offered at least one fully reasoned justification for the proposal.¹²⁷ Only two debates contained speeches which lacked any reasoning at all.¹²⁸ Clearly politicians do put

intervenes.”) and 132 (“A member speaking may be interrupted — (a) by a point of order: (b) by the raising of a matter of privilege relating to the conduct of strangers present.”). These suggested reasons for interruption are only sufficient, not necessary – not every interruption outside their terms will be censured.

¹²⁵ Such as Russel Fairbrother’s exclaimed “Ha ha!” during Heather Roy’s speech in the Private Property Bill, 643 NZPD 13348).

¹²⁶ BZP Bill, 645 NZPD 16079.

¹²⁷ 71.4% of the justifications were ‘qualified’ or ‘sophisticated’.

¹²⁸ The BZP and Private Property debates. The offending speeches were delivered by Jonathon Coleman

some effort into their reasoning in the Chamber. Whether this is for the benefit of other Parliamentarians (in pursuit of the deliberative aim of swaying others toward a consensus position) or merely window-dressing for public consumption, is a harder question to answer. Perhaps a comparison between the results and the interplay of various institutional factors (while remaining cognisant of their statistical tentativeness) can shed some light on the issue.

The Substituted Section 59 and Sale of Liquor Bills, the two debates whose levels of justification were the highest, are also the two debates where party discipline was the least strict (a personal vote in the latter, and informally relaxed party discipline by all parties save Labour in the former). Perhaps the possibility of persuading fellow MPs was an incentive to give fuller reasoning than would otherwise be demanded. On the other hand, these two Bills were also the two which attracted the highest number of submissions to their respective Select Committees (1718 and 180 written submissions, 207 and 83 oral submissions respectively). Perhaps it was the importance of explaining their position to the more interested and more deeply divided public which prompted an outpouring of logical justification.

Toeing the party line impedes deliberation, because the preferences of the individual participants (whether seen as individuals, as representatives of the participating parties, or as representatives of their constituencies)¹²⁹ are fixed rather than free to vary as other opinions become known. Backroom deals lock party members into positions they would not otherwise choose, and cannot alter in light of the debate in the House. There is no point in debating carefully and convincingly when all the actors know it will make no difference to the outcome. Moreover, as part of the value of deliberation is the accountability it fosters,¹³⁰ such shadowy arrangements run counter to the ideal decision-making procedure. This commonsensical hypothesis seems borne out in the data – debates where full party discipline held were lower on the scale of justification than others.

Conversely, publicity multiplies the incentive to fully justify one's stance. With the

and Peter Dunne respectively.

¹²⁹ A variety of models for elected representatives' behaviour have been proposed from both empirical and theoretical sides; some see Members of a legislature as elected to propound their personal point of view, and others their electors' points of view. None is undeniably superior. See J Mansbridge, 'Rethinking Representation', *American Political Science Review*, Vol. 97, No. 4 (2003), pp. 515-28.

¹³⁰ J Cohen, 'Deliberation and Democratic Legitimacy', 413.

eye of the nation turned toward Parliament, Members are fighting to validate their standpoints not only to each other, but to the electorate as well. Giving reasons is the way to do so, and hence are seen more often in debates which are closer to the public's heart.

These factors could be reducible to functions of the moral issues at stake. Holding a personal vote indicates that the issue is one of moral principle,¹³¹ and thus more likely to be the subject of disagreement (and therefore also attention) within the wider community than, say, a Securities Amendment Act. Similarly, high numbers of submissions to the Select Committee considering a Bill (the rough indicator of public interest used here) indicates that it is the centre of controversy. So perhaps it is the strength of ethical disagreement which fuelled the fires of well-reasoned argument. (Looking at the content of justifications to see if particularly high numbers of rights arguments were raised in response to this conjectural moral outrage cannot refute this hypothesis. Quite apart from the face of divergence between the rationales used in the Sale of Liquor and Substituted Section 59 debates, reasonable moral disagreement is not restricted to rights issues. Social utility, and what policies would best implement it, are similarly subject to dispute.)

Without a broader range of Bills and institutional factors which might be confounding the results, conclusions are hard to draw. At the very least, Parliament seems to give reasons for its decisions on rights issues more often than not. Which factors influence when more rather than fewer reasons are given is unclear.

c. Content of Justification

	Group	Neutral	Utilitarian	Difference	Practical	Rights	Balancing
Private Property	5	0	23	5	23	32	14
Human Tissue	5	10	29	0	24	24	10
Sale of Liquor	8	0	50	0	25	13	4
Section 59	3	0	35	6	24	32	0
Tagging & Graffiti	0	0	53	6	27	13	0
BZP	19	13	44	0	25	0	0
Mean	6	3	38	3	24	21	5

Table entries are percentages (which add up to 100 percent in each row)

Overall, Parliamentarians do give reasons for their positions which reflect the concerns Parliament is expected to have. Furthering the common good is their primary goal, but it is

¹³¹ A personal vote is called if the Speaker considers the question to be a matter of 'conscience': SO 143.

tempered by differing conceptions of *how* that goal is to be fulfilled – at what cost in the undesirable externalities of inefficiency, ineffectiveness, or violation of citizens’ rights.

Principally, appeals were made to the common good in utilitarian terms; the practicalities of implementation followed, and then concerns about rights. Given the centrality of rights to the Bills in question, the latter seems disappointingly low (averaging 21% of the justifications given in each debate).

Group or constituency interests were seldom mentioned – but half of those mentions were by Māori Party members. In four of the six debates studied the Māori Party member speaking called on the interests of Māori to support their argument. The remainder concerned youth opinions or welfare, and were made by National, Labour and Progressive members.¹³² That is, other political parties preferred to appeal to a constituency spread across ethnic (and geographic) lines, which is more in keeping with deliberative theory’s emphasis on the good of society as a whole. With its emphasis on the party’s roots in “kaupapa Māori, the foundation principles of the Māori world,” the Māori Party’s Constitution confirms this intuition.¹³³ A party dedicated to a single constituency or ideology creates a curious problem for deliberative theory: though this coding scheme privileges appeals to universal interests, a niche party thrives by cultivating the support of a small sector of society.¹³⁴ Issue-based parties (like the Greens, for instance) still aim to attract votes from any members of the population they can convince of the worth of their policies; apparently the Māori party has decided to dedicate itself to a single ethnic group.¹³⁵ Ought this be held as an undesirable deviation from ideal deliberation, or might it be excusable in some cases?

¹³² Meteria Turei and Jim Anderton in the BZP debate, and Mark Blumsky and Steve Chadwick in the Sale of Liquor debate.

¹³³ ‘The Rules of the Maori Party’, *The Maori Party*, 1/11/08, http://www.maori-party.com/index.php?option=com_content&task=view&id=1056&Itemid=94 (accessed 4/10/08). See also C James, ‘In two worlds - Politics of Maori Party’, *New Zealand Herald*, 30/9/08, http://www.nzherald.co.nz/maori/news/article.cfm?c_id=252&objectid=10534834&ref=rss (accessed 4/10/08).

¹³⁴ And suffers heavily if it attempts to shift from that small sector – niche parties are effectively “prisoners of their ideologies”: J Adams, M Clerk, L Ezrow, G Glasgow, ‘Are Niche Parties Fundamentally Different from Mainstream Parties?’, *American Journal of Political Science*, Vol. 50, No. 3 (2006), pp. 513–529.

¹³⁵ Though establishing just how effective such targeted strategies are, or if ethnoregionalist parties collect a wider share of the electorate than their singular focus merits, is a difficult task: F Tronconi, ‘Ethnic Identity and Party Competition. An Analysis of the Electoral Performance of Ethnoregionalist Parties in Western Europe,’ *World Political Science Review*, Vol. 2, Iss. 2 (2006), Article 2.

Since all policies need language which implements them as intended, it is hardly surprising that the practicalities of that implementation featured at a steady rate in all the debates. For some proposals this is a straightforward and relatively uncontroversial question: the Private Property Bill was agreed to have objectionably indeterminate consequences, for instance.¹³⁶ For other proposals an intuition about Parliament's role seemed to determine whether passage was merited, or whether the ensuing Act would not even be worth the paper on which it was written.¹³⁷ Two competing models of Parliament were often raised – one as the guardian of the public good with a duty to reduce societal harm by instigating even solely incremental changes, and the other as an institution with limited powers to transfigure a country's intransigent culture.

These two models were at the forefront of the Sale of Liquor debate. All participants concurred it was imperative that New Zealand's "drinking culture"¹³⁸ change, but differed on whether the proposal made adequate progress toward that change. Supporters ranged from defending even a single step (among others) toward amelioration,¹³⁹ to the optimism of Gordon Copeland that "voting for the second reading of this legislation... will, of itself, help to bring to an end the binge-drinking culture in this country."¹⁴⁰ At the other end of the spectrum, opponents believed a cultural shift would not be achieved by simply raising the purchase age by two years – such an idea was "rather ambitious, hopeful, and destined to fail."¹⁴¹

Movement along a similar spectrum of enthusiasm was a common theme in the other debates. The Select Committee Report on the Tagging and Graffiti Bill did not "expect this bill alone to solve the problem of tagging and graffiti, and consider[ed] that this legislation would be successful if it were used in conjunction with strategic and

¹³⁶ Almost all participants in the debate used this as their main reason for opposing the Bill. See Private Property Bill, 643 NZPD 12916 (Lynne Pillay); 12918 (Christopher Finlayson); 12919 (Hon Annette King); 13344 (Chris Auchinvole); 13349 (Nicky Wagner); 13350 (Russel Fairbrother).

¹³⁷ Which was Chester Borrows' opinion of the Substituted Section 59 Bill (637 NZPD 7572).

¹³⁸ Law and Order Committee, 'Sale of Liquor (Youth Alcohol Harm Reduction: Purchase Age) Amendment Bill' (Wellington: 2006), 9.

¹³⁹ Chester Borrows, for instance, wondered:

whether each member of this House can imagine themselves in the glare and the spotlight of public scrutiny when someone shoves a microphone in front of his or her mouth and asks: 'Would you vote for something that would solve 10 percent of the problem, or 20 percent of the problem?'. If we accept that this legislation is not a one-hit wonder—that, in actual fact, to change the drinking culture in New Zealand we have to take a number of different initiatives, and this is just one—then I challenge that member to say into that microphone, under that glare of public scrutiny: 'No, stuff ya. I won't pass legislation that will fix even 10 percent of this problem.' (Sale of Liquor Bill, 635 NZPD 6340).

¹⁴⁰ *Ibid.*, 6349.

operational responses from a variety of agencies.”¹⁴² In the Human Tissue debate Members carefully pointed out the lack of evidence that establishing an organ register would boost rates of organ donation.¹⁴³ The Substituted Section 59 Bill was decried as a “cop-out that we have created just to show that we are trying to do something.”¹⁴⁴ While opposing the BZP Bill Rodney Hide pessimistically observed:

I think we overestimate what this Parliament can and cannot do. We sit in this House and pontificate as though all the young people who might be taking party pills are listening to us say that party pills are bad and as though, on a certain day in a certain year, they will therefore suddenly stop taking them... That will not happen, and anyone in this House who thinks it will happen needs to get out more.¹⁴⁵

Like any popular theme, these appeals to a Bill’s efficacy or lack thereof at remedying its targeted mischief have been overused. When it suits a party’s position to assert that “Parliament should only enact laws that work”¹⁴⁶ it will primly do so, but such avowals are forgotten should a proposal they support be only “part of an overall strategy” to improve some social statistic.¹⁴⁷ These inconsistencies might lead one to unflattering conclusions on a party’s sincerity in the views it espouses.

Deliberative theory presumes that the positions put forward are sincerely held by the participants.¹⁴⁸ A cynic might suppose all views propounded by politicians only are

¹⁴¹ Damien Connor, *ibid.*, 6337. See also, for instance, David Carter, *ibid.*, 6352.

¹⁴² Law and Order Committee, ‘Summary Offences (Tagging and Graffiti Vandalism) Amendment Bill’ (Wellington: 2008), 1.

¹⁴³ That is, to explain their rejection of Jackie Blue’s Human Tissue (Organ Donation) Amendment Bill, they called on the undesirability of introducing an enactment merely for the sake of being seen to do something in response to a social problem. See Human Tissue Bill, 643 NZPD 12613 (Sue Moroney); 12618 (Sue Kedgley); 12619 (Judy Turner); 12623 (Maryan Street); 12627 (Lesley Soper). Cf. Jonathon Coleman, who observed that “there is pretty much no evidence to support a lot of the things that are done in Parliament and decided upon” (12621).

¹⁴⁴ Nicky Wagner, Substituted Section 59 Bill, 637 NZPD 7588.

¹⁴⁵ BZP Bill, 645 NZPD 14660.

¹⁴⁶ Justice and Electoral Committee, ‘Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill’ (Wellington: 2005), National Minority view, 9.

¹⁴⁷ Health Committee, ‘Human Tissue Bill’ (Wellington: 2007), National Minority View, 8.

¹⁴⁸ J Habermas, *Moral Consciousness and Communicative Action*, trans. by C Lenhardt and SW NicholSEN (Cambridge: MIT Press, 1990), 136. As Gutmann and Thompson put it, one ought to respect one’s own moral position by representing it faithfully: *Why Deliberative Democracy*, 81. Not all agree truthfulness is a desirable feature of a deliberative theory, however. See, for instance, E Markovits, ‘The Trouble with Being Earnest: Deliberative Democracy and the Sincerity Norm’, *The Journal of Political Philosophy*, Vol. 14, No. 3 (2006), pp. 249–269.

motivated by sheer opportunism – the desire to be re-elected to the hallowed halls of power outweighs any moral obligation to be truthful. But if those views are propounded well, with full logical justifications, an objective measure of deliberation cannot distinguish between genuinely or disingenuously held opinions. Alternative routes are available for citizens to judge the sincerity of their elected representatives. Parliamentary discussion is open to the public; legible in Hansard, visible on television, audible on the radio. Unlike development of policies in the bowels of the government, where free and frank opinions are protected by the shadow of the Official Information Act,¹⁴⁹ MPs are expected to expound their views forthrightly. Under such scrutiny a mild degree of hypocrisy is unlikely to be fatal. Though ideally politicians would sincerely hold the views they espouse in debate, perchance the quality of deliberation which actually occurs is independent of that sincerity, and none the worse for it.

Subject-matter drives the content of justification. Rights were mentioned most frequently in the Substituted Section 59, Private Property and Human Tissue debates. Notably these were the Bills which impacted most seriously on people with whom most Members could easily identify. “Ordinary caring parents”,¹⁵⁰ bach owners,¹⁵¹ organ donors and their grieving families¹⁵² – these are groups with whose tribulations it is easy to sympathise. In comparison “tom-cats”¹⁵³ or “drunk, disorderly teenagers”¹⁵⁴ ostensibly deserve nothing more than their comeuppance; certainly not the rights accorded to full members of society. Rights held by people clearly worthy of them are clearly worth protecting, unlike those whose contribution to society is questionable. Rational as such a discrepancy might be for politicians roused by the fear of alienating middle New Zealand’s reliable votes, from a principled rights-based standpoint it is frustrating.

Equally frustrating is Parliament’s blindness in the face of clear alarms. Despite a report of inconsistency with the Bill of Rights Act being attached to the BZP Bill,¹⁵⁵ the

¹⁴⁹ Particularly s9(2)(g).

¹⁵⁰ Chester Borrows, Substituted Section 59 Bill, 637 NZPD 7572.

¹⁵¹ Chris Auchinvole, Private Property Bill, 643 NZPD 13343.

¹⁵² Sue Kedgley, Human Tissue Bill, 643 NZPD 12617.

¹⁵³ Hon David Benson-Pope, Tagging and Graffiti Bill, 647 NZPD 16070.

¹⁵⁴ Pita Sharples, Sale of Liquor Bill, 635 NZPD 6347.

¹⁵⁵ M Cullen, ‘Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Misuse of Drugs Act (Classification of BZP) Amendment Act 2007’ (Wellington: 2007). See also *Rv Hansen* [2007] 3 NZLR 1, where the Supreme Court made its first major ruling on a Bill of Rights Act inconsistency, sparking the Section 7 notice.

right to be presumed innocent was not raised once in the Second Reading debate. For the majority of the Select Committee a proposed review of the Act by the Law Commission sufficed to “address the New Zealand Bill of Rights Act 1990 issues associated with this bill.”¹⁵⁶ Although provisionality is a virtue according to deliberative theory (because it encourages re-opening the debate in the future as opinions change),¹⁵⁷ when serious rights issues have been placed at the centre of the debate it seems an unconvincing cop-out to sidestep responsibility for their resolution. If s7 notices are to have any significance, they ought to be taken seriously. Unless debated in Parliament, rather than Members fobbing the job onto some other body,¹⁵⁸ there is little sense in their being tabled in Parliament. And if Parliament fails to consider rights issues even when they are so squarely relevant, its qualifications as a decider of rights are questionable.

If the ideal of rights-deliberation is an explicit balancing of individual rights against other considerations which deserve attention, then the Private Property debate is the closest to that ideal (with 14% of the justifications offered being of this calibre). Though it lacks all the institutional features which might be expected to promote good deliberation – the Select Committee was unanimous in its rejection of the proposal, party discipline was enforced for the vote, and it barely rippled the public sphere – its subject-matter places rights front and centre, and demands that they be pondered seriously. Adding to the New Zealand Bill of Rights Act, our seminal list of rights to which our society is committed, intrinsically involves issues of the proposed addition’s utility or lack thereof.

Only six times was this balancing act performed, from a total of 70 speeches and 132 instances of justification coded. Expecting politicians to become moral philosophers is probably too ambitious – but since ideal deliberation is an aspiration towards which to strive, rather than a standard to require of reality, this ambition need not be ill-placed. Unlike black-letter law, which ought to ask no more than we are capable of giving,¹⁵⁹ a

¹⁵⁶ Health Committee, ‘Misuse of Drugs (Classification of BZP) Amendment Bill 146-1’ (Wellington: 2007), 6.

¹⁵⁷ A Gutmann and D Thompson, ‘Deliberative Democracy Beyond Process’, 46-47.

¹⁵⁸ A parallel evasion of responsibility was reviled by the Hon Jim Anderton in the Sale of Liquor debate, where he “hear[d] that sigh of relief in many places: ‘Oh gosh, we’ve got a review so we don’t have to make a hard decision.’ Well, this is the place for hard decisions, and this is where the buck stops.” (Sale of Liquor Bill, 635 NZPD 6343).

¹⁵⁹ While teachers can pose impossible ideals and reward students’ efforts, enforcers of a law which cannot be satisfied face “the alternative of doing serious injustice or of diluting respect for law by... winking at a departure from its demands”: L Fuller, *The Morality of Law*, 71.

normative theory's ideal is unattainable in reality by definition.¹⁶⁰

One last point worthy of comment is the degree to which the substantive arguments delivered in the House reflected those in the Select Committee reports, which in turn reflected the public submissions received. Here the wider public sphere infiltrates Parliament. Connecting elected representatives to those they represent is crucial to the legitimacy of their deliberation. “Democratically constitutive opinion— and will-formation depends on the supply of informal public opinions,”¹⁶¹ and New Zealand's Select Committee system is the perfect supplier.¹⁶² Public submissions are received (or heard if the submitter prefers) as a matter of course,¹⁶³ creating an opportunity for public dissent to gain the legislators' ears.

Comparing the Substituted Section 59 Select Committee report to the debate evidences this phenomenon in action. In outlining its consideration of the Bill, the Justice and Electoral Committee recorded the principal arguments of submitters who supported and opposed the Bill.¹⁶⁴ Each of the arguments noted was raised in the House during the debate.

First, the concerns with the Bill. The legislation would impede the right of parents to control their children as they saw fit – that is, it would “criminalise good parents”.¹⁶⁵ It would deprive caring parents of an effective disciplinary tool, which “in the short term... works,” according to Nicky Wagner.¹⁶⁶ An entire generation of children would grow up without the consistent boundaries they need, which are “often” reinforced by parents administering “a light smack.”¹⁶⁷ The right to discipline one's children according to

¹⁶⁰ J Dryzek, *Discursive Democracy: Politics, Policy and Political Practice*, 36-7.

¹⁶¹ J Habermas, *Between Facts and Norms*, 308.

¹⁶² In a pre-MMP world J Burrows and P Joseph called them “a crucial bastion of democracy in our legislative process”: ‘Parliamentary Law Making’ [1990] NZLJ 306.

¹⁶³ M Ganley, ‘Select Committees and their Role in Keeping Parliament Relevant. Do New Zealand Select Committees Make a Difference?’, *Australasian Parliamentary Review*, Vol. 16, No. 2 (2001), pp. 140-150, 83; G Palmer & M Palmer, *Bridled Power*, 194-5. Both were written before the Foreshore and Seabed Act 2003 was passed. The Fisheries and Other Sea-Related Legislation Select Committee heard from only five per cent of the people who sought to make oral submissions, perhaps indicating a chink in this ‘bastion’ of democracy when it does not suit the Government's agenda (C Charters, ‘Responding to Waldron's Defence of Legislatures: Why New Zealand's Parliament Does Not Protect Rights in Hard Cases’, 2006 NZ Law Review 621, 641). Compare Lynne Pillay's triumphant announcement that “every submitter who requested to be heard was” (Substituted Section 59 Bill, 637 NZPD 7590).

¹⁶⁴ Justice and Electoral Committee, ‘Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill’ (Wellington: 2005), 3.

¹⁶⁵ Chester Borrows, Substituted Section 59 Bill, 637 NZPD 7572.

¹⁶⁶ *Ibid.*, 7589.

¹⁶⁷ *Ibid.* Curiously Mr Wagner leaps from an empirical statement (that “research also tells us that children

“specific belief systems”¹⁶⁸ would also be compromised – it is a part of the “Judaean-Christian tradition and the Greek philosophical tradition” that “with training and discipline [children] will become virtuous,”¹⁶⁹ and those traditions are sacrosanct for Western culture. Finally, otherwise model parents will face prosecution for minor acts of physical discipline, since “if the police arrest someone, they will generally prosecute... if they do not prosecute, they end up getting sued for wrongful arrest.”¹⁷⁰

In defence of the Bill it was argued that “smacking does not work,”¹⁷¹ and that it encouraged child abuse. Jim Anderton’s ‘argumentum ad hitlerum’ implicitly relies on the latter.¹⁷² Under the current law there was a disparity between the protection afforded to adults’ bodily integrity and that for children.¹⁷³ Fears of trivial prosecution were unfounded, particularly in the light of the absence of police action over the technical kidnappings under s209 of the Crimes Act which occur every time a child is taken to his or her room.¹⁷⁴ Lastly, enacting the Bill would “send a strong anti-violence message to society”¹⁷⁵ and underscore the importance of cultural change.¹⁷⁶

Each of the principal arguments raised in submissions to the Select Committee was rehashed in the House’s debate, and not only by Select Committee members who had heard the submissions firsthand.¹⁷⁷ This overlap in content is not unique to the Substituted Section 59 Bill, but a common theme throughout the debates coded. Select Committees do appear to be a channel for public opinion to reach the ears of Parliament.

need those consistent boundaries, and often a light smack is what parents do to reinforce them”) to an ethical one – that because parents *do* use a ‘light smack’, they *ought* to continue to do so.

¹⁶⁸ Justice and Electoral Committee, ‘Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill’ (Wellington: 2005), 3.

¹⁶⁹ Gordon Copeland, Substituted Section 59 Bill, 637 NZPD 7581.

¹⁷⁰ Judith Collins, *ibid.*, 7585.

¹⁷¹ Tariana Turia, *ibid.*, 7579.

¹⁷² “The root of Nazism and of all hatred is the use of violence and bullying by one group of people who feel they have a moral claim higher than those of others. Without violence, hatred cannot flourish, and that is a strong reason why we should strip violence out of our homes”: *ibid.*, 7586.

¹⁷³ *Ibid.*, 7569 (Sue Bradford); 7579 (Tariana Turia); 7587 (Hon Jim Anderton).

¹⁷⁴ Justice and Electoral Committee, ‘Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill’ (Wellington: 2005), 3, 7; Substituted Section 59 Bill, 637 NZPD 7571 (Sue Bradford); 7574 (Hon Mark Burton); 7577 (Hon Brian Donnelly).

¹⁷⁵ Justice and Electoral Committee, ‘Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill’ (Wellington: 2005), 3.

¹⁷⁶ Substituted Section 59 Bill, 637 NZPD 7574 (Hon Mark Burton); 7578 (Hon Brian Donnelly); 7579 (Tariana Turia); 7587 (Hon Jim Anderton).

¹⁷⁷ Sitting on the Committee were Lynne Pillay (Chairperson), Christopher Finlayson (Deputy Chairperson), Russell Fairbrother, Ann Hartley, Nándor Tanczos, Nicky Wagner, Richard Worth, Chester Borrows and Sue Bradford.

d. Respect

	Overall	Demand/Counter-Argument
Human Tissue	5.5	3.8
Private Property	4.2	3.2
Section 59	3.9	2
Sale of Liquor	3.8	2.5
BZP	2.2	1.2
Tagging & Graffiti	2	1.1

‘Overall’ scores are from a total of 9, ‘Demand/Counter-Argument’ from a total of 7

Respect was never entirely lacking from the debates, despite the undeniable presence of some creative invective. Looking at the ‘Overall’ scores (which include ‘respect for groups affected’), the Bill’s purpose might be thought to drive levels of respect. Just as it is easier to champion the rights of suitable community members than those of the riff-raff, it should be easier to show them the respect they are due. It is possible that this explains the high concentrations of respect seen in the Human Tissue,¹⁷⁸ Private Property and Substituted Section 59 debates. However, even after that measure is removed (in the second column) the relative levels of respect remain fairly stable.

The Tagging and Graffiti and BZP debates were particularly low in respect. They were characterised by a high level of disdain for those who held opposing positions, and by particularly high levels of ‘positional’ politics. Though they generated more political heat than the Human Tissue or Private Property Bills, they certainly attracted only a fraction of the attention paid to the Sale of Liquor or Substituted Section 59 Bills.¹⁷⁹

Salient moral values were shared in the Human Tissue debate – an individual’s decisions regarding his or her own body, the preferences of his or her family, and the social utility of organ donation. In contrast the Tagging and Graffiti and BZP debates were marked by vociferous and inveterate disagreement over the value of the activities being regulated. Polarised views within the debate, and resignation to the rift which will inevitably ensue, drastically reduce the odds of reaching a compromise – so one of the

¹⁷⁸ Some Members in that debate seemed carried away by the general atmosphere of esteem for all points of view, even valuing positions they would ordinarily be cautious of appreciating. Barbara Stewart, a New Zealand First member, even called mandatory organ harvesting “a very interesting concept” (Human Tissue Bill, 643 NZPD 12615).

¹⁷⁹ 29 submissions were received on the Tagging and Graffiti Bill, and 52 on the BZP Bill.

main incentives to remain respectful evaporates.¹⁸⁰ Strategic bargaining does not require that one respect one's opponents, but merely that one persuade them to comply. Determining the direction of the causal connection between inflexible opinions and a lack of respect is a difficult task, however – one is less inclined to agree with people one disrespects, but similarly less inclined to respect those with whom one disagrees.

Both debates do have one feature in common which could not be controlled for in the limited sample size of this study. They were held just eleven weeks apart, on the 5th March (BZP) and 20th May (Tagging and Graffiti) of 2008. (The Human Tissue and Private Property Bills were separated by less than a month – between the 23rd October and 21st November 2007 – and had comparably high levels of respect.) Political climate may have a far greater influence over these results than can be accounted for here.

Select Committee members are the staple speakers of the Second Reading Debate, and almost invariably begin by praising their fellow Committee members. Away from the vicissitudes of public sittings, Committee members can reach personal understandings which surpass the tensions underlying their political divergences. For Chester Borrows it was:

a privilege and an education to sit as a member of the Justice and Electoral Committee's subcommittee... After sitting on the subcommittee listening to the submissions and reading the material, the group of five became relatively close in spite of the gulf that lies between us on the fundamentals of the bill.¹⁸¹

As the Swiss study showed, public arenas of debate tend to encourage posturing and derision of opponents.¹⁸² Without an audience the incentive for mindless jabs is removed, and relating to other participants sensitively (with respect rather than deprecation) becomes possible. Private deliberation may be freer, franker and less polarising.¹⁸³ Select

¹⁸⁰ That is, once a majoritarian, rather than consensus-seeking, paradigm is entered: J Steiner et al., *Deliberative Politics in Action*, 120-121.

¹⁸¹ Substituted Section 59 Bill, 637 NZPD 7571.

¹⁸² J Steiner et al., *Deliberative Politics in Action*, 129-130. The mean overall respect for non-public arenas was 3.67; for public arenas 3.36.

¹⁸³ D Stasavage, 'Polarization and Publicity: Rethinking the Benefits of Deliberative Democracy', *The Journal of Politics*, Vol. 69, No. 1 (2007), pp. 59-72.

Committees are a far less public arena than debate within the House itself, and Committee members are the staple speakers in the Second Reading Debate. Their contributions form a bridge between the high respect environment of a Committee meeting and the very different character of the House of Representatives.

e. Constructive Politics

	Positional	Alternative	Consensus	Mediating
Section 59	42	17	17	25
Sale of Liquor	31	38	19	13
Private Property	83	0	17	0
BZP	78	22	0	0
Human Tissue	45	27	18	9
Tagging & Graffiti	70	10	10	10
Mean	58	19	14	10

Table entries are percentages (which add up to 100 percent in each row)

Compared to the Swiss study, levels of constructive politics were oddly high. Positional politics in their study ranged from 81.00% to 93.50% – this study’s mean of 58% is remarkably low. Given the ease with which they slip off the tongue, the number of consensus appeals found here might be thought low (they were made in 14% of the speeches coded). But this is still high compared to the Swiss study, where levels varied from 0.00% to 8.10%. Whether this is a function of a curiously co-operative political culture in New Zealand, of the quality of debate or desire for agreement on the Bills chosen, or coder error, would require further investigation.

Mediating proposals generally consisted of amendments which were to be introduced in the Committee stage. This may be a function of the stage of debate chosen for analysis – Members who endorsed the principle underlying the Bill, but found its wording unacceptable, announced their intention to support the Bill to the Committee of the Whole House where they could introduce an ameliorating amendment.¹⁸⁴ Other parts of the Bill’s progress through the House would be less amenable to similar mediating proposals.

The Private Property debate was notable for the participants’ lack of flexibility –

¹⁸⁴ For instance, horrified at the marginalisation of Māori cultural values by the Human Tissue Bill in its current shape, Tariana Turia rallied magnificently: “Never a party to give up, however, the Māori Party will be tabling a Supplementary Order Paper at the Committee stage of this bill to give this House the opportunity

their minds were already decided against the merits of the proposal, and the high level of positional politics reflects that. After the strongly worded Select Committee report¹⁸⁵ this could hardly have come as a surprise. When half of the debate's participants had sat on the Committee which came to a firmly negative resolution,¹⁸⁶ their unwillingness to be swayed from a fully-considered position is understandable.

Overall, New Zealand's House of Representatives does not do an abysmal job of debating proposals which affect rights. Respect and attempts to reach a constructive consensus are higher than the stereotypical Question Time session might suggest. Most importantly, reasons *are* given for the positions propounded. Just as a court refers to the legal materials which ground its decision, so Parliamentarians tend to refer to the common good which is their purview, with a smattering of individual rights thrown in for good measure.

to... create legislation that is inclusive of a Māori world view' (Human Tissue Bill, 643 NZPD 12617).

¹⁸⁵ Which repeatedly called for "exhaustive" research to be carried out on the Bill's potential effects before any more lenient position was taken: Justice and Electoral Committee, 'New Zealand Bill of Rights (Private Property Rights) Amendment Bill 255-1' (Wellington: 2005), 3-4.

¹⁸⁶ Members on the Committee who participated in the debate were Lynne Pillay, Christopher Finlayson, Chris Auchinvole, Nicky Wagner, Russel Fairbrother and Gordon Copeland (who was a non-voting member of the Committee for the purposes of his own Bill).

Chapter Four: Concluding Remarks

‘Whenever I find a man who will not let me put myself on a par with him in every respect [for example, a nobleman or a rich man with unearned and undeserved advantages], it is right and proper and becoming that I should knock him down, if I have a mind to do so, and if that will not do, knock him on the head, and so forth.’¹⁸⁷

It is a matter of pride that citizens of modern democracies do not respond to quarrels as Bentham’s pilloried French revolutionary did. Rather than resort to violence as a solution to disagreement, we turn to talk. Just as violence may be a more or less effective route to resolution, so our talking will lie along a continuum running from no communication whatsoever to a communion of minds and realisation of a common aim. Since our Parliament’s function is to talk in the hopes of finding society’s common goal and a method by which to reach it, its place on that continuum becomes important, whether for the refutation of claims that it cannot perform such a task, for the bolstering of an argument that it can and should do so, or vice versa. It is also important to situate Parliament on that continuum from time to time in order to review the continuum itself. Does it reflect the dispute-resolution mechanism we ideally want to replace brute force?

This study is an exploration into how to undertake that situating. With a single coder and small handful of cases, a snapshot of how New Zealand’s Parliament deals with the rights-affecting subset of its legislative business is its modest aim, rather than pretending to establish broad and sweeping claims with any statistical validity. In a nutshell, the upshot was that the House of Representatives is not in the state of dire disrepair some would claim; its Honourable Members do achieve some modicum of their epithet. Parliament’s detractors are wrong to believe it is exclusively filled with self-serving, inarticulate, cynical rabble, and Waldron’s assertion that legislators do give reasons for their decisions to the same extent judges do is given another confirming instance. But the data cannot be asked to bear more weight than that – to conclude too much about Parliament’s propriety, particularly in the face of strong evidence that it is often lacking, would be a mistake.

¹⁸⁷ J Bentham, *Anarchical Fallacies; Being An Examination of the Declarations of Rights Issued During the French Revolution*, in John Bowring (ed.), *The Works of Jeremy Bentham*, Vol. 2 (Edinburgh, 1843), lines 719-720.

On the other hand, as a springboard suggesting future avenues for study this research may prove more profitable. Some questions in regards to the New Zealand House of Representatives' place on the continuum which leads up to ideal deliberation, and in regards to the construction of that continuum itself (both in terms of empirical measurement and theoretical desirability) are posed below.

Parliamentary Behaviour

No member was ever denied the freedom to participate in a debate once he or she was speaking – but it was certainly made more difficult at times. Some parties have decided to voluntarily adopt a code of conduct promising not to indulge in raucous behaviour,¹⁸⁸ but “there is insufficient support for the development of such a code” across the board.¹⁸⁹ According to these results deliberative quality has no strong correlation to the number of interruptions – the lack of a code preventing disturbances need not be a cause for concern to deliberative theorists.

Beyond interjections, the tone of discourse can itself be reprehensible. In the Substituted Section 59 debate several Members disparaged the quality of debate outside Parliament. Supporters of the Bill were compared to “the Nazi State,”¹⁹⁰ assassination attempts were discussed on websites, as was the “opportunity to drive my fist straight into [Sue Bradford’s] face as hard as I can, hopefully breaking her nose or jaw in the process.”¹⁹¹ On the other side opponents of the Bill were told they “support child abuse.”¹⁹² In comparison the Parliamentary debate was dignified, and often filled with respect for the people across the Chamber. This was an example of Parliament surpassing the standard of debate set in the wider public sphere – or of Parliament drawing attention to the lowest denominator in order to throw into relief their relatively superior discourse. Whichever is true, the censoring role taken is valuable for alerting the community to the pattern of public debate currently available, and implicitly asking them to approve or change it. Public debate feeds into Parliament – but conversely Parliament can feed into the public debate.

¹⁸⁸ The Green Party, Māori Party, United Future and ACT New Zealand, according to the Standing Orders Committee Report, ‘Review of Standing Orders’ (Wellington: 2008), 12

¹⁸⁹ Ibid.

¹⁹⁰ Hon Jim Anderton, Substituted Section 59 Bill, 637 NZPD 7586.

¹⁹¹ Ibid, 7570-71.

Select Committees

Offering an opportunity for the public to comment on potential statutes before their text is finalised is one of the great triumphs for deliberative democracy in a wider sense (extending beyond the halls of Parliament to encompass interested community members as well) in New Zealand. Select Committee submissions seem to form the basis of Members' evidence for a social ill and understanding of the best solution to it.

In the Human Tissue debate Judy Turner used her speaking time to relay the opinion of doctors questioned on the efficacy of an organ register. They were “completely unconvinced that a register would secure a higher donation rate... We [politicians] did not understand the dynamics of the work that they do, and therefore we needed to be developing ideas in consultation with them,”¹⁹³ a conclusion with which she agrees wholeheartedly. When dealing with an issue of social regulation that affects a highly specialised group and life-and-death decisions, listening carefully to that group's idea of the best decision makes sense.

On the other hand, rehearsing letters sent by concerned individuals is less clearly pertinent. Ron Mark was eager to read submissions ad verbatim during the debate, finding it “refreshing that young people do not see the bill as a direct attack on young people. How refreshing that they should identify that the bill is but one step that needs to be taken, and that other steps should be and could be taken. How refreshing that they condemn tagging...”¹⁹⁴ His excitement at flaunting young people who agreed with his own position only emphasised their rarity – their statements were being used to bolster his arguments, but were so effective only because they were not a representative view.

Apart from providing fodder for politicians casting around for any support available, if the submission to the Select Committee is no more than a personal opinion, put forward with idiosyncratic ‘evidence’ or none at all, the weight to be placed on it is debatable. Rawls' idea of ‘public reason’ is relevant here – one ought only proffer those reasons that you “reasonably think... other citizens might also reasonably accept.”¹⁹⁵ The reasons offered by submitters to Select Committees effectively set the agenda for the Parliamentary debate which follows.¹⁹⁶ If they fail to satisfy the standard of public reason

¹⁹² Judith Collins, *ibid.*, 7584.

¹⁹³ Human Tissue Bill, 643 NZPD 12619.

¹⁹⁴ Tagging & Graffiti Bill, 647 NZPD 16075.

¹⁹⁵ J Rawls, ‘Idea of Public Reason Revisited’, 137.

¹⁹⁶ Explicitly so in some cases, like that of the Hon Jim Anderton who announced “I will deal briefly with

(as did many of reasons based in a particular faith-tradition that were submitted by opponents of the Substituted Section 59 Bill), the chances are high that the Parliamentary debate will fail to do so as well. How to create a more discerning filter between the Committee and Parliament Chambers, and reverse the near-blanket acceptance of Select Committee submissions as gospel, is a question which may call for consideration.

As was noted in the previous Chapter, Select Committees seem to be breeding grounds for respect and high quality discourse, which then trickles down into the Parliamentary debate. Further empirical work is needed to corroborate that hypothesis, as it does to corroborate the hypothesis that Select Committees are steering the House's debate. Whether or not it is true, however, does not affect the normative question – is it desirable that these subsets of the House have this control over it as a whole? Is this an unhealthy abdication of Members' duty to deliberation, in favour of sitting back and letting a smaller number introduce and discuss the issues?

The Bill of Rights Act, and its Ignominious Neglect

One particular instance of this institutional neglect of duty is the failure to refer to New Zealand's overt dedication to individual rights. Whatever one's conception of an official rights-enshrining instrument, it is the sort of thing Parliament ought to take into account when legislating. Whether it is intended to be part of an ongoing dialogue between the branches of government,¹⁹⁷ or part of a sacred societal pre-commitment to rights preventing their infringement by the executive,¹⁹⁸ or an acknowledgement of certain cultural values currently in ascendancy,¹⁹⁹ it deserves at least some consideration when enacting a statute. Precautions like s7 of the New Zealand Bill of Rights Act 1990 are designed to ensure that due consideration is given. This is a commendable institutional feature from a deliberative perspective – it is intended to guarantee that certain topics of conversation cannot slip under the radar.

But the results of this snapshot, and experiences with previous section 7 notices, imply that this institutional design is being thwarted by the institution's culture. The absence of rights from the BZP debate was pointed. At least some parliamentarians might

some of the issues raised at the Select Committee": BZP Bill, 645 NZPD 14648.

¹⁹⁷ See, for instance, TR Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998', (2005) PL 306.

¹⁹⁸ See, for instance, J Elster, 'Majoritarian Rule and Individual Rights', in *Politics of Human Rights*, pp. 120-148.

¹⁹⁹ See, for instance, G Sjoberg, E Gill & N Williams, 'A Sociology of Human Rights', *Social Problems*, Vol. 48,

be expected to respond after an alarm from the Attorney-General was sounded about the Bill's shifted balance of proof. Only two mentioned it in the First Reading debate.²⁰⁰ After the Select Committee Report's unqualified acceptance of the Attorney-General's claims that the law change was necessary, none did. (Though the Greens' noted the "flimsy evidence" for that necessity,²⁰¹ they did not raise it in the House. The Māori party's minority view did not even mention the s7 notice.²⁰²) If the Select Committee is to take responsibility for the "coherence and workability" only,²⁰³ leaving the whole House to debate the substance of the Bill,²⁰⁴ there needs to be a greater delineation between the Committee members writing its Report, and the Members speaking to the whole House in the debate on that Report. A breach of the Bill of Rights Act ought to be the kind of thing Parliament talks about, and any institutional impediment to that conversation ought to be revised.

Theoretical Implications and Improvements to the DQI

Whether the Discourse Quality Index used here captures what is meant by 'deliberation' in the theoretical literature is a crucial question. That it produces data explicable according to the theory is an encouraging indicator of its reliability;²⁰⁵ and the results of this study did prove amenable to fruitful (or at least diverting) hypotheses. Once again, given the limited sample size and lack of reliability testing, little can be drawn from these results. However, the experience of employing the DQI raised some suggestions for its future development.

'Good deliberation' is sometimes used in the literature as a monolithic unit, a holy grail to be sought, or an attribute which attaches to a debate, an institution, even an entire culture. Conducting empirical research can debunk that myth – individual speech acts may approach either extreme of good or bad deliberation, but deriving an overall score across so many factors (at once independently moving and interacting with each other) and so many speakers seems impossible. All the debates can be ranked on each measure, and

No. 1 (2001), pp. 11–47.

²⁰⁰ The Hon Jim Anderton and Nandor Tanczos: 11 Sept 2007, 642 NZPD 11714.

²⁰¹ Health Committee, 'Misuse of Drugs (Classification of BZP) Amendment Bill 146-1' (Wellington: 2007), Green party minority view, 8.

²⁰² Ibid., Māori party minority view, 9.

²⁰³ Standing Orders Committee, 'Review of Standing Orders' (Wellington: 2008), 28. This comment was particularly in relation to conscience votes – however, when a section 7 notice has been tabled asking Members to vote in support of a known breach of the Bill of Rights Act is arguably an issue of 'conscience' under SO 143.

²⁰⁴ Ibid.

²⁰⁵ J Steiner et al., *Deliberative Politics in Action*, 165.

those rankings added up and ranked themselves. The Substituted Section 59 debate is at the top, closely followed by the Sale of Liquor, Private Property, and Human Tissue debates in second equal, with Tagging & Graffiti and BZP trailing far below. Yet this combination of the various measures is less informative than keeping them distinct – the Human Tissue debate was very low on the Level of Justification and Constructive Politics measures, but speakers were respectful of each other and drew on a wide range of justificatory arguments. Weighing all the desirable features of good deliberation equally seems counter-intuitive – surely a high level of reasoning should count for more than a high (but possibly insincere) level of respect? Sorting out which of their desiderata are closest to the crux of the theory is a task for academics to take up, as is sorting out how to reflect that in an empirical instrument.

One aspect of deliberative quality which the DQI entirely fails to grasp is the relevancy, or lack thereof, of a speech. A frustrating, but common, phenomenon in discourse is an aversion to staying on topic. In Parliament, where scoring political points is a customary pastime, this is magnified. Superfluous comments on a debater's past behaviour,²⁰⁶ tenuously relating the topic back to a rival party's fate in recent public opinion polls,²⁰⁷ or simply reading aloud an Expert Advisory Committee's report as the entire 'speech',²⁰⁸ were all presented to the House. These (and many other examples) were either tangential to the topic at hand, or merely recited facts instead of putting forward a demand based upon them. Despite (or rather, because of) this, they did not register in the coding scheme. Surely, however, a full description of the deliberation as experienced by someone present would include the deathly boredom or angry frustration at the speaker – emotions which would not endear one towards the thought of a friendly consensus. Speech acts which counteract the good work of deliberation ought to be recorded as well, or the measuring scheme will risk failing to take into account all that needs to be taken into account.

Publicity is valued by deliberative theorists, because it encourages accountability

²⁰⁶ For instance, the Hon Annette King remarked on Gordon Copeland's failure to 'stick to his principles' when breaking his word that he would not establish his own political party (Private Property Bill, 643 NZPD 12920).

²⁰⁷ Hone Harawira did not wish "to downplay any of the harmful effects of BZP—the nausea, the headaches, the hot and cold flushes, the poor appetite, the tremors, and the shakes. Mind you, those are the same symptoms that Parekura tells me him and his mates in the Labour Party Māori caucus have been suffering since the last *Marae* DigiPoll came out": *ibid.*, 14559.

²⁰⁸ As Jonathon Coleman did in the BZP debate, despite interjections suggesting he let others read it for themselves (and instead present proper reasons to support the Bill): 645 NZPD 14653-4.

and truthfulness. But it seems to be incompatible with another value, respect, at least in a representative debating chamber.²⁰⁹ Similarly, appeals to the common good are privileged forms of justification according to the model – which makes niche parties who target a constituency a problem. Can the Māori party’s preoccupation with a limited sector of society be reconciled with that theoretical emphasis? Perhaps – theories of deliberative democracy place importance on the values a community holds at a particular point in time. Māori currently hold a special constitutional place in New Zealand, for better or ill.²¹⁰ If that constitutional partnership is to be taken seriously, a deliberative theory adequately suited to our context ought to accommodate that special status, by recognising Māori concerns and interests as valid reasons in support of a proposal. Should deliberative theory be amended to mirror this reality of public and disrespectful debate, and debaters focussed on a narrower notion of the good? Or should the reality be altered to match what theorists consider desirable? Again, this is a question beyond the scope of this paper.

Parliament is the subject of a curious paradox in our cultural imagination. At once august lawmaker and site of squabbles and spats, its public perception has been tarnished by one-too-many media reports of the latest scandal. Despite this, there are moments of genuine deliberation in the House, moments where a genuine cross-partisan spirit reigns, moments where genuine attempts to listen respectfully to all perspectives are witnessed. Dismissing these as aberrations, the flickering of a candle flame amid the strong winds of power and passion, is premature. Parliament is a human institution, and at times is all-too-human in the worst way. But at others its hopeful light can warm the heart.

²⁰⁹ Steiner et al., *Deliberative Politics in Action*, 128-131, 169.

²¹⁰ A Geddis, ‘A Dual Track Democracy? The Symbolic Role of the Māori Seats in New Zealand’s Electoral System’, *Election Law Journal*, Vol. 5, No. 4 (2006), pp. 347-371.

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Appendix: Data Summaries

Crimes (Substituted Section 59) Amendment Bill

21 February 2007, 637 NZPD 7569

Speaker	Justification		Respect			Constructive Politics
	Level	Content	toward group	toward demand	toward counterarg.	
Sue Bradford/Greens	3	2a, 2b, 2d	2	0	0, 3	0
Chester Borrows/National	3	2a, 2c, 2d	2	0	0, 3	3
Mark Burton/Labour	3	2a, 2d	2	1	2	1
Brian Donnelly/NZF	3	2a, 2c, 2d	2	1	2	2
Tariana Turia/Maori	2	0, 2a, 2c, 2d	2	1	4	0
Gordon Copeland/UF	2	2a, 2d	2	0	0	3
Heather Roy/ACT	3	2a, 2c, 2d	2	1	1	0
Judith Collins/National	3	2a, 2b, 2c, 2d	2	1	0, 2	3
Jim Anderton/Progressive	2	2a, 2c, 2d	1	1	0	0
Nicky Wagner/National	3	2a, 2c, 2d	2	0	0, 3	1
Lynne Pillay/Labour	2	2a, 2c	2	0	1	2
Jeanette Fitzsimmons/Greens	2	2a, 2d	2	1	1	0

Human Tissue Bill

23 October 2007, 643 NZPD 12607

Speaker	Justification		Respect			Constructive Politics
	Level	Content	toward group	toward demand	toward counterarg.	
Harry Duynhoven/Labour	1	2a,2d	1	1	n/a	0
Jackie Blue/National	1	2a,2c	1	1	0	1
Sue Moroney/Labour	2	2a, 2c	2	2	1	0
Barbara Stewart/NZ First	1	2d	2	2	3	1
Tariana Turia/Maori	2	0	2	0	0	3
Sue Kedgley/Green	1	1	2	3	4	2
Judy Turner/United Future	1	1	2	2	3	0
Jonathon Coleman/National	2	2a, 2c, 2d, 3	2	3	4	2
Maryan Street/Labour	2	2a, 2c, 2d, 3	1	2	3	0
Jo Goodhew/National	1	2a, 2d	2	3	1	0
Lesley Soper/Labour	2	2c	2	1	1	1

Misuse of Drugs (Classification of BZP) Amendment Bill

5 March 2008, 645 NZPD 14647

Speaker	Justification		Respect			Constructive Politics
	Level	Content	toward group	toward demand	toward counterarg.	
Jim Anderton/Progressive	1	0, 2a	1	0	0	0
Jacqui Dean/National	1	2a	1	0	0	0
Lesley Soper/Labour	2	2a	1	1	2	0
Jonathon Coleman/National	0	1	1	1	1	0
Barbara Stewart/NZF	2	2a, 2c	0	1	2	0
Metiria Turei/Green	3	0, 2a, 2c	1	0	0	0
Hone Harawira/Maori	2	0, 2a, 2c	2	0	0	0
Rodney Hide/ACT	3	2a, 2c	1	0	0	1
Paul Hutchinson/National	1	1	1	1	2	1

New Zealand Bill of Rights (Private Property Rights) Amendment Bill

7 November 2007, 643 NZPD 12913; 22 November, 643 NZPD 13342

Speaker	Justification		Respect			Constructive Politics
	Level	Content	toward group	toward demand	toward counterarg.	
Harry Duynhoven/Labour	1	2a,2d	1	1	n/a	0
Jackie Blue/National	1	2a,2c	1	1	0	1
Sue Moroney/Labour	2	2a, 2c	2	2	1	0
Barbara Stewart/NZ First	1	2d	2	2	3	1
Tariana Turia/Maori	2	0	2	0	0	3
Sue Kedgley/Green	1	1	2	3	4	2
Judy Turner/United Future	1	1	2	2	3	0
Jonathon Coleman/National	2	2a, 2c, 2d, 3	2	3	4	2
Maryan Street/Labour	2	2a, 2c, 2d, 3	1	2	3	0
Jo Goodhew/National	1	2a, 2d	2	3	1	0
Lesley Soper/Labour	2	2c	2	1	1	1

Sale of Liquor (Youth Alcohol Harm Reduction: Purchase Age) Amendment Bill
8 November 2006, 635 NZPD 6332

Speaker	Justification		Respect			Constructive Politics
	Level	Content	toward group	toward demand	toward counterarg.	
Martin Gallagher/Labour	1	2a	1	1	2	0
Simon Power/National	2	2c	1	2	2	1
Damien Connor/Labour	2	2c	1	2	2	1
Wayne Mapp/National	3	2a	1	3	1	3
Chester Burrows/National	3	2a, 2c	1	2	2	3
Ron Mark/NZF	2	2c	2	2	3	2
Jim Anderton/Progressive	2	2a	1	0	0, 2	0
Meteria Turei/Green	3	2a, 2d, 3	1	0	0	0
Pita Sharples/Maori	3	2a	1	1	1	2
Gordon Copeland/UF	1	2a	1	0	0	0
Mark Blumsky/National	2	0, 2a, 2c	2	1	1	0
David Carter/National	2	2a	1	1	2	2
Jill Pettis/Labour	2	2c, 2d	2	1	1	1
Moana Mackey/Labour	3	2a, 2d	1	0, 2	2	1
David Parker/Labour	2	2a	1	1	2	1
Steve Chadwick/Labour	1	0, 2a	2	0	1	1

Summary Offences (Tagging and Graffiti Vandalism) Amendment Bill
29 May 2008, 647 NZPD 16066.

Speaker	Justification		Respect			Constructive Politics
	Level	Content	toward group	toward demand	toward counterarg.	
Annette King/Labour	1	2a	1	1	n/a	0
Simon Power/National	1	2a, 2c	1	2	1	2
David Benson-Pope/Labour	1	2a	0, 2	2	1	0
Judith Collins/National	2	2a, 2d	0, 2	0	1	0
Ron Mark/NZF	2	2a, 2c	0,2	1	1	0
Nandor Tanczos/Greens	2	2c, 2d	1	0	0	3
Hone Harawira/Maori	2	2c	1	0	0	1
Dover Samuels/Labour	1	2a, 2b	0	0	0	0
Chester Borrows/National	2	2a	1	1	0	0
Shane Jones/Labour	2	2a	0	0	0	0