CONSTRUCTING DEMOCRATIC SPACE: INCLUSION, EFFICACY, AND PROTEST IN DELIBERATIVE DEMOCRATIC THEORY

by

ANNA MARIE DRAKE

A thesis submitted to the Department of Political Studies
In conformity with the requirements for
the degree of Doctor of Philosophy

Queen’s University
Kingston, Ontario, Canada
(November 2008)

Copyright ©Anna Marie Drake, 2008
Abstract

This dissertation looks at the challenges that deliberative democratic theory encounters when it tries to offer a rich account of inclusion yet refuses to acknowledge the legitimacy of external protest. While sympathetic to deliberative democracy’s goals, I challenge this focus upon the deliberative group as the theory tries to satisfy requirements of inclusion and legitimacy. In response I offer a normative account of protest within a larger deliberative framework – one that offers a more comprehensive account of democratic inclusion. I look at critiques of deliberative democracy, particularly in terms of the theory’s ability to account for pluralism, and I argue that in order to meet this challenge we need to offer a normative justification of protest. Moreover, we need to do this not only to achieve full and effective inclusion but also to deal with the lack of efficacy that marginalized deliberants may encounter even when requirements of formal and effective inclusion are met.

As I address these challenges I offer a theory of protest-as-deliberation in which I develop a normative justification of protest and set out the conceptual changes that allow this justification to be normatively and practically viable. My account takes protest, as something outside of and in opposition to the deliberative group, seriously and extends the deliberative framework to include protest; importantly, it does this without co-opting protestors. Drawing from previous critiques, I develop the normative and practical links that are necessary in order to facilitate a deliberative dialogue between protestors and the deliberative group. The conceptual changes that are necessary in order to realize protest-as-deliberation require that we re-evaluate the impact that deliberative criteria of reason-giving has upon effective inclusion and people’s efficacy and that we change these criteria accordingly. Additionally, we need to revisit the democratic capacity of the public sphere, reconceptualized as the deliberative polity in which the process of protest-as-deliberation takes place. When we do this we ought to place a greater emphasis upon available public spaces, both physical
and conceptual, that deliberants and protestors need in order for effective deliberation and contestation to occur.
Acknowledgements

First and foremost I would like to thank Margaret Moore for being such a wonderful supervisor. Not only has she been a great mentor and helped to sharpen the dissertation considerably, she has also been a good friend and incredibly supportive, providing welcome distractions tempered with continual reminders to keep working. This dissertation is much better for it, as am I.

I would also like to thank Avigail Eisenberg for her help and support with a much earlier version of this project. Conversations over pots of tea helped to bring this to life and her continued support and friendship is much appreciated.

Andrew Lister and Eleanor MacDonald have provided valuable feedback on parts of the dissertation, for which I am grateful.

Lots of other people have also contributed to this with their support and friendship. I would like to thank Mira Bachvarova, Emmett Macfarlane, Allison McCulloch, Dimitri Panagos, all of whom have done a great deal to make my time at Queen’s an enjoyable one, encouraging me with the dissertation and doing their best to convince me to leave my desk every now and then. Thanks to Martin French and Heather Martin for being a wonderful urban family and making sure that I got here in the first place (even if they did move away later on). Cassie Hague, Sandra Lohmann, Tara Murphy, Menaka Phillips, and Dana Wight have all provided very important long-distance support. The perspective on the dissertation that I got from trips to see them no doubt improved the quality of the work (and provided a very good excuse for a few holidays).
Table of Contents

Abstract ........................................................................................................................................... ii
Acknowledgements ........................................................................................................................ iv
Table of Contents ............................................................................................................................ v
Chapter 1 Introduction ..................................................................................................................... 1
Chapter 2 THREE APPROACHES TO DELIBERATIVE DEMOCRACY ........................................... 39
  2.1 Habermas: Deliberation, Effective Inclusion, And The Public Sphere ................................... 42
  2.2 Gutmann And Thompson’s *Democracy And Disagreement* .............................................. 53
    2.2.1 Managing Disagreement: Justification and Reason-Giving ........................................... 53
    2.2.2 Inclusion and Exclusion ............................................................................................. 69
  2.3 From Deliberative To Communicative Democracy: Iris Young ............................................. 72
  2.4 Deliberative Criteria ............................................................................................................... 84
Chapter 3 PROTEST: A PROBLEM FOR DELIBERATIVE DEMOCRACY ........................................ 92
  3.1 Disagreement ........................................................................................................................ 95
  3.2 Protest ....................................................................................................................................... 100
  3.3 Democratic defence of protest ............................................................................................... 114
  3.4 Protest: a challenge to deliberative democracy ....................................................................... 118
    3.4.1 The deliberative argument against protestors ............................................................. 118
    3.4.2 The problem with the deliberative argument against protest ....................................... 120
    3.4.3 Gap in the deliberative literature ................................................................................... 127
Chapter 4 A DELIBERATIVE RESPONSE: PROTEST-AS-DELIBERATION .................................. 144
  4.1 Protest and deliberative literature, revisited .......................................................................... 147
    4.1.1 Dupuis-Déri: direct action and effects on deliberative democracy ............................... 150
  4.2 Why should deliberants talk to protestors? ............................................................................ 159
    4.2.1 Difference as a Resource ............................................................................................. 163
    4.2.2 Protest-as-deliberation ............................................................................................... 166
    4.2.3 The Deliberative Polity ............................................................................................... 168
    4.2.4 Impact on the Deliberative Group .............................................................................. 170
    4.2.5 How Protest-as-Deliberation Works .......................................................................... 172
  4.3 Protest and deliberative criteria ................................................................................................. 174
Chapter 5 THE CHALLENGE TO DELIBERATIVE CRITERIA OF REASON-GIVING ................ 194
Chapter 1
Introduction

On November 30, 1999, tens of thousands of anti-corporate globalization protestors successfully shut down the thirteen entrances to the Convention Centre in Seattle where the opening meeting for the World Trade Organization (WTO) talks were to take place. The Direct Action Network, through a series of affinity groups and activist hubs, managed to maintain the blockade, with new waves of protestors replacing people who were tear-gassed, shot with rubber bullets, and arrested. This “Battle of Seattle”, which effectively shut down the city, changed the nature of the globalization discourse. Protestors denounced the secrecy of the talks and the undemocratic nature of a process that affected them but which they had virtually no influence upon. As a result of the N30 action there are greater challenges to legitimacy of transnational institutions and higher expectations of their accountability to the citizens of democratic states.

As the above example shows, protest plays an increasingly important role in democratic life. Global institutions, despite their origins and the fact that they did not intend to include the people who feel the effects of their policy making, nonetheless find themselves caught up in this push for greater accountability. The protests in Seattle underscore the need for deliberative institutions to effectively include people who are affected by policy discussions and in this respect protestors had an effect not only upon the practices of transnational institutions but upon deliberative democratic theory. The success of N30 and the good reasons that protestors had to oppose the exclusive and undemocratic talks has, in fact, led deliberative democratic theorists to pay attention to protestors and to move to expand the inclusive capacity of deliberative theory itself.¹ The formal exclusions that existed in the WTO talks are clearly at odds with deliberative criteria and processes. Deliberative

Theorists, of course, denounce this exclusion. The parallel NGO talks that were set up at the last-minute in Seattle in a (futile) attempt to quell protest offer another perspective on deliberative inclusion. The claims that anti-corporate globalization protestors made are not only against their formal exclusion from the WTO talks, but also challenge the agenda of the talks themselves. As we see with the criticisms leveled against the parallel talks, effective exclusions pose a serious challenge to the legitimacy of both the WTO’s talks and, whenever people are effectively excluded from deliberations, to deliberative democratic legitimacy more generally. In this respect, protest has a significant impact upon deliberative democratic theory. Deliberative theorists denounce effective exclusion as a marker of illegitimacy and respond by setting increasingly stringent standards of effective inclusion that deliberative groups must meet if we are to consider their process and results legitimate. In this respect, deliberative theorists address protest. However, as I will argue, their response is limited in two main ways. First, the tendency is for deliberative theorists to respond to protest by working to strengthen the inclusive capacity of deliberative institutions, not by offering a normative account of protest. With this response the discourse is about what deliberative theorists can learn from protestors’ challenges to deliberative legitimacy, not what – if any – role there ought to be for protest within a larger deliberative framework. This is, as I will argue, an important distinction because it is not clear that deliberative theorists can address problems of effective inclusion (solely) by trying to strengthen people’s effective inclusion in the deliberative group. Second, and relatedly, is the fact that protest is significant for reasons beyond this push for effective inclusion within the deliberative group.

Environmental and animal rights movements engage in a great deal of protest actions against the state and corporations. Unlike the WTO talks, where protestors clearly faced effective exclusion, people who support environmental and animal welfare issues are much more likely to be effectively included in deliberations. Just as it is difficult to deny the antidemocratic sentiment of the WTO (and similar groups) there is widespread agreement that environmental and animal welfare issues are
ones that ought to be on the deliberative agenda. Despite this effective inclusion, environmental and animal rights groups are very active in their protest. From Greenpeace activists descending from the ceiling during Premier Ed Stelmach’s annual Premier’s dinner with a banner protesting anti-environmental policies and appointments (“Stelmach: The Best Premier Oil Money Can Buy”)\(^2\) to animal rights groups protesting outside laboratories that perform animal testing, it is clear that effective inclusion is not always enough. Sometimes the issue that leads people to protest is not their effective exclusion from deliberations but rather their lack of efficacy within them. While animal welfare measures and environmental protections are both convincing moral claims that do factor into policy decisions, the stronger claims that some activists support tend to be much less persuasive. When it comes to animal rights groups who oppose animal testing for medical research and environmentalists who oppose the generation of nuclear power altogether, these kinds of arguments are unlikely to change the course of deliberative events. People who advance these claims may be effectively included and able to present their arguments as equals, they may have their claims accepted as substantive moral ones that are relevant to the issues at hand, but on the whole the response to these marginal positions is one that leaves deliberants unconvinced. Deliberants are likely to then dismiss the weight of these claims given the persuasiveness of the alternative arguments (medical progress and a reliable and affordable energy source).

Although deliberative democrats focus, for good reason, upon the fair exchange of reasons within the deliberative group, in the end the deliberative group needs to make a decision. As much as deliberative democracy relies upon the exchange of reasons to strengthen the legitimacy of deliberative processes it cannot abandon all aggregative measures and, in the end, people must vote upon the outcome in the face of remaining (public reason-based) disagreement. When deliberants know that, in the end, there will be a vote this makes them less inclined to try and win over people who, in their opinion, do not have very strong public reasons. Because this is the case it is unrealistic

to expect that animal rights groups will be successful in their call to ban the use of animals in medical research. There are many other instances where deliberants will encounter this lack of efficacy: Democrat minorities in Republican states (or vice versa) are unlikely to have significant policy impacts, energy industries and environmentalists are bound to clash, and both sides of the abortion debate cannot (simultaneously) secure their desired outcome. If deliberative democrats are to take the principle of treating all people as equals seriously – and if we are to look seriously at the efficacy that comes with this – then the kinds of differences that are at work here show that protest may be necessary even when criteria of effective inclusion and deliberative legitimacy are met. Marginalized deliberants will not always be sufficiently persuasive in the deliberative group and may find themselves facing odds that they will be unlikely to overcome in the foreseeable future. Effective inclusion in the deliberative group lends additional legitimacy to a process where the decision will not necessarily be shaped by the best reasons. When this is the case, engaging in protest may be the only chance that marginalized deliberants have to register their lack of support for the deliberative process that they cannot affect and in order to have any kind of efficacy when it comes to deliberative decisions. If deliberative theorists are serious about both effective inclusion in the deliberative group and people’s efficacy therein then deliberative democracy needs to offer a normative account of protest and we need to set out a conceptual account of deliberative democracy that shows that we take these challenges seriously.

*       *       *

3 As I discuss in Chapter 3, abortion does not pose a fundamental challenge to deliberations: indeed, the deliberative literature frequently refers to abortion as an example of the benefit of turning to deliberative democracy to deal with issues of fundamental disagreement. The argument here is that deliberating upon these kinds of conflict can help people to discover new areas of agreement and, given the limitations of our knowledge of the good, deliberative democracy offers the best political solution to this disagreement. While I agree with the benefits to a deliberative approach to conflict resolution, this framing does not address the question of a lack of efficacy. While deliberative democracy can account for effective inclusion in the case of abortion, deliberative democrats do not tend to discuss the problems that a lack of efficacy cause, instead choosing to discuss deliberative legitimacy. This, however, only captures part of the problem and points to another reason why deliberative democrats need to offer a normative justification of protest.
There is a strong consensus that in the last fifteen years democratic politics took a “deliberative turn”.\textsuperscript{4} The call for deliberation is the result of a growing acknowledgement that we cannot speak of legitimate democratic discourse unless the procedures that we have in place include all people that democratic policies affect. Deliberative democracy calls for a specific kind of inclusion – a rich account where formal inclusion is not enough and where we pay particular attention to the efficacy that deliberants have in influencing the framing of deliberative debates and to impact deliberative decisions. The theory itself is a response to aggregative conceptions of democracy in which democratic decisions are the result of counting people’s preferences and are legitimate as long as decision-making processes observe requirements of formal inclusion. Aggregative democrats offer a thin account of inclusion and support a “one person one vote” approach to equality that treats all people as equals insofar as everybody has (on the face of it) an equal chance to influence democratic outcomes. In aggregative conceptions of democracy there are minimal requirements on the kinds of things that people can legitimately vote for, and democratic equality is measured in terms of whether or not all people have an equal chance to influence democratic outcomes by voting. On this account institutions satisfy the criterion of inclusion if all people have access to the information that is necessary to cast an informed ballot and if everyone has an opportunity to vote. Whether or not people like or hate the outcome, the decision’s legitimacy rests upon these minimal normative criteria and the decision rests on the sheer number of votes. When people engage in aggregative democratic processes the goal is to win decisions (numerically by a vote) and it is this that makes the outcome legitimate. Aggregative democracy depends upon competition, and the process is meant to treat all people (including marginalized people) as equals via the system of checks and balances that arise because people have to compete for power. As long as people do not remain in permanent minorities (as long as the chance to influence the outcome is real) then aggregative democracy meets its (thin) requirement of inclusion. Because the composition of groups changes along with specific

\textsuperscript{4} John Dryzek *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford: Oxford University Press,
issues this is supposed to ensure that a wider range of people will be successful. People have a chance to influence policies beyond electing governmental officials, and aggregative conceptions of democracy supplement this with interest group pluralism. As one of the significant checks upon power, interest groups lobby government institutions in an attempt to win limited resources from the state. The same kind of competition and system of checks and balances is at work here as groups form shifting coalitions to try and win concessions from the government.

The problem with aggregative conceptions of democracy and interest group pluralism is that there are effective barriers to effective inclusion that a system of aggregation and competition is unable to remedy. Since success depends upon groups’ ability to convince the government to give them a share of limited resources, the most successful claims are those that consist of general and overarching concerns. Although groups are supposed to be able to benefit from coalitions that are meant to (temporarily) strengthen minorities in order to help them achieve a specific goal, because some groups already have more power than others the more powerful groups in a particular coalition can retain their advantage “by confining the scope of decision-making to relatively ‘safe’ issues.”

The combination of the more powerful members of a coalition controlling the agenda and the increased chances for success when groups present “uncomplicated” claims to the government means that coalitions often alienate members with intersecting identities as, for example, was the case when the women’s movement lobbied the Canadian government on behalf of “all women” during debates on the Canadian Charter of Rights and Freedoms and the Meech Lake Accord. The type of inclusion that the women’s movement advocated was thin, and Native women and lesbians faced effective exclusion as the larger group supported a deal that denied them rights as Natives and lesbians because it was successful in securing some rights for women.

---

Deliberative democracy takes issue with aggregative conceptions of democratic legitimacy. Deliberative democracy privileges reasons over preferences and because the legitimacy of democratic processes depends upon exchanges of reason-giving – ones that all deliberants can accept – and not upon who wins because they are able to exert the most pressure (or place the most votes), deliberative democracy offers a much thicker account of inclusion. Effective exclusions of the kind that occur within aggregative conceptions of democracy are far less likely to occur within deliberative democracies. While deliberative theories of democracy cannot escape power imbalances altogether (one of the central problems that I will address in the dissertation), the process of justification that deliberants must engage in render illegitimate the kind of force that is permissible in aggregative conceptions of democracy.

The adversarial way that groups interact in aggregative democracy affects the way that we understand what constitutes a public. The public in interest group pluralism is fragmented because each interest group focuses almost exclusively upon its own community and its own interests rather than upon the larger political community. Deliberative democracy, as we see in the requirement of justification and the deliberative criteria of reason-giving, requires that people deliberate with (not compete against) others in order to find mutually acceptable resolutions. Whereas in aggregative conceptions of democracy people do not have to engage with each other (their demands are dealt with by the state), deliberative democracy requires that deliberants work with each other and this mandatory engagement means that people have to try and resolve the problems that aggregative democrats can avoid (or delegate to the state, which can then effectively avoid them by picking winners and losers from the various lobby groups).

In deliberative democratic theory the requirement of equality is only fulfilled when all people can participate effectively and as equals. This is a significantly more demanding criterion that requires people to bracket influences of power that unfairly privilege some people over others. Practically, the call to treat all people as equals means that deliberative democrats need to do more to
regulate the processes by which people reach decisions. Effective inclusion only occurs if deliberants reach decisions after they exchange public reasons. All people ought to be able to participate effectively in this exchange of reasons: they must be able to impact the terms of the debate, be able to justify their reasons to one another, and deliberative decisions must be ones that all people can accept. It is this process of justification and stronger requirement of legitimacy that gives deliberative democracy its normative appeal.

The primary focus of deliberative democrats is on the polity. This is the case because the immediate and clearly-defined scope of application allows deliberants to justify their reasons to all affected people. People who live together in a polity, after all, have to live under a set of rules that they can collectively agree to and they need to negotiate shared access to resources. The arguments that I make assume this context, both because the vast majority of deliberative democratic literature assumes a state context and because the problems of effective inclusion and efficacy that I am particularly interested in compound significantly when we look beyond state borders. These questions are, of course, important but, if we are to address them, there are certain foundational questions that we need to sort out before complicating the question in this particular way. There is, however, a growing focus on deliberative democracy’s implications globally.7

In both global and state applications, deliberative democracy must engage people in deliberations (and not just include them in the minimal sense typically found in aggregative conceptions of democracy). This entails a much richer kind of inclusion and while this commitment to a more substantive conception of democratic legitimacy sets out a basic structure for deliberative theorists, there is still considerable disagreement about the institutional structure, scope, and substantive constraints that deliberative theorists ought to insist upon. Much of this disagreement

---

exists because deliberative theorists have different ideas about the way that deliberations will – and should – take place. While a deliberative approach to decision-making is supposed to treat all people as equals, deliberative theorists disagree on what it takes to achieve this. The emphasis on exchanging reasons (instead of aggregating votes) is due to the process of justification that this entails and because of the way that this better equips marginalized people to have a more effective role in decision-making. The problem remains, however, that marginalized people still lack the power that other deliberants have, and while this is mitigated in part via the action of justification, larger hierarchical structures remain in the background and these impact the degree of influence that deliberants have. Social pluralism – the recognition that people are differently-situated for various reasons, and the corresponding acknowledgment that differences in cultural practices and economic positions may lead to marginalization – is a motivation for deliberative conceptions of democracy. This is apparent given the lengths that deliberative democrats go to in order to try and secure effective inclusion. While these efforts bode well for people who are the most likely to suffer from effective exclusions in aggregate conceptions of democracy, at the same time they give rise to some of the stronger critiques about the ability (or lack thereof) of deliberative democrats to meet the more demanding criteria of effective inclusion and equality. Given the array of differently-situated people and the wide range of issues, concerns, and speaking styles that accompany this, deliberative democracy might not be able to accommodate marginalized deliberants in a substantive way. To complicate this even further marginalized people may not, despite their inclusion, have a significant chance of affecting the deliberative decision.

Some of this disagreement about deliberative criteria follows from the different types of pluralism that different deliberative theorists focus upon. Gutmann and Thompson, for example, frame deliberative democracy in terms of the problem of moral disagreement. Their focus upon moral pluralism notes that people have multiple conceptions of the good and their deliberative response to the disagreement that arises from this is to secure political agreements that are informed
by procedural and substantive constraints and which require that deliberants use (second-order) moral arguments and try to find a mutually-justifiable solution that respects this moral pluralism.\textsuperscript{8} Other deliberative theorists reject this focus upon moral argumentation. Monique Deveaux objects to the moral pluralist approach on the grounds that the substantive principles that moral pluralism requires attempt “to neutralize unjust motives and pernicious interests by excluding certain kinds of reasons a priori from public discourse.”\textsuperscript{9} Deveaux focuses upon cultural pluralism and with this attention to conflicts of culture – both within and between cultures – she looks to deliberative democracy to mediate these tensions by highlighting the political and strategic character of disputes and uses this to highlight the way that people try to (unjustly) exert power over each other.\textsuperscript{10}

Both Gutmann and Thompson and Deveaux’s approaches to deliberative conflict try to minimize the power that deliberants exert over each other, but they do so in different ways and with different goals in mind. Moral and cultural pluralism are distinct, and the difference that moral argumentation versus more traditionally political types of reasons (that explicitly stay away from moral claims) have upon the tone and outcome of deliberations is significant.\textsuperscript{11} Additionally, there are critiques of deliberative democracy that focus upon the impact that social and economic inequalities have upon the ability of deliberants to participate as equals and which question the viability of fair deliberations until these inequalities are addressed.\textsuperscript{12} This positional pluralism


\textsuperscript{9} Monique Deveaux, \textit{Gender and Justice in Multicultural Liberal States}. (Oxford: Oxford University Press, 2006) p. 105. See Chapter 5 for further discussion on this.


\textsuperscript{11} See especially Chapter 5.

\textsuperscript{12} See, for example, Nancy Fraser. \textit{Justice Interruptus: Critical Reflections on the “Postsocialist” Condition}. (New York: Routledge, 1997). Simone Chambers argues that questions of material conditions in deliberative groups are becoming increasingly important in deliberative democratic theory, particularly as deliberative theory and diversity theory continue to merge. “Deliberative Democratic Theory” In \textit{Annual Review of Political Science}. 6 (2003), p.322.
contains its own distinct set of recommendations about the ways that we ought to structure deliberative democracy if it is to be successful.

These three types of pluralism all deserve to be taken seriously by deliberative theorists. This, of course, does not help us to address how deliberants ought to deal with the fact of pluralism; the fact that people are differently-situated makes it difficult to create a level deliberative playing field and to secure fair deliberative decisions. This being said, I focus primarily upon social pluralism, which I take to encompass both cultural pluralism and positional pluralism. On this account accommodating social pluralism takes people’s cultural differences and economic marginalization seriously and, in doing so, is better equipped to deal with the structural disadvantages that people face because of their economic and cultural status. The way that social pluralism plays out politically is significantly different than moral pluralism and it is normatively preferable because it offers the best insight into the construction and perpetuation of power relations that works to effectively exclude and marginalize people. Focussing on the effects of cultural conflicts and economic disparity by making power visible, as Deveaux does, means that deliberative democracy has a wider and more effectively inclusive scope that better equips marginalized people to challenge the hegemonic views and structural disadvantages that limit their efficacy in deliberations. Deveaux’s cultural approach takes positional pluralism seriously since power imbalances often follow from people’s interests in maintaining social and economic inequalities and so I draw my discussion of social pluralism out of this. Moral disagreements, as I discuss later on, can play a role in deliberations insofar as deliberants can present their moral concerns as factors that weigh upon the issue at hand. As a method of resolving disagreement, however, an emphasis upon moral argumentation fails to capture the kinds of disagreements that are the result of people’s social and economic marginalization.13

Significant problems also arise when theorists try to envision deliberative democracy in practice. Most of these problems deal with the ability of deliberants to effectively bracket power

13 See Chapter 5 for further discussion on this issue.
relations and the extent to which deliberative democracy can account for the fact of social pluralism. These critiques, while they are serious and certainly need addressing, are not so formidable, however, so as to discourage further work on the theory or to prompt us to abandon the deliberative turn. Deliberative theorists still disagree about the direction that this deliberative turn ought to take. Despite this, the various responses to challenges about the viability of the theory shed light on these problems in many different and productive ways and the number of amendments that theorists make demonstrate that one of deliberative democracy’s strengths lies in its ability to expand the theory to take these critiques into account.

The critical focus on the extent to which deliberants can meet the requirement of effective inclusion occurs, understandably, in the deliberative group. The deliberative group, as I use the term, is the place where deliberations occur and where deliberative decisions are made. One polity may have multiple deliberative groups, all of which deal with different issues. The common thread throughout all deliberative groups, however, is that they all have some form of institutionalized decision-making power: that is, whether the deliberative group is a large collective that deals with issues of federal concern, or whether it is a small, community-based group that deals with municipal bylaws, the group has the power to make binding decisions. The deliberative group is regulated by normative criteria that govern the exchange of reasons and which deliberants must take into account when they weigh these reasons and try to produce the best policies. The procedural constraints that govern the exchange of reasons limit the kinds of reasons that will carry weight, but this still leaves a lot of room for disagreement and in the end the deliberative group must utilize decision-making mechanisms.

The problem with this focus, however, is twofold. First, there is the assumption that we can only address issues of effective inclusion within the deliberative group. This leads to the problematic assumption that deliberative theorists will, eventually, be able to devise a set of normative criteria that will ensure that all people can participate as equals in ways that do not systematically exclude
(whether formally or effectively) marginalized people. This assumption is, of course, far-fetched. The likelihood of having a “perfect” theory of deliberative democracy is highly unrealistic, and even less likely is a practical application of deliberative democracy in which the deliberative agenda, processes, and outcomes do not lead to charges of effective exclusion. Even when theorists acknowledge the improbability of deliberations unfolding in these ideal ways the typical theoretical and practical response to this is to push for better ways to conceptualize and regulate the deliberative group in order to avoid unjust exclusions while simultaneously making the case that procedural fairness, as the best that we can do, is a strong justification for accepting deliberative decisions, even when minorities may object to them. Jane Mansbridge, who pays particular attention to the impact that power structures have upon actual deliberations and, relatedly, on the way that this should affect our theorizing about procedural fairness, argues that “in most cases” good faith efforts to secure procedural fairness in deliberations disallows external protest. The power differences that raise these questions of effective exclusion bear upon the second problem. Effective exclusion is only part of the problem that marginalized people need to overcome in deliberative democracy. Just as important (although significantly less theorized) is the efficacy that marginalized people have in the deliberative group even when the group meets (strong) criteria of effective inclusion. It is one thing to say that deliberants only have to accept (the legitimacy of) the outcome – rather than the stronger requirement that they agree with it – but another to expect that deliberants will be able to do this, especially given the fact that in a socially pluralistic society people have significant differences in discursive power and the majority, who have an advantage when it comes to decision-making, may not give marginalized people’s arguments the consideration that they deserve. If marginalized people are significantly outnumbered then they will be significantly outvoted. The fact that deliberative groups need to use decision-making mechanisms does not receive as much attention as it ought to in the deliberative literature. As Judith Squires notes, decision-making is undertheorized, and

deliberative theorists implicitly assume that the deliberative group will, in the end, aggregate votes.\textsuperscript{15} While the exchange of reasons substantially limits the kind of aggregative practices that can occur in deliberative democracy, because there will be more than one reasonable outcome numbers still matter, and knowing this may make deliberants less likely to be moved by marginalized people’s arguments. If deliberants lack efficacy in the deliberative group then their relative lack of power in deliberations will systematically disadvantage them when it is time for the deliberative group to make a decision. When it is time to utilize a decision-making mechanism there will be both winners and losers\textsuperscript{16} and marginalized deliberants, when faced with the above circumstances, may not want to support a process that can, in the end, lead to a policy outcome that they do not accept.

These practical obstacles should not keep deliberative theorists from working to continually improve deliberative democracy. The gains that we can make in this process, while not perfect, are certainly valuable. The critiques that I make about the ability (or lack thereof) of deliberative democracy to account for power differences between deliberants and, more specifically, to deal with power differences that give rise to protest are ones that pose a significant challenge to deliberative democratic theory and practice. The underlying problem that I address – the one that forms the basis for the overarching question of the dissertation – is that deliberative theorists’ focus upon improving the deliberative group closes off a necessary space outside of the deliberative group that people who object to deliberative framings and decisions can use to launch their objections. Significantly, as it does this it undermines the very legitimacy, effective inclusion, and efficacy that deliberative theorists seek to achieve. Although these challenges are significant, they are ones I argue that deliberative democracy has the ability to deal with. The arguments that I make as to how


\textsuperscript{16} Jack Knight and James Johnson raise this as part of their critique of deliberative democracy’s ability to deliver upon the account of legitimacy that it promises. “Aggregation and Deliberation: On the Possibility of Democratic Legitimacy.” In Political Theory 22:2 (1994), p.288.
deliberative democrats ought to address the effective exclusions and problems of efficacy that give rise to protest are arguments that I offer as critical but friendly amendments to deliberative democratic theory. The starting point of my dissertation is that deliberative democracy offers the strongest account of democratic legitimacy but a conception that, as it is, has significant weaknesses. The critiques and arguments that I make are ones that I intend as contributions to the rich account of inclusion that the theory promises.

1) Central Problem

The problems of effective exclusion and efficacy that I take up in this dissertation concern the role – or lack thereof – that protest has in deliberative democracy. Protest is a problem for the theory because the deliberative conception of legitimacy – as it requires that deliberants exchange reasons within the deliberative group where people are held accountable for their arguments – cannot, by definition, accept arguments that arise outside the deliberative group. In the absence of a perfect theory and application of deliberative democracy, the implication of this is that when there are problems within the deliberative group the only place that deliberants can possibly resolve the conflict is within the deliberative group itself. The problem with this, however, is that if these problems exist because of significant and systematic differences in power relations and if the result of this is that marginalized people are positioned as weaker deliberative participants, then the requirement that marginalized people effect change from within may be insufficient to address the problem. If marginalized people cannot work from within the deliberative group then this has significant implications for deliberative legitimacy. All of this is to say that deliberative theorists need to do more to take the challenge of social pluralism seriously, and that deliberative processes can be structured in more or less constructive ways when it comes to facilitating differently-situated people’s effective inclusion and promoting their efficacy within the group.

When these kinds of objections exist marginalized people could, of course, still engage in protest; the problem, however, is that because of the considerable lengths that deliberative democrats
go to in order to offer a rich account of effective inclusion, deliberants, unlike people in aggregative
democratic societies, will not accept that protestors offer legitimate arguments. Instead, the
deliberative response entails scepticism and the belief that protestors are selfish attention-seekers
who either cannot wait for the deliberative group to address a particular issue (protestors are
impatient with over-inflated conceptions of the importance of their issues), or that protestors’
arguments are just not strong enough to make it through a rigorous process of deliberative evaluation
(and as such their claims ought not to merit any more attention and protestors are just wasting their
time). Deliberative democracy’s emphasis upon reason-giving is meant to ensure that people justify
their reasons to each other so that the process and decisions are fair. Sidestepping a monitored
evaluation process (at least on the face of it) rejects this appeal to fairness. If reason-giving is to be
fair, deliberants need to make sure that people will not manipulate others, and monitoring the
exchange of reasons is necessary to guard against the potential for manipulation. Because protestors
step outside this process, deliberants reject protestors’ claims as (at least potentially) manipulative.

In order to address the problem that deliberative democracy’s refusal to offer a normative
account of protest poses to the theory, it is important to understand why deliberative theorists have
this response. Protest, after all, forms a significant part of democratic theory. Much of the literature
on democratic legitimacy considers the role of protest and there is a considerable amount of work
devoted to normative justifications of protest, including the stronger form of civil disobedience in
which protestors not only object to democratic processes and decisions but break the law as a way to
register these objections. This democratic response is missing in accounts of deliberative democracy.
There is a significant gap in the literature when it comes to the role of protest in deliberative
democracy. Indeed, it is only recently that theorists identified the lack of attention to protest as a
problem, and still very little research has been done in this area. The reason (though clearly not a
justification) for this lack of attention to protest is due to deliberative democracy’s reliance on an
exchange of reasons. Because reason-giving plays a central role in deliberative democracy, people
are reluctant to address protest because the perception is that doing so undermines deliberants’ ability to fairly evaluate the reasons that people put forth in the deliberative group and, in doing so, throws deliberative procedures into upheaval and threatens the legitimacy of deliberative outcomes. While I contest this evaluation, the objection itself does carry a certain amount of weight because this (monitored) process of justification is key. Before I set out the way that I respond to the deliberative democratic critique of protest, I will set out a brief account of the role that public reason plays in deliberative democracy and I will offer an illustration of an instance of deliberation that tries to include protest but, because the deliberative group limits the scope of discussion, effectively excludes the protestors whom it goes to considerable lengths to try to involve.

When people use public reasons they frame arguments in a way that aims to make the reasons that they have accessible to others. This accessibility is fundamental to deliberative democracy because without it people will not be able to justify their reasons, nor will they be able to hold others accountable for the claims that they make. Without the ability to do this, deliberants will be unable to ensure a process where all people’s reasons receive the scrutiny that is necessary if we are serious about treating all people with equal respect. Equal respect requires that people participate in the exchange of public reasons “as free and equal, and not as dominated or manipulated, or under the pressure of an inferior political or social position.”17 As I discussed above, the exchange of reasons must take place in the deliberative group where people can ensure that this fair exchange occurs.

The normative basis for public reason is that all people are equals and, as such, should accept substantive principles of political justice only when they can, as free and equal people, agree to them from within their own conceptions of justice.18 Because people must agree to collective decisions from their particular positions, and because people have conflicting conceptions of the good, this means that the reasons that people offer must be ones that make sense across these

different conceptions of the good. When people offer public reasons they do so in order to clarify their standpoint and to justify a ground or motive to members of a public in terms that other people should be able to understand. The accessibility involved in the requirement that people understand the basis of people’s reasons allows people to seek out empirical validation and to evaluate other people’s claims in terms of the impact that they have upon proposed policies.

Because it imposes the same restrictions on everyone, the requirement that people deliberate on the basis of public reasons offers people a practical motivation to engage in deliberation. There are several reasons why deliberative democracy requires public reasons. First, we need a way to ensure that the claims that people make upon others are fair -- that the reasons that people give in support of a particular claim are reasons that ought to carry weight in a public setting (that they are not, in other words, selfish reasons). If reasons meet this criterion then deliberants must pay normative attention to the impact that their claims have upon others. At the most basic level private or self-interested claims do not carry the moral weight that more generalizable claims do. An argument for the importance of freedom of religion will therefore carry more weight in deliberative democracy than the self-interested claim that a particular policy is more financially advantageous for a deliberant. Less obviously hierarchical reasons will of course produce more (and more contentious) debate, but as long as deliberants take seriously the impact that different weightings of public reasons will have and as long as they try to resolve conflicts in a way that all people can accept, then the rational argumentation that public reasoning offers -- because public reasons help people to understand the motivation (and the seriousness) behind particular claims -- is still the best way to resolve conflicts.

Given the good reasons that deliberative democrats set out as to why public reasons ought to regulate the deliberative exchange, it is easy to see why deliberative democrats are reluctant to listen to claims that arise outside of a (monitored) space where we can ensure that deliberants meet

---

these criteria. The role that reason-giving plays in securing deliberative legitimacy is important not only in terms of deliberative democratic theory, but also because the normative emphasis upon justification prompts an increasing number of institutions to put deliberative theory into practice.\textsuperscript{19}

Genevieve Fuji Johnson documents a deliberative turn in Canadian nuclear waste management policy. The need to justify decisions to constituents and the increasing demand for richer democratic processes provides the motivation for formerly elite decision-making processes to actively seek out the participation of people who are affected by the decisions: in this case all Canadian residents. Specifically, Johnson cites “a powerful discursive coalition of environmental, religious, and Aboriginal organizations” as the impetus for this turn.\textsuperscript{20} This pressure from outside the Nuclear Waste Management Organization (NWMO) was undoubtedly all the more successful because, as Johnson points out, the NWMO “understood that without addressing certain social concerns and obtaining social acceptance, the nuclear waste management program could be thwarted by a vociferous anti-nuclear campaign at the national, provincial, and local levels.”\textsuperscript{21} The 462 participants in these deliberations were drawn from “a statistically representative sample of the Canadian electorate” and had “views on nuclear energy generally consistent with those of the broader population.”\textsuperscript{22} Participants were asked to develop guidelines for an impact statement that the Atomic Energy of Canada Limited (AECL) would write. The process was explicitly designed so that participants would “realize principles of deliberative democracy”\textsuperscript{23} and the task at hand was for deliberants to focus upon requirements for nuclear waste management policy. The main issues that came out of this dealt with demand for a quantitative risk assessment and an “ethical and social assessment framework.”\textsuperscript{24} The two issues conflicted in the deliberations, with strong objections

\textsuperscript{19} For more detailed discussions of public reason see Chapters 3 and especially 5.  
\textsuperscript{24} Johnson, “The Discourse of Democracy in Canadian Nuclear Waste Management Policy”, p. 84-85.
coming from participants who argued “the public does not accept risk assessment as a legitimate
decision-making tool because it describes a certain number of negative impacts and deaths as
acceptable.”

Johnson’s discussion of NWMO’s deliberative turn is particularly relevant to the central
problem that I develop in this dissertation. The deliberative approach that she documents is both an
important illustration of the extent to which deliberative theory is increasingly translating into
deliberative practice, and the resulting problems (and anticipation of problems) that this brings makes
a deliberative account of protest all the more important. In this particular example some of the
organizations that Johnson cites as instrumental in the call for expansive deliberations are
organizations that routinely engage in protest actions (Greenpeace, the Sierra Club). The
disagreement over the acceptability of risk assessment as a marker of legitimacy in the nuclear waste
deliberations is significant both because of the challenges that it presents to deliberants’ ability to
advise the AECL (and to have this recommendation be one that all deliberants can accept) – which
speaks to core issues of deliberative legitimacy – and because of the steps that the NWMO takes to
try and effectively include people with deeply divergent perspectives and, moreover, people who have
a record of protesting against nuclear power. Johnson’s account is significant because it is a
deliberative attempt to deal with deep disagreement and protest and moreover one that, in its
theoretical analysis of deliberations that actually occurred, illustrates what happens when deliberative
guidelines and mechanisms (a mediator oversaw the process) try to make deliberations inclusive (in
a rich sense) despite significant differences in participants’ relative power and perceived authority on
the issue.

When Johnson analyzes participation in these deliberations she breaks down the participants
into two main types: the “historically dominant coalition of government and industry”, and a “looser
grouping of actors from environmental and religious non-governmental organizations, as well as

Aboriginal nations.”27 The weight that this second type – the one that includes groups with a history of protest actions – carries in deliberations shows that this is a serious attempt to include disagreement and protest in deliberations that will influence policy decisions.

In her analysis Johnson notes the successes that arose out of these deliberations. She notes the democratic virtue of the deliberative group’s report. Here democratic contestation is evident as the report “publicly articulated a position critical of the dominant coalition and called for further deliberation among a wide range of citizens.”28 More specifically, the second “type” of participants “succeeded in convincing the panel of an independent waste management agency, a strong and active advisory council, and extensive Aboriginal and public participations processes.”29 These accomplishments are significant and go to show the impact that marginalized and otherwise less-powerful deliberants can have upon deliberative processes.30 At the same time, Johnson is careful to demonstrate the limits of these deliberations. In the second part of her article, she measures the deliberations against five deliberative criteria (inclusion, equality, reciprocity, agreement, and integration). While I take issue with the way that she measures some of these criteria, her argument that these deliberations fall short on all five criteria is sound and highlights the work that deliberative democrats still need to do if we are to secure effective inclusion in actual deliberations.

Johnson’s study is interesting for a number of reasons, but I am particularly interested in the implications that it has for a deliberative democratic account of protest. On the one hand, the

30 Melissa Williams argues that marginalized groups “have four characteristic features: (1) patterns of social and political inequality are structured along the lines of group membership; (2) membership in these groups is not usually experienced as voluntary; (3) membership in this group is not usually experienced as mutable; and (4) generally, negative meanings are assigned to group identity by the broader society or the dominant culture.” See, Voice, Trust and Memory: Marginalized Groups and the Failings of Liberal Representation (Princeton: Princeton University Press, 1998), pp.15-16. Aboriginal deliberants fit into Williams’s definition of a marginalized group, and the environmentalist groups that participated in NWMO’s deliberations have less power (in terms of both status in society, and the dialogical tools and finances that are available to them) and perceived credibility than do the “officials” who argue for the benefits of nuclear power. As such, the second type of deliberants participate at a disadvantage.
lengths that the NWMO went to in order to include people who oppose nuclear energy is a significant step forward for a deliberative theory (and practice) that takes the issue of protest seriously. After all, the expansive scope of these deliberations acknowledges that the legitimacy of the process and outcome depends upon the effective inclusion of people who disagree with (but are affected by) the nuclear industry. Because this concern for effective inclusion extends to protestors, soliciting their participation in deliberations is one step forward in the normative argument that deliberative democracy ought to have a conceptual response to protest that allows the deliberative group to engage with external criticism. Indeed, the role that protest groups played in these deliberations might lead people to conclude that protest does not pose such a significant problem to deliberative democracy because, as NWMO demonstrates, there are ways of extending effective deliberative roles to people who disagree, even fundamentally, with a particular issue.

Instead of helping us to address the problem that protest poses to deliberative democracy, however, I argue that Johnson’s discussion of the NWMO deliberations shows deliberative democracy’s failure to offer a normative response to protest. Although NWMO took significant steps to include protestors in deliberations, and although their participation impacted the deliberative recommendation that came out of NWMO, the protestors in this deliberative group were, I argue, effectively excluded.

The second “type” of participants lacked efficacy in NWMO’s deliberations. An effective exclusion is evident in the objections that these participants raised about the legitimacy of risk assessment,\textsuperscript{31} and in the outcome, in which “important concerns related to the future of nuclear in Canadian energy policy were not incorporated into the NWMO’s recommendation.”\textsuperscript{32} These shortcomings, however, only hint at a more fundamental problem. The core of the problem stems from the way that the NWMO framed the deliberations. The subject is waste management, but although this is inextricably connected with the issue of nuclear waste production, the question of

using nuclear energy in the first place did not affect (and was explicitly prevented from affecting) the agenda. This poses a significant problem to participants such as Nuclear Waste Watch, whose position statement argues “the first priority of responsible waste management is reduction at source” and that this can only occur “through a binding commitment to the early phaseout of nuclear power.” Nuclear Waste Watch’s position on nuclear energy is fundamentally at odds with the AECL and most (if not all) of the participants who constitute the first “type” of participants.

Johnson’s analysis of the NWMO’s deliberations does not address this fundamental problem. Instead, the implications that she draws out of the study – implications that she argues impact both the theory and practice of deliberative democracy – focus upon the important role that participants in deliberations have in terms of the ability to realize deliberative democracy. Johnson’s specific critique is that deliberative theorists and people who participate in actual deliberations need to focus on addressing what she calls “problems of will.” As she analyzes the list of things that contributed to the deliberative democratic turn (the willingness to engage in deliberative discussions, resources, etc), Johnson argues that meeting all these things will, on their own, be insufficient; this is where she introduces the problem of will. The main implication that she draws from her study is that “without the will of actors from both sides to realize principles of deliberative democracy in their decision making processes, to sit down with each other, listen to each other, find areas of disagreement and agreement, and collectively decide how to proceed from there, their entrenched positions and pre-existing power structures will persist.”

Now, clearly if deliberations are going to effectively include people and if marginalized people are to have any efficacy in the deliberative group, these requirements that she lists are crucial. The problem

33 http://www.cnp.ca/nww/position-statement.html
with Johnson’s conclusion is not that she calls for this kind of deliberative interaction, but rather lies in the way that she fails to address the starting point of deliberations. Instead of asking the question of how deliberants ought to frame deliberations that deal with deep disagreement on nuclear waste disposal (and here bringing up the legitimacy of nuclear energy itself), Johnson takes the main issue (nuclear waste disposal), which already takes a particular side, and analyses deliberations from that point on.

One consequence of the way that Johnson frames the deliberative turn in her case study is that she unfairly blames the second type of deliberants for the “problem of will.” Moreover, this points to the larger problem that is Johnson’s focus on resolving the problem of effective exclusion by looking at the mechanics of particular deliberations without asking if the starting point itself is one that all types of deliberants should have to accept. As she draws lessons from the NWMO deliberations, Johnson concludes that:

participants with a history of activism or with direct stakes in a given policy area have more difficulty reasoning in the collective interest and seeking agreement. They are less willing to listen to and be persuaded by other arguments. They may require more time to deliberate collectively on the core values that divided them and on ways of addressing these divisions. They may require closer, more sustained, mediation by specialists in public deliberation and citizen engagement.\(^{37}\)

Reading this, it is very difficult not to draw the conclusion that the second type of activists is to blame for the shortcomings of these deliberations. The “problem of will” appears to be theirs. While it may not be Johnson’s intent to blame protestors (the problem of will could, after all, originate because the conditions that are necessary to meet all five deliberative criteria were not in place which could just as easily be the fault of the first type of deliberants and/or larger structural conditions beyond the second type’s control), her conclusions nonetheless imply that participants ought to be

---

able to avoid much of the disagreement that did occur if only the deliberative group can resolve this problem of will. This solution does not consider the larger issue of framing that I argue prevents, from the outset, the effective inclusion that the second type of deliberants need. Instead, Johnson’s argument that these deliberations demonstrate “how to involve both the perspectives of the general public as well as those of more specialized individuals and organizations”\textsuperscript{38}, as well as her argument that “it is the combination of the range of sequential dialogues and the range of dialogue topics that create the conditions of inclusion”\textsuperscript{39} suggest that the problem is one that we can resolve in the deliberative group. There is no mention of the larger issue of agenda-setting, nor is there a mention of even the possibility that an exclusive deliberative group focus – however well-framed this may be given the starting point – on waste management may be fundamentally at odds with the effective inclusion of people who do not accept an assumption that we need to generate nuclear waste in the first place.

What Johnson does not address is that deliberative legitimacy in this case rests upon the larger question of whether holding deliberations upon the impacts of a particular decision (to continue to generate nuclear waste) is in fact compatible with effective inclusion. Given that there are good reasons why groups may be opposed to the generation of nuclear waste, and given that these reasons did not impact the deliberations that did occur and were, moreover, prevented from doing so by the very structure of NWMO’s deliberations, I argue that effective inclusion was not possible within the terms of these deliberations, and that no amount of effort in terms of participants’ “will” to deliberate can achieve this. If we are serious about effective inclusion then deliberations should occur over the (missing) initial question: whether or not the continued generation of nuclear waste is something that Canada ought to engage in.

What is ultimately significant about Johnson’s analysis (in terms of my argument in this dissertation) is that this initial question is not on the radar. Johnson discusses a deliberative turn, the

successes and failures of deliberative criteria, and looks at an interesting case that went to considerable lengths to include protestors’ views. Given the attention that she pays to divergent and dissenting views we may be inclined to think that deliberative groups can, with some normative adjustments and perhaps a greater degree of political will, effectively include unlikely participants, including protestors. The normative case for us to extend a discussion of deliberative democracy to protest is definitely here. This normative appeal is important, but the larger point gets lost in this approach; significantly, NWMO’s deliberations did not effectively include protestors. The solutions that Johnson seeks are ones that accept the initial framing and, as such, are ones that co-opt people who oppose nuclear energy. The choice for groups such as Nuclear Waste Watch then becomes one of a principled refusal to participate (because doing so would lend legitimacy to a process whose starting point they fundamentally oppose), or to enter deliberations on terms that they do not accept for the “greater good” (or lesser evil) of trying to minimize the harm that they, at least in some way, accept when they enter NWMO’s deliberations.

Johnson’s analysis does not address agenda-setting and the significant role that this plays in effective inclusion. Johnson does not discuss the fundamental problem with the terms of the debate, and she carries out her analysis from a starting point that negates effective inclusion. Even more importantly, she does this without acknowledging the problems that it might cause.

Deliberative theorists’ focus upon effective inclusion in the deliberative group all too often happens at the expense of the larger questions of deliberative framing that are necessary to effectively include marginalized people. Johnson’s discussion of the NWMO is illustrative of this – although she is by no means alone in neglecting to problematize the starting point of deliberations. The missing dialogue about agenda-setting and starting points is why deliberative theorists need to address protest. The problem of effective exclusion is one that we cannot address unless we step outside the terms of the debate itself and this requires that we take protest seriously.

2) Central Arguments

The main goal of my dissertation is to offer an account of deliberative democratic theory that recognizes why protest is important and that can offer a normative account of protest without co-opting it. I offer normative arguments in support of an expansive conception of deliberative democracy. At the core of my account is an insistence that we need to expand the scope of deliberative democracy. If we want to take the challenge that the exclusion of protest poses to deliberative theory seriously then we need to do two things before we can begin to compose a response. First, we need to make sure that any solution that we propose is one that treats protest as an activity that necessarily occurs outside of, and in opposition to, the deliberative group. There is a danger, particularly given deliberative theorists’ tendency to focus upon strengthening the quality of effective inclusion within the deliberative group, that deliberative accounts of protest will co-opt protest as an activity. This is the case in Johnson’s account of NWMO, as well as in other cases that I will discuss later on. If deliberative democrats do this – if we draw protest back into the deliberative group as a way of “managing” the people who argue that they are effectively excluded – then we fail to address the problem. This problem of co-optation is a serious one and one that deliberative theorists, in the rare cases where they do try to deal with protest, appear particularly susceptible to. Second, it is important that a deliberative account of protest is able to satisfy the deliberative objection that arises from the fact that there is no way (unless of course we co-opt protestors) that we can monitor the claims that protestors put forth because they occur outside the deliberative group and therefore beyond the limits of where it is possible to expect deliberants to make sure that people’s claims are fair. The problem when protestors no longer exchange reasons within the deliberative group is that they could offer selfish and self-interested claims, claims that violate principles of justice and equality, and claims that ought not to belong in the realm of public deliberation. The concern here is that if deliberants listen to protestors’ claims, the ability of the deliberative group to treat all people as equals will be jeopardized.
The solution that I develop deals with both of these concerns. The way that I do this involves expanding the scope of deliberative politics so that we are able to question effective inclusion and agenda-setting and the efficacy that people may or may not have within the deliberative group and upon deliberative decisions. Both objections follow from a belief that protestors must either be inside or outside of the deliberative group (and thus either co-opted or excluded – forced into making a choice similar to the one that Nuclear Waste Watch had to make) and that this inside/outside division is necessary if the deliberative group wants to make sure that people offer public reasons in support of their arguments. Given that the deliberative group's boundary causes this problem I argue that we need to extend our normative deliberative democratic gaze outside of the deliberative group. This expansion draws in some ways from Habermas's account of deliberation, but it breaks with it insofar as the space that I focus upon is one that rejects a circulation of power. I propose that we widen the scope of deliberative democratic theory to what I call the deliberative polity. The deliberative polity is the larger space where we can locate both the deliberative group (or groups) and the protest that the theory needs to address. The deliberative polity is both a physical and conceptual space: physically it maps onto public spaces within the polity in question, and conceptually it demands that we extend a (particular) application of normative democratic criteria to it. Unlike Habermas, these criteria are not caught up in a process of legitimation that is necessary for decision-making. The division between the deliberative group and protestors that I set out does not exist as a built-in check to make sure that the deliberative group is inclusive so much as it does to interrupt deliberations and break from the deliberative group altogether in case the type of inclusion effectively excludes marginalized people. The point of developing a deliberative polity is to create a space that deliberative theory has a claim to, but not one that the deliberative group can control.

The reason for deliberative theorists to stake this claim rests upon the effective exclusion and lack of efficacy that people experience in deliberations and the current inability of deliberative
theory to deal with this. Deliberative legitimacy requires a safeguard. The normative justification for a deliberative account of protest, therefore, is the argument that if people are unable to effectively participate and affect change in the deliberative group, and if their status as equals depends upon them affecting this change, then protestors are justified in trying to hold the deliberative group accountable for their marginalization by trying to gain their attention and push for change from outside the deliberative group. The normative appeal for deliberative theory comes from protestors’ shared commitment to the normative criteria that underlie the deliberative group. Protestors’ aim is to persuade the deliberative group to take their arguments more seriously and in challenging unfair power structures with this activity protestors contribute to deliberative legitimacy.

Marginalized deliberants might be included in deliberations, but if their role in deliberative processes is either restricted to deliberation upon a starting point that they do not endorse, or if they are unable to affect the deliberative decision, then further deliberation (on the terms that produce these two outcomes) is unlikely to address the problem. Unlike in conceptions of aggregative democracy where protest plays an important role in democratic legitimacy because of the widespread recognition of the shortcomings of political agendas and decision-making mechanisms, deliberative democracy does not own up to these effective exclusions and lack of efficacy (at least not in a way that acknowledges the seriousness of it and the possibility that the deliberative group cannot rectify it) and does not have a way to alter these non-ideal situations. Here, persuasion rather than further deliberation may be necessary to interrupt the particular stream of deliberation which may be hegemonic in its framing (as with the NWMO example) and to try to change the deliberative (and decision-making) course from the outside where the same restrictions on the type of “acceptable” and effective participation do not exist. The purpose of protest in terms of the benefits that it offers to democratic theory is not just to make sure that protestors are included in the deliberative group – both the kind of inclusion and the ongoing safeguard that external opposition provides are what are at stake. The point of developing a deliberative response that is specifically directed to protest – and
does not fall under a larger umbrella of inclusion that we can address within the deliberative group – is to make sure that our concern is with the efficacy that marginalized deliberants have. It is only by approaching these issues of effective exclusion via protest – as something outside of and in opposition to the deliberative group – that we can avoid co-optation and the effective exclusions that this carries with it.

As this discussion implies, there are two kinds of protest that deliberative theorists need to address. Only one, however, poses a problem to deliberative theory. The first kind of protest – the one that I take up in the dissertation – is the kind that I discussed above: the one in which protestors’ arguments are ones that the deliberative group ought not to automatically reject, and that follows from the shared commitment to normative deliberative criteria. This protest is, in the language of deliberative justification, legitimate by virtue of these shared normative roots. The second kind of protest deals with arguments that do not make this normative claim. Protestors will not always appeal to principles of (political) justice and equality. Some protest intends to cause physical harm, either in terms of the consequences of the action itself (blowing up a meeting hall), or in terms of the messages that protestors advance (threats and hate speech). When this is the case, deliberative democrats do not have the same normative obligation to respond to external arguments. Violent acts do not have a claim on the deliberative group and when protestors try to manipulate deliberants instead of persuading them, they violate democratic criteria that hold that all people are moral equals. Deliberative theorists ought to come up with a position on this kind of “illegitimate” protest (does this protest fall under freedom of speech? To what extent? What should the consequences be when protestors inflict harm upon others?) because the deliberative group is likely to encounter it. I will revisit these questions in my conclusion, but it is clear that this second kind of protest does not present a theoretical problem for deliberative democracy. Refusing to engage with

---

40 I set out upon this normative obligation in Chapter 3 where I set out the normative justification for protest and extend this justification to theories of deliberative democracy. I elaborate upon the role of persuasion and manipulation throughout the dissertation, and especially in Chapter 6.
violent protestors who clearly and purposefully violate the core principles of democratic theory – both deliberative and otherwise – does not create an internal tension in the way that the failure to account for the first kind of protest does. Whenever I address protest, unless I explicitly state otherwise, I refer to this first kind of legitimate protest.

The few theorists who do address the normative justification for protest in deliberative democracy offer convincing moral pleas. The larger problem of how to secure a space for protest within a theory of deliberative democracy is under-theorized and the literature on the relationship between deliberative democracy and protest is under-developed. Particularly lacking are details of how any kind of sustained dialogical exchange between deliberants and protestors is to take place. When I look at the small deliberative literature on protest, a recurring problem is the lack of a conceptual argument that develops the place that protest ought to have in deliberative democratic theory. These adjustments require normative changes to the larger theory that help protestors to engage with the deliberative group and that offer protections that enable the deliberative group to do this without co-opting them. This is why I argue that the deliberative polity is so important. In order to avoid the problem of co-optation and to address deliberative democrats’ concerns about protestors’ ability to meet the criteria of public reason, I argue that we need to set out a series of normative guidelines that regulate a deliberative exchange between deliberants and protestors.

I offer a theory of protest-as-deliberation that sets out criteria to regulate an exchange between the deliberative group and protestors who extend reasons outside of, but directed to, people in the deliberative group. Protest-as-deliberation takes place in the deliberative polity. This exchange takes place alongside the exchange of reasons that continually occurs in the deliberative group. There are, then, two levels of dialogue that occur: dialogue within the deliberative group, and dialogue between protestors and deliberants. This second kind of dialogue deals with the problems of effective exclusion and lack of efficacy that marginalized deliberants encounter when the deliberative group makes a decision – dialogue that would be necessary, for instance, to address the
problems in the NWMO case.\textsuperscript{41} The idea behind fostering a dialogue between protestors and deliberants is that protestors can regroup in the deliberative polity where they have greater freedom to reframe and re-present their arguments in ways that are more likely to persuade deliberants to conduct deliberations in a way that gives more weight to their claims and that makes protestors more likely to affect the outcome of the deliberative decision.

In order for a theory of protest-as-deliberation to work, deliberants and protestors need more information about the criteria that will regulate the exchange. Following from the two objections that I set out earlier, it is important that the theory is able to explain how it is that protestors will be able to start a dialogue with deliberants and how it is that the reasons that protestors offer from outside the deliberative group will, in practice, have any impact on the deliberative process. Protest-as-deliberation needs a conceptual argument to make sure that the moral case for protest translated into the normative changes that will make protest effective (a deliberative account of protest, after all, needs to do more than “allow” protest to occur) and to satisfy deliberants’ concerns about protestors’ ability to meet the requirements of public reason. Protest-as-deliberation needs to regulate what protestors can do, how the deliberative group ought to react, how the exchange between the deliberative group and protestors ought to unfold, and how, exactly, protestors can (if they wish to) re-enter the deliberative group.\textsuperscript{42} In response to these requirements I do four things. First, I draw the concept of protest-as-deliberation out of an analogy to Iris Young’s argument that deliberative theorists ought to use difference as a resource. Just as Young uses this argument to convince deliberative democrats that they ought to amend their criteria so that the reasons that differently-situated people put forth are reasons that will carry more weight in the deliberative group, I argue that deliberants ought to think of protest as if it is a resource insofar as protestors may have claims that, if we take them seriously, will strengthen the legitimacy of the

\textsuperscript{41} This efficacy (or lack thereof) may arise in either the initial framing of deliberations, deliberative premises, or deliberative decisions.

\textsuperscript{42} See Chapters 5 and 6.
deliberative group. On this account, protestors are worth talking to. Drawing this analogy places normative pressure upon deliberants to respond to protestors’ arguments (when they frame them as appeals to normative deliberative criteria), and Young’s discussion of inclusive political communication, which she uses as a way to enable deliberants to use difference as a resource, provides a basis for some of the practical ways that protestors – who use alternative political communication – can engage people in deliberations. Second, in order to strengthen the ability of the deliberative polity to function as an oppositional space, I address a series of practical and conceptual changes that must occur if the deliberative polity is going to function in the way that protest-as-deliberation needs it to. These changes include access to public space, and require that we push for the deliberative polity to assume a particular kind of contestatory democratic space. Third, I address the concern that deliberative democrats have about protestors offering reasons from outside the deliberative group – reasons that may not be public reasons and that may not deserve to carry the weight in deliberations that protestors are pushing for. My response to this is that deliberative theorists need to 1) expand the scope of inclusion in the deliberative group so that deliberants can present arguments that are not (initially) framed as public reasons, and 2) to revisit the way that we think about deliberative criteria of reason-giving to include an overarching normative set of criteria that regulate the deliberative exchange of reasons and two institutional applications: one for the deliberative group and one for the deliberative polity. This move both acknowledges the shared normative basis of protestors’ and deliberants’ claims (the same basis that I draw from to offer a normative justification for protest in deliberative democratic theory), and it allows deliberants to (eventually) evaluate protestors’ reasons while, at the same time, it allows for the possibility that deliberants may not always evaluate people’s reasons fairly. Normatively, neither institutional application of this deliberative criterion takes precedence. The second set of criteria that appears in

\[43\] This evaluation is a two-step process, where the initial legitimate/illegitimate protest evaluation takes place in the deliberative polity, and an in-depth evaluation takes place later on if and when protestors decide to re-enter the deliberative group. I discuss this in greater detail in Chapter 5.
the deliberative polity, after all, exists as a safeguard for the times when the deliberative group’s application hampers effective inclusion and equality. Practically, the two sets mean that protestors have more freedom in terms of the ways that they present their arguments and the fora that they use to do so. Fourth, and relatedly, the relationship between protestors and deliberants in a theory of protest-as-deliberation is one where protestors’ goal is to have the chance to re-enter the deliberative group and to deliberate as equals with their reasons this time affecting the deliberative decision. The practical implications of this, insofar as it relates to reason-giving, are twofold. First, people in the deliberative group need convincing that protestors are worth deliberating with. The deliberative exchange between the deliberative group and protestors in the deliberative polity needs to offer a preliminary evaluation of protestors’ arguments. All that needs to occur for protestors to re-enter the deliberative group is for protestors to establish that their reasons meet normative deliberative criteria. The point of this is to motivate the deliberative group to listen to protestors’ arguments even though they are outside the deliberative group. Second, protestors need to persuade the deliberative group that their reasons are stronger than the deliberative group gives them credit for. Since the reason for protestors’ opposition to the deliberative group comes from the lack of efficacy that they have in deliberative processes of reason-giving, the motivation for re-entry after people engage in protest is to be able to participate as equals in deliberations that are not constrained by power structures that marginalize some deliberants and prevent them from effecting change. When protestors re-enter the deliberative group after persuading them of the strength of their arguments, the process of deliberative debate and the decision that deliberants arrive at can take place free from objections over the framing of the debate, the pre-existing power structures implicit in the general agreement about the ways that political communication can unfold, and the kinds of reasons that are convincing. These third and fourth measures, when we take them together, offer a response to the strong objection that deliberative theorists currently have about the normative danger of listening to arguments that arise outside of the deliberative group. Through establishing a deliberative polity and
developing a conceptual account of the deliberative process that regulates exchanges of reasons between the two I argue that deliberative theory can satisfy this concern and account for protest in a way that is not only consistent with deliberative democratic criteria, but which strengthens the ability of the theory to effectively include deliberants in a much richer way and which can address problems of efficacy in the deliberative group.

*       *       *

As I develop my theory of protest-as-deliberation I set out my arguments in the following way. In Chapter 2 I detail the way that the problem of effective inclusion and exclusion manifests itself in deliberative democratic theory. I look at three different approaches to the discursive strand of deliberative democracy, and as I do so I introduce some concepts that are important for my theory. I look at Jürgen Habermas in order to flesh out his discussion of the role of the public sphere. While his account offers good insights about an expansive public sphere (insights that are necessary if deliberative democracy can offer a conceptual account of protest), the circulation of power that he argues for fails to provide institutional protections for marginalized people and as such is not sufficient to take up this challenge. I look at Amy Gutmann and Dennis Thompson’s theory of deliberative democracy in order to flesh out the way that deliberative democracy can account for disagreement. Their discussion of disagreement is an important contribution to deliberative theory, but their larger account of deliberative democracy is problematic because of their focus upon moral pluralism and the narrow scope of their deliberative constitution and the uneven weighting that they give to their procedural principles; the result of this is that Gutmann and Thompson (unintentionally) undervalue the reasons that marginalized people put forth. This limits the type of disagreement that their theory can address and leaves the deliberative group vulnerable to charges of effective exclusion. The third approach is more promising. Here I look at Iris Young’s amendments to deliberative democracy that deal with disagreement over the type of political communication that deliberative democracy ought to include and which she introduces specifically to expand the scope of
the theory to effectively include marginalized people to improve their efficacy in deliberations. I end the chapter by setting out the normative criteria of deliberative democracy that we can draw from Young and which I take to be the account of deliberative democracy that is best equipped to deal with hierarchical power relations and to promote deliberative decisions that do not effectively exclude people.

In Chapter 3 I argue that, despite the positive changes that Young introduces, deliberative democracy still fails to set out procedural and decision making structures that effectively include all deliberants. The fact that the deliberative group cannot ensure that people can effectively participate as equals gives rise to the theory’s need to address protest. As I introduce the problem that protest poses for deliberative democracy I offer a democratic defence of protest and I extend it to deliberative democracy. I explain why deliberative theorists do not address protest and offer an argument for them to do so. I note the dangers of co-optation in cases where deliberants do discuss protest, and I conclude by arguing that we need to make significant conceptual amendments to the theory if we expect deliberants and protestors to be able to engage with each other.

I take my discussion of the value of protest into Chapter 4 and look at how it is that deliberative theorists might be able to develop a deliberative democratic defence of protest that gives protestors a chance to impact deliberative decisions without co-opting them. I revisit the normative criteria of deliberative democracy and argue that deliberative theorists do not take full advantage of the amendments that Young makes when she introduces communicative democracy. I argue that if we wish to offer a deliberative democratic account of protest then we need to reframe deliberative interactions; I argue that the best way to do this is to draw from the idea of using difference as a resource and to think of protest in a way that is analogous to this. At this point I introduce my theory of protest-as-deliberation and develop my normative justification for protest while I develop conceptual changes that can facilitate dialogue between the people in the deliberative group and protestors in the deliberative polity.
In Chapter 5 I set out the challenge that a theory of protest-as-deliberation poses to the exchange of reasons that is necessary for deliberative legitimacy. At this point I propose two things. First, that we expand the scope of inclusion in the deliberative group so that already having fully-articulated public reasons is not a prerequisite of deliberative participation. Second, I propose that we reconceptualize deliberative accounts of reason-giving in terms of an overarching normative criteria and two sets of institutional criteria: one for the deliberative group and one for the deliberative polity. I explain the ways that this satisfies the objection that deliberants have about the legitimacy of protestors’ reasons and I look at the way that it helps us to evaluate protestors’ (and deliberants’) reasons while simultaneously helping us to avoid the problem of co-optation.

In Chapter 6 I expand the conception of deliberative space that we find in the deliberative polity. I look at what we need from the deliberative polity in order to engage in the persuasive alternative political communication that we need if we take seriously the idea of an oppositional space that is necessary to combat the power structures that sustain marginalization. I pay particular attention to the ways that people construct space and the ways that this can be more or less conducive to contestation and a rich democratic oppositional public space that can provide the necessary context for a productive deliberative exchange between protestors and deliberants.

In my concluding chapter I set out the conceptual requirements of protest-as-deliberation. Here I draw upon the observations of the previous chapters and I outline the conceptual changes that deliberative democrats need to make to the larger framework of deliberative democratic theory if we are to offer a normative account of deliberative democracy that takes protest – and deliberants’ effective inclusion and efficacy – seriously. I set out the changes that we need to make to discourse both within the deliberative group and in the deliberative polity, and I discuss the deliberative fora that are necessary to see this account of deliberative democracy flourish.
Chapter 2

THREE APPROACHES TO DELIBERATIVE DEMOCRACY

The challenges and recommendations that critics and supporters make divide deliberative theory into two main areas. John Dryzek details this divide as he speaks of deliberative democracy as an umbrella term that encompasses two “strands” of deliberative theory: liberal constitutionalism and discursive democracy. Dryzek favours the latter because it is “more critical and more expansive in its orientation to the liberal state”, and because the emphasis on discourse “is necessarily social.”\(^4^4\) The collective aspect in Dryzek’s conception is important; his definition of deliberative democracy clearly avoids interpretations of deliberation as a personal decision-making process, one that we can clearly distinguish from earlier Rawlsian projects that are criticized because of the ways that their theories deal with (or rather fail to deal with) social pluralism.\(^4^5\) Similarly, Dryzek’s support for a broader and more critical take on the state becomes particularly important when we look at some of the obstacles that deliberative democracy encounters as a result of the theory’s application.

Dryzek’s discussion of the distinction between the two strands is an important one. I will focus on the discursive strand as the normatively stronger of the two, but the discursive strand itself encompasses a wide range of approaches to deliberative democracy. The term “discourse” in this strand is, I think, slightly ambitious given that deliberative theorists conceive of deliberative dialogue in significantly different ways – some of which are much better equipped to challenge uneven power relations than others. The discursive strand, as I approach it, is a deliberative one with more and less dialogical proponents depending upon the particular theorist. The dialogues that occur offer thicker

\(^4^5\) Internal deliberation is, through abstraction, supposed to be able to account for multiple social positions, however, there are limits to the extent to which people can accomplish this without the input of the people that deliberations will affect. As I set out the second strand of deliberative theory I will outline the arguments that call for the direct participation of people involved in and affected by deliberations. This participation is crucial.
and thinner accounts of inclusion depending upon the ways that the different theorists set out the procedural and substantive constraints that they argue ought to shape the deliberative criteria that regulate the exchange of reasons. While the framings of these constraints sometimes display little more than slight organizational preferences, other differences have fairly dramatic consequences for the type of political discourse that can occur and this can have a significant impact upon the ability of differently-situated people to affect deliberative decisions.

To make my discussion of deliberative theory clear I will use the term “deliberative democracy” to refer to the type of deliberative discourse that necessarily involves deliberation with other people. Some theorists advocate a process of deliberation in which people engage in an internalized process of deliberation in which other people are “imaginatively present” in a hypothetical debate but where deliberation involving other people does not take place. This is not the kind of deliberation that I argue for. Within the literature in the discursive strand I highlight three different approaches to deliberative democracy; between them they capture the main differences within the theory. The theorists that I will focus upon in this chapter – Jürgen Habermas, Amy Gutmann and Dennis Thompson, and Iris Marion Young – vary significantly in terms of the scope that they think deliberative democracy ought to have, the procedural and substantive constraints that deliberation requires, and the ways that political communication can legitimately differ.

In this chapter I look at these three different approaches in turn, and I set out the central arguments and discuss the problems that they see themselves as addressing. First I look at Habermas’s theory of deliberative democracy. His work is particularly important in terms of the way that he draws from the public sphere and makes the deliberation that occurs there something that the people who make deliberative decisions have to take into account. Here public deliberation is a because people who are immediately affected have privileged access to information that is necessary for deliberative legitimacy.
requirement of deliberative legitimacy. I detail the benefits of an account of deliberative politics that engages the public sphere in this way, but I go on to critique his theory because of the way that he envisions the relationship between the administrative and public spheres unfolding. There are, I argue, too many opportunities for marginalized people to fall through the cracks in the circulation of power that Habermas argues is necessary to establish deliberative legitimacy. Habermas's theory lacks adequate safeguards to prevent marginalized people’s effective exclusion from decision-making.

After I look at Habermas I turn my attention to Gutmann and Thompson. Gutmann and Thompson develop their theory in a way that emphasizes deliberative democracy’s ability to account for disagreement. This is, at least initially, very promising. Their emphasis upon justification and reason-giving detail the importance of a set of deliberative criteria that allow people to deal with disagreement while they engage in a practice of mutual respect. The deliberative criteria that they set out, however, have their limitations when it comes to ensuring that the kinds of reasons that deliberants exchange are ones that are able to fully and effectively include all affected people. The problems that arise in Gutmann and Thompson’s theory are a result of their decision to frame disagreement in terms of moral pluralism. This decision limits the scope of deliberations and excludes people. Additionally their deliberative constitution, in which they give priority to a principle of reciprocity that does not pay enough attention to the fact of differently-situated deliberants, further contributes to this effective exclusion. While their discussion of disagreement is an important contribution to deliberative theory, their account of deliberative democracy fails to overcome power imbalances that result in marginalized deliberants’ lack of efficacy.

In the last section of this chapter I focus on Young’s discussion of deliberative democracy. The problems that she identifies in deliberative theory are substantial enough that, if deliberative democrats do not address them, the theory will not be able to account for the fact of social pluralism.

Young takes issue with the type of unity that deliberative theorists require as well as the type of deliberative discourse that people are expected to use if they want the deliberative group to take them seriously. She makes two amendments to deliberative democracy and her resulting theory of communicative democracy is, I argue, a conception of deliberative democratic theory that offers the richest set of normative criteria for the deliberative group – one that does the most to effectively include marginalized people and best enables them to affect deliberative decisions.

2.1 Habermas: Deliberation, Effective Inclusion, And The Public Sphere

Although it is not uncommon for deliberative theorists to advocate the benefits of deliberation in the public sphere, the focus typically remains on the deliberations that occur within administrative bodies. The focus upon deliberation in institutional contexts is not unsurprising, particularly when much of the focus of deliberative democracy concerns a process that enables all affected people to make deliberative decisions that have a greater claim to legitimacy. At the same time, however, this institutional focus overlooks a significant force in democratic theory and practice: the role of the public sphere and the important work that occurs here in terms of the polity’s ability to provide a check upon the power of decision-making bodies. Sometimes deliberative theorists are ambiguous about the role that the public sphere ought to play. The justification of deliberative democracy itself is such that deliberants cannot ignore the claims that people make in the public sphere. This is the case because deliberative legitimacy depends on the ability of the deliberative group to effectively include all people who are affected by deliberative decisions. People in the public sphere must therefore play a role. At the same time, deliberative theorists do not, for the most part, pay very much specific attention to the role that the public sphere ought to play in deliberative democracy, preferring instead to focus upon state institutions as the primary source of deliberation and the focus, therefore, of deliberative theory.

Jürgen Habermas argues for an expansive conception of deliberative democracy that gives much more normative weight to the process of communication and to the normative work that
occurs in the public sphere. Although many deliberative theorists expect public sphere deliberation to play a role, Habermas’s discussion of the public sphere stands out. His theory of communicative action and his discussion of the relationship between communicative power and administrative power depend upon the public sphere. Whereas many deliberative theorists see the public sphere as an important oppositional space that supports and enriches democratic legitimacy (although they may not be entirely clear about how this ought to work), Habermas attributes a central, constitutive role to it. Indeed, for Habermas the basis of deliberative democratic legitimacy depends upon the relationship between formal (decision-making) deliberative bodies and the informal discourse that occurs in the public sphere. This concern for a thick account of inclusion that takes the input of all people in the polity seriously is a very important move for deliberative legitimacy and one that challenges the limited ways that many other deliberative theorists use political communication. As I set out Habermas’s theory of deliberative democracy I look at the normative contributions that the public sphere makes to deliberative democracy in terms of effective inclusion. The ideally inclusive discourse that Habermas seeks to establish is significant because of the way that he tries to balance decision-making with a thick account of inclusion. However, while this normative argument has value, Habermas’s account suffers from the question of its institutionalization. Without a richer institutional account of the way that the circulation of power engages marginalized people, his move to establish a thick account of inclusion is unsuccessful.

Much of Habermas’s motivation for this attention to the public sphere comes from the context in which he wrote. Deliberation within the public sphere and its ability to influence formal deliberations are important because for Habermas the basis of legitimacy occurs in the process of communication. The emphasis on the social processes of deliberation is a response to John Rawls, whose discussion of deliberation falls into the first strand of deliberative democratic theory. Justifying decisions to other people without their input is not enough, in Habermas’s view, to secure
deliberative legitimacy, and input must come from the people who will be affected by deliberative decisions. The attention that we ought to pay to the (necessarily social) process of deliberation is one of two criteria that we need to meet in order to engage in the “ideally inclusive” practical discourse that Habermas advocates. The other criterion is to make sure that the communicative process is one that allows people to protect themselves from unjust exercises of power, which is something that Habermas argues is only possible if the public sphere plays a strong role in our collective decision-making processes and provides a check on administrative power.

Habermas argues for a thicker account of inclusion in the deliberative process as he looks to an institutional solution and balances an autonomous public sphere with a legislative/administrative branch of government. The connection between these two requires that a communicative exchange take place both within and between the two areas. As he explains the communicative process, Habermas sets out his discourse principle. The discourse principle deals with the reasons that are acceptable in a discursive exchange and is a way of regulating communication in order to ensure deliberative legitimacy. The norms that deliberants must work with are, first, ones that have to arise as a result of a discursive exchange (deliberants have to produce them in deliberations and must not appeal to pre-existing norms) and, second, are only valid when they “could meet with the acceptance of all concerned in practical discourse.” In order to measure these criteria, Habermas offers guidelines for the rational acceptability of statements. In addition to the requirement that the process must include all who are affected, these mandate that people must have an equal opportunity to participate, that they are sincere, and that the process must be free from coercion.

Habermas locates legitimacy in processes of communication. To meet the requirement of legitimacy deliberants must be able to do two things. First, there needs to be an (inclusive) way to

---

47 This process must be one that offers a thick account of inclusion and seeks the input of people outside decision-making bodies.
49 Jürgen Habermas, *The Inclusion of the Other*, p.44.
determine what it is that everyone would agree to. Second, we need to ensure that this information influences the decision-making of political institutions. The first process occurs in the public sphere where he locates social power. This is where democratic opinion- and will-formation take place. The public sphere is “‘unconstrained’ in the sense that its channels of communication are not regulated by procedures”\textsuperscript{50}, and this leaves people free to discuss political issues without procedural constraints. Because everyone can participate in this discourse and because the public sphere is autonomous, this social power is well-positioned to serve as “a warning system”\textsuperscript{51} in case the administrative sphere neglects important issues or perspectives. Habermas argues that we can then take the social power that people generate and transform it, via elections, will-formation, and opinions, into what he terms “communicative power.” Because only the political system can act,\textsuperscript{52} people in the public sphere must work to convince people in the administrative sphere to take up the issues that they argue are important.\textsuperscript{53} They can do this “only insofar as they can advertise their interests in a language that can mobilize convincing reasons.”\textsuperscript{54} Communicative power is transformed into administrative power through legislation\textsuperscript{55} and “only after it passes through the filters of the institutionalized procedures of democratic opinion- and will-formation and enters through debates into legitimate lawmaking.”\textsuperscript{56} This transformation takes place (and is legitimate) because the beliefs that people in the public sphere put forth are ones that “have been tested from the standpoint of the generalizability of interests.”\textsuperscript{57} The role of people in the public sphere ultimately plays out as influence that is transformed into communicative power and which is consequently able to legitimate the political decisions that occur in the administrative sphere.\textsuperscript{58} The result, Habermas argues, is an

\textsuperscript{51} Habermas, \textit{Between Facts and Norms}, p.359.
\textsuperscript{52} Habermas, \textit{Between Facts and Norms}, p.300.
\textsuperscript{53} Habermas, \textit{Between Facts and Norms}, p.359.
\textsuperscript{54} Habermas, \textit{Between Facts and Norms}, p.364.
\textsuperscript{55} Habermas, \textit{Between Facts and Norms}, p.299.
\textsuperscript{56} Habermas, \textit{Between Facts and Norms}, p.371.
\textsuperscript{57} Habermas, \textit{Between Facts and Norms}, p.371.
\textsuperscript{58} Habermas, \textit{Between Facts and Norms}, p.371.
inclusive deliberative process that, by balancing state power and the public sphere, effectively includes all people and is able to meet the requirements of legitimacy.

The relationship between the public sphere and the administrative sphere is essential to Habermas’s account of legitimacy. The administrative sphere would not be able to (legitimately) claim that the deliberative process is inclusive without this substantive input from the public sphere. The administrative sphere’s normative power comes from these communicative processes; input from the public sphere limits administrative power. While public opinion cannot rule, it can “channel the use of deliberative power in specific directions.” With this influence, people in the public sphere can make sure that the issues that concern them are not ignored. In this way, communicative power provides an important check on administrative power and makes the process accountable. Anticipating critiques that the public sphere’s power could lose force after undergoing its communicative transformation and passing into this different sphere, Habermas responds that, “the constitutionally regulated circulation of power is nullified if the administrative system becomes independent of communicatively generated power.” Because normative legitimacy requires the inclusion of all affected people, the institutional processes that Habermas creates make political legitimacy dependent upon the continued connection between the two spheres. The administrative sphere has good reason to take input from the public sphere seriously and make sure that they reflect this in deliberative decisions. Without it the administrative sphere would face charges of effective exclusion.

Deliberative theorists are finding it increasingly harder to justify processes and policies that do not involve the public sphere in a substantive way. Habermas’s argument that the public sphere must play a fundamental role in formal deliberative bodies if we are to take legitimacy seriously is an

---

59 Habermas, The Inclusion of the Other, p.250.
60 Habermas, Between Facts and Norms, p.386.
important claim and one that he gives us good institutional reasons to take seriously. Similarly, the
emphasis that Habermas places upon the communicative process also makes an important
contribution to deliberative theory, especially when we consider discursive processes in light of the
additional burdens that marginalized people must overcome as they try to influence deliberative
decisions. The attention that Habermas pays to a richer account of inclusion, coupled with his desire
to counteract uneven power relations by fostering an ideal process and building checks into the
circulation of power, shows that he takes the problem of effective inclusion seriously. The step that
Habermas takes by engaging people in the public sphere is something that deliberative theorists (who
tend to focus upon state institutions) ought to pay more attention to. While the idea of fostering this
engagement in the public sphere is one that I support, the way that Habermas institutionalizes his
normative argument does not do enough to secure the kind of rich inclusion that his theory claims.

The institutional mechanisms that Habermas has in place to secure legitimacy depend upon
the ability of the public sphere to hold the administrative sphere accountable. While the way that
Habermas structures the circulation of power is good in terms of the value that lies in making the
administrative sphere look to the public sphere, the “generalizable interest” that is supposed to
emerge from the public sphere occurs without the institutional checks that are necessary to ensure
marginalized people’s effective inclusion in the public sphere as it generates social power. Habermas’s expectation that the public sphere can generate a critical mass that moves their
communicative power to influence political decisions takes a great deal on faith: faith that deliberants
will adhere to an ideal process and that marginalized people with legitimate claims on the state will be
able to use this communicative power to their advantage. The assumption that people in the public
sphere will be able to produce a generalizable interest that fully captures the concerns of all people in
the public sphere is very unlikely in practice and this weakens his argument about the benefits of the
circulation of power.
The relationship that Habermas envisions between the public sphere and the administrative sphere assumes an ideal process. There are deliberative benefits that follow from his call for this, notably the continual revision of procedural guidelines that have made deliberative democratic theory better equipped to deal with disagreement and better able to address issues of marginalization. At the same time the assumption of an ideal process poses a significant threat to the ability of actual deliberative processes (once we try to put his theory into practice) to address the differences in the amount of power and influence that deliberants have. While the benefits of an ideal speech situation motivate deliberative theorists to pay more normative attention to flaws in deliberative processes – something that we definitely need more of – without ideal processes and speech situations Habermas cannot fully support his argument for deliberative legitimacy. Although we can make similar critiques about many other deliberative democrats – that their theories are normatively weak as the result of difficulties in translating theory into practice – Habermas is more vulnerable than most.

As Young notes (and as I will address later in the chapter), inclusive processes of communication are central to deliberative legitimacy. On her account, deliberation fails to be sufficiently inclusive if “some of the interests, opinions, and perspectives are suppressed, which would otherwise be formulated to persuade others of the importance of particular problems or solutions”, or “if some groups have difficulty getting heard for reasons of structural equality, cultural misunderstanding, or social prejudice.”

When deliberative theorists take steps to address the kinds of effective exclusions that arise as a result of processes of reason-giving, the responses tend to centre upon a call for more demanding institutional requirements that regulate the type of political communication that people can use and the time and attention that the deliberative group ought to pay to people as they speak (I will elaborate upon this in greater detail in the next section and in subsequent chapters). These kinds of institutional responses are missing in Habermas’s theory. Habermas’s theory is vulnerable to these

---

62 Young, Inclusion and Democracy, p.178.
real world problems and this lack of sufficient institutional protection to marginalized people causes problems at two main points in his argument for the circulation of power.

The first practical problem for marginalized people arises because of the lack of regulations on discourse in the public sphere. In Habermas’s argument an autonomous public sphere is able to work as a warning system for the administrative sphere because it is unregulated and because people can engage in informal deliberations that can be quite critical of the state. Now, in many ways this kind of participation is crucial. This kind of healthy, unconstrained debate provides a good arena for constructive criticism, dissent, and protest, and functions as both as a check upon administrative power and in terms of democratic health more generally. The problem of effective exclusion arises because Habermas does not offer any protections to people in the public sphere other than insisting upon the minimal normative requirements that people recognize each other as equals and that there are no overtly coercive forces or relations of power.\textsuperscript{63} While people ought to deliberate in accordance with these restrictions, the normative appeal that people do so is not enough to make sure that it happens, particularly given the social context. People are reluctant to give up power and even if we expect slightly more of people they may be unaware of the ways that their expectations as to what constitutes a free and fair exchange of reasons (free of relations of domination) serve to sustain the status quo (and relations of domination). It is unclear what the larger impact on Habermas’s deliberative theory would be if people in the public sphere were to protest that they are systematically left out of the communicative power that the public sphere generates (and as a result systematically excluded from exerting influence on the administrative sphere).

Habermas’s account of deliberation depends upon the circular production of power for its legitimacy. Habermas’s theory works when the transformation of communicative power into deliberative influence takes the concerns of the public sphere (which already may not represent the interests of all people in the public sphere) seriously and because it expects people in the

\textsuperscript{63} Habermas, \textit{The Inclusion of the Other}, p.42.
administrative sphere to know how they ought to process this power. Because Habermas’s way of preventing effective exclusions is to balance the public and the administrative spheres, he does not pay enough attention to effective inclusion within the administrative sphere. The relationship that Habermas constructs between the public and the administrative sphere goes some way to address fears of effective exclusion insofar as agenda-setting goes because the administrative sphere has to respond to the public sphere’s call for the inclusion of certain issues; however, it is still up to people in the administrative sphere (who did not engage in deliberation upon these issues in the public sphere) to weigh all the claims that enter into this sphere and it is the people in the administrative sphere who ultimately make deliberative decisions. The normative constraints that deliberants face in the administrative sphere are ones that people in the public sphere do not have to adhere to. This has two problematic effects. First, it is difficult to predict how these constraints will impact this second round of deliberations. Second, it is the case that people in the administrative sphere may lack the necessary perspectives to deliberate upon the issues in a way that does justice to the issues themselves.

Although the public sphere serves as a check upon administrative power, its role is limited because communicative power plays out in terms of the influence that people have upon the administrative sphere. This influence is collective, and marginalized people face additional burdens when they try to appeal to others in the public sphere and to the administrative sphere. One way that Habermas responds to effective exclusions is via a discussion of the role of protest. His discussion of this is good insofar as he makes the normative case for protest and argues that protestors should be able to influence people in the public sphere and in the administrative sphere.64 Habermas details why protest is necessary in the public sphere and how it can be useful in terms of bringing issues onto the agenda. This is an important contribution and a reason why deliberative theorists ought to pay more attention to protest itself. However, as I will discuss in greater detail in

---

64 Habermas, *Between Facts and Norms*, p.383.
the next chapter, ways of addressing protest that offer normative appeals from within an institutional framework that, itself, do not adjust to account for protest, raises concerns of co-optation and, as such, the efficacy of protest action is limited. Habermas’s argument that civil disobedience is “always an implicit appeal to connect organized will-formation with the communicative processes of the public sphere”\(^\text{65}\) does not address the problem from the standpoint of institutional mechanisms. On Habermas’s account, protest works to address effective exclusion when protestors, in their appeal to people who are shaping communicative power, “dramatize contributions, presenting them so effectively that the mass media take up the matter.” Through the media protestors’ arguments “reach the larger public and subsequently gain a place on the public agenda.”\(^\text{66}\) In this way, protestors make use of this communicative power and enter “into the core of the political system” where they will “receive formal consideration.”\(^\text{67}\) The problem with this is that protestors are successful insofar as they are able to utilize communicative power to influence the administrative sphere’s agenda. The success of protestors, on this account, depends on the ability of protestors to capture the media’s attention and this assumes that the media will take up protestors’ concerns in a way that presents them fairly and also that this will be sufficient to influence the administrative sphere to take protestors’ claims seriously in deliberative framings and decisions. One immediate objection to the practical implementation of this lies in the contradictions that give rise to protest in the first place. Habermas discusses protest because the public sphere was unable to take these claims, test them in terms of a generalizable interest, and transform them into the communicative power that typically informs the administrative sphere. The civil disobedience that Habermas accounts for indicates that people are not always able to treat each other as equals or to avoid coercive power relations in deliberations. The media is itself a large institution that we cannot rely on to offer sympathetic portrayals of protest. As a result the role that it is supposed to play is somewhat unrealistic.

\(^{65}\) Habermas, *Between Facts and Norms*, p.383

\(^{66}\) Habermas, *Between Facts and Norms*, p.381

\(^{67}\) Habermas, *Between Facts and Norms*, p.381.
Sometimes specific mechanisms are necessary if we wish to see people engage in deliberation in the ways that we think they ought to. Habermas’s argument that “reasonable or fair results are obtained insofar as the relevant information and its proper handling have not been obstructed” shows his ideal theory at work, but, as I will go on to show, what counts as obstructing information (deliberative arguments) is much more complicated than making sure that people can speak to different spheres. A great deal of people’s effectiveness follows from whether or not deliberative processes actively enable people, through procedural and substantive constraints, to speak from their differently-situated positions. This can make all the difference if our concern is with effective inclusion. The inability of people in the public sphere to recognize that protestors have legitimate claims (that lead to protest in the first place) does not do much to instil confidence that people in the administrative sphere will understand protestors’ claims or that they will be able to weigh them appropriately, especially given the pre-existing structures. The extra work that protestors have to do in order to influence communicative power makes it less likely that the administrative sphere will enact policies that accurately reflect the particular concerns that differently-situated people have. This is especially the case when people in the administrative sphere try to explain the particular ways that certain practices impact marginalized people.

Habermas’s insights about the important role that an expansive public sphere can play in securing deliberative legitimacy are ones that I return to in my discussion of a theory of protest-as-deliberation. His emphasis upon carving out an institutionalized space for contestation – a space that the decision-making body is obliged to listen to and take seriously if they are to make a claim to deliberative legitimacy – offers a strong normative justification for the need to expand deliberative fora and to take any protest that may arise in the course of deliberations seriously. I differ with Habermas, however, in terms of the mechanisms that are necessary to protect against effective exclusions. Habermas institutionalizes the relationship between the public sphere and the

---

68 Habermas, *Between Facts and Norms*, p.296.
administrative sphere, but the connection that he argues for – via the role that communicative power plays and due to the way that the circulation of power is supposed to effectively include all people in the polity and serve as a check upon abuses in decision-making power – is a connection that relies too heavily upon the assumption that people will not be prevented from playing an effective role in the generation of communicative power by unequal power relations. In the rest of the chapter I detail ways that actual deliberative exchanges work to limit the efficacy of arguments that come from differently-situated people; this effective silencing is not always intentional, but it is entrenched in and supported by systems of political communication that do not have sufficient conceptual and practical ways to temper differences in power relations. If we are to take concerns of effective inclusion seriously then we need to develop stronger conceptual arguments to deal with these power imbalances. I aim to do this in the rest of the dissertation. As I do so, I will return to the normative arguments that Habermas makes about the public sphere and draw upon these to offer an account that combines his insights with a stronger response to the effective exclusions that marginalized people encounter. I do this in the hope that I can offer a normative account of a reconceptualized theory of deliberative democracy that connects people who work to combat effective exclusion in the public sphere (protestors) with a deliberative group that takes questions of efficacy more seriously.

2.2 Gutmann And Thompson’s Democracy And Disagreement

2.2.1 Managing Disagreement: Justification and Reason-Giving

Gutmann and Thompson make an important contribution to deliberative democratic theory. In Democracy and Disagreement (1996) they offer a theory of deliberative democracy complete with a “deliberative constitution” that frames the core idea of deliberative democracy in terms of deliberants’ need to continue exchanging reasons in an attempt to reach mutually acceptable

---

decisions even when people encounter moral disagreement. Gutmann and Thompson deal well with disagreement; their aim, however, is not to resolve conflict. Agreement takes a backseat to acceptance and it is the process of justification that makes the deliberative process legitimate. Throughout the course of the book, Gutmann and Thompson develop six procedural and substantive principles (reciprocity, publicity, and accountability; and basic liberty, basic opportunity, and fair opportunity) that they argue ought to govern the exchange of reasons in deliberative processes. Together, these six principles form their conception of public reason and determine the scope of deliberative inclusion. As I look at the ways that Gutmann and Thompson outline their approach to disagreement I examine the constraints that they set out. I argue that, despite their claims to the contrary, Gutmann and Thompson’s procedural and substantive principles cannot resolve the problem of moral disagreement.

Gutmann and Thompson approach deliberative disagreement through a lens of moral pluralism and defend deliberative democracy on the grounds that it is “the most justifiable conception for dealing with moral disagreement in politics.” Moral pluralism influences both their normative justification to treat all people as moral and political equals and their proposed solution to deliberative disagreement. Moral disagreement arises because people have multiple competing conceptions of the good and this poses a problem because we lack the foundational knowledge necessary to resolve moral conflicts. Because nobody can offer any proof of the “right” answer (if one does in fact exist), the best – most legitimate – way to deal with this conflict is to allow people, insofar as it is possible, to order their lives according to their own conceptions of the good. People ought to have this freedom because it is illegitimate to impose a conception of the good upon

---

70 Gutmann and Thompson, *Democracy and Disagreement*, p.1.
71 Gutmann and Thompson, *Democracy and Disagreement*, p.5.
another person and because we ought to accord “equal respect to the moral claims of each citizen.”\textsuperscript{73}

When disagreement over how best to order our collective lives arises, aggregative solutions are insufficient, and only a process of justification can satisfy the requirement of legitimacy when what is at stake concerns these kinds of questions. Gutmann and Thompson’s emphasis on political legitimacy and mutual respect, as well as their insistence that people must be able to accept deliberative decisions, makes their theory much better equipped than aggregative forms of democracy to justify political decisions to people who favour a different outcome.

The process of justification that Gutmann and Thompson set out is part of what they argue to be the greater contribution of deliberative democracy: “to help citizens treat one another with mutual respect as they deal with disagreements.”\textsuperscript{74} While the point of deliberations is not to evaluate moral beliefs, the deliberative group must set policy and inevitably this will require deliberants to choose between policy decisions that favour some practices over others. These practices may have strong connections to people’s first-order beliefs (such as the debate over implementing sex education classes in public schools where religious and secular beliefs often conflict) and when this is the case it is often easy for people to lose sight of the motivation for exchanging public reasons in accordance with deliberative criteria. Not all deliberants will agree with policy outcomes and some may be strongly opposed to them. When this is the case Gutmann and Thompson emphasize that deliberative democracy’s goal is for people to accept the legitimacy of the process (and the decision) and to recognize that, although they dislike the outcome, the policy itself is fair.

Gutmann and Thompson’s emphasis on second-order resolutions is important because it leaves the premises of deliberants’ first order theory intact. Because acceptance occurs at a second-order level (and does not touch upon conception of the good that define moral identity), deliberants are more likely to compromise at a level that they can accept. This makes it much more likely that deliberants will agree to engage in a collective debate that depends upon the public evaluation of

\textsuperscript{73} Gutmann and Thompson, Democracy and Disagreement, p 26.
important principles. A second-order emphasis also means that deliberants will be more likely to make policy decisions that everyone in the polity will be able to accept.

The accommodation of disagreement is particularly important. Gutmann and Thompson’s emphasis upon acceptance (rather than agreement) allows deliberative theorists to offer a strong response to those who question the theory’s ability to deal with the specific challenges that arise because differently-situated people have significant and sometimes fundamental disagreements about the best way to order institutions. The mutual respect that this requires is “a form of agreeing to disagree”; this kind of disagreement demands more than toleration and has the stronger requirement that deliberants adopt “a favourable attitude toward, and constructive interaction with” the people with whom they disagree. Mutual respect is integral to the requirement that deliberants justify policy decisions, and it shapes a process of reason-giving that is reciprocal in nature. This quality, they argue, is important if we are to treat all people as moral and political equals. Because of this requirement they can only make claims that are possible for other people to accept in principle: reasons that are accessible and that deliberants can evaluate on the basis of empirical knowledge.

Gutmann and Thompson’s approach to deliberative democracy is considerably different from Habermas’s. They ground their discussion of deliberative democracy in state institutions and have a considerably narrower scope than Habermas. Gutmann and Thompson argue that their deliberative perspective “explicitly rejects the idea . . . that deliberation under the right conditions – real discourses in ideal speech situations – is sufficient to legitimate laws and public policies” and they set out substantive constraints that restrict, more than other accounts of deliberative democracy, the kinds of reasons that deliberants can exchange. Gutmann and Thompson’s focus in Democracy and Disagreement is to develop principles that deliberants can use to assess the institutional design of

---

74 Gutmann and Thompson, Democracy and Disagreement, p.9.
75 While Gutmann and Thompson’s focus is on moral pluralism, the point re: accepting decisions and not the stronger requirement of agreement is relevant to conceptions of deliberative democracy that focus upon social pluralism.
76 Gutmann and Thompson, Democracy and Disagreement, p.79.
deliberative democracy\textsuperscript{78} and they locate these principles in what they call the deliberative constitution. The deliberative constitution consists of procedural and substantive constitutional principles “that public officials and citizens must not violate”; these principles allow for the deliberative group to provisionally justify “to citizens who are bound by them.”\textsuperscript{79} As the deliberative constitution governs all deliberative exchanges and the principles contained within it are used to evaluate the arguments that deliberants put forth, arguments that violate any of the principles within the deliberative constitution are unjustifiable and will not weigh in on any deliberative decisions.\textsuperscript{80}

Although Gutmann and Thompson argue that deliberations “should extend throughout the political process” and occur in “virtually any settings in which citizens come together on a regular basis to reach collective decisions about public issues”\textsuperscript{81}, it is clear that the balance of power lies with state institutions. Gutmann and Thompson argue that we should not “designate some institutions as forums for reason and others as arenas of power”; on the face of it this appears to avoid the problems of effective exclusion that may arise when this division exists, but they go on to explain that in practice this means that “legislatures as well as courts . . . should be designed to encourage these reason-giving practices.”\textsuperscript{82} While Gutmann and Thompson certainly encourage deliberation in “the land of middle democracy” (fora outside courts and legislatures), the kind of deliberation that occurs here is inevitably limited by the decisions that legislatures and courts make. Gutmann and Thompson’s primary focus is upon institutions of government. The division between reasoning and decision-making that they wish to avoid, it turns out, is within a deliberative group that, in its larger setting, stands apart from people in the public sphere.

\textsuperscript{77} Gutmann and Thompson, Democracy and Disagreement, p.200.
\textsuperscript{78} Gutmann and Thompson, Democracy and Disagreement, p.358.
\textsuperscript{79} Gutmann and Thompson, Democracy and Disagreement, p.199.
\textsuperscript{80} Gutmann and Thompson, Democracy and Disagreement, p.199.
\textsuperscript{81} These settings include: “grassroots organizations, professional associations, shareholder meetings, and citizens’ committees in hospitals and other similar institutions” Gutmann and Thompson, Democracy and Disagreement, pp.12-13.
\textsuperscript{82} Gutmann and Thompson, Democracy and Disagreement, p.358.
Gutmann and Thompson’s deliberative constitution has six theoretical principles in two mutually supporting parts. The first part is procedural and consists of reciprocity, publicity, and accountability; these principles address the kind, forum, and agents of reason-giving respectively. The second is substantive and contains principles of basic liberty, basic opportunity, and fair opportunity; these govern the content of deliberations. Taken together, these six principles – all of which constrain deliberants and must be applied in light of the other five principles – ought to help deliberants address disagreements in a way that satisfies deliberative legitimacy. The combination of procedural and substantive constraints are supposed to restrict the public reasons that deliberants can exchange in a way that ensures that these reasons will be inclusive, accessible, and treat all people as moral equals.

Reciprocity requires that all deliberants make claims on terms that others can accept in principle. This kind of reason-giving is valuable because it ensures that arguments will be accessible. It has its normative basis in mutual respect and its purpose is to establish fair terms of social cooperation. This fairness exists because the principle requires that deliberants limit themselves to making claims that other people can access; in turn, they must take other deliberants’ claims seriously (when they also limit their arguments in this way). Because of this requirement reciprocity (justly) excludes people “who refuse to press their public claims in terms accessible to their fellow citizens.” In limiting the scope of public reason to claims that meet the requirement of reciprocity, Gutmann and Thompson ensure that people’s moral claims do not have to compete with selfish ones. After these initial exclusions, reciprocity regulates the exchange of reasons on the weight of the arguments in terms of the degree to which claims demand things from others and the merit that these claims have when we consider them in light of competing claims. The principle of publicity ensures that all deliberants have access to the exchange of reasons and that the dialogue itself is one

83 Gutmann and Thompson, *Democracy and Disagreement*, p.52.
84 Gutmann and Thompson, *Democracy and Disagreement*, p.12.
85 Gutmann and Thompson, *Democracy and Disagreement*, p.58.
that only deals with political and public reasons (and not metaphysical or self-interested ones). Publicity is primarily valuable because it supports democratic accountability.\textsuperscript{87} The intent of publicity in making the exchange of public reasons transparent is to deter a politics of pure self-interest. As it tempers exclusions, publicity’s main contribution is to allow citizens to “decide together what kind of politics they want”\textsuperscript{88} and to do so in a way that effectively includes everyone. Finally, the principle of accountability asks that the reasons that deliberants give must be ones that “all those who are bound by the laws and policies they justify,” can accept. This principle is in place to make sure that the exchange does not favour some deliberants over others and, in order to ensure this, the exchange of reasons should address the claims of anyone who the laws and policies significantly affects.\textsuperscript{89}

While the procedural principles that Gutmann and Thompson set out all speak to important parts of deliberative legitimacy they do not add up to a properly inclusive account of deliberative democracy. This problem with Gutmann and Thompson’s deliberative constitution is one of effective exclusion and it manifests itself in two ways. First, the scope of deliberative democracy is too narrow, and Gutmann and Thompson’s emphasis upon moral disagreement, because it requires people to deliberate on the basis of moral claims that others can accept in principle, limits the scope of deliberations. Second, the way that Gutmann and Thompson weight their six principles favours reciprocity, and because of 1) the kind of reciprocity that Gutmann and Thompson seek (one in which deliberants have to make moral arguments accessible) and 2) the state-centric focus that sees deliberative institutions decide upon the kinds of reasons that people should exchange before discussions on the participants and the forum, Gutmann and Thompson’s principle of reciprocity has exclusionary effects.

Gutmann and Thompson’s prioritization of the principle of reciprocity asks deliberants to focus upon the kinds of reasons that they exchange before they take into account the agents and

\textsuperscript{86} Gutmann and Thompson, \textit{Democracy and Disagreement}, p.55.
\textsuperscript{87} Gutmann and Thompson, \textit{Democracy and Disagreement}, p.97.
\textsuperscript{88} Gutmann and Thompson, \textit{Democracy and Disagreement}, p.127.
forum of reason-giving; this is a problem because it limits the influence that marginalized people – who already need to overcome obstacles concerning the dominant (exclusionary) viewpoint – will have in deliberations. Gutmann and Thompson do not intend to prioritize reciprocity over the other principles (especially not to the extent that I argue they do); despite this, the result of reciprocity’s elevated status in their conception of deliberative democracy is that deliberants focus upon the kind of reasons that deliberants can offer before they fully take into account different people’s subject positions.

The principle of reciprocity exerts the strongest influence on the conditions of reason-giving because the way that Gutmann and Thompson set up the procedural principles forces deliberants to meet the requirement of reciprocity before they go on to address the requirements of publicity and accountability. As a result, publicity and accountability are both constrained by the limits that originate in the principle of reciprocity. The weighting of reciprocity in relation to the other procedural principles effectively allows an initial conception of the best kind of reason to predetermine the types of acceptable reasons that deliberants can exchange. Unfair exclusions are more likely to follow from Gutmann and Thompson’s procedural principles because an evaluation of the kinds of reasons that deliberants can legitimately exchange happens before deliberants work out the best way to draw the boundaries that set out the forums of deliberations (in the principle of publicity). Similarly, within their principle of reciprocity, deliberants already have an (incomplete) idea of what ought to count as an acceptable public reason. This is the case before the deliberants turn their attention to the principle of accountability, which addresses input from a wide range of deliberative agents with conflicting reasons. Gutmann and Thompson’s treatment of reciprocity, because it introduces an evaluation of the kinds of public reasons that deliberants ought to find acceptable before addressing the forum and agents of deliberation, creates a flaw in the procedural principles and upsets justificatory neutrality. If the kinds of reasons that people offer are subject to

89 Gutmann and Thompson, Democracy and Disagreement, p.129.
evaluation before we take into account the multiple subject positions that deliberants have then the
deliberative standard of what constitutes acceptable kinds of reasons is (to a considerable extent)
fixed at the level of agenda-setting (which is effectively determined by those more powerful
deliberants) before deliberants can take different perspectives on what constitutes an effective public
reason into account. With the principle of reciprocity leading, differently-situated people are
vulnerable because this approach does not address the problems that they may encounter when they
(as a direct result of Gutmann and Thompson’s construction of public reason) have to respond to a
predetermined conception of what a public reason ought to look like (as opposed to participating in
this initial construction when the deliberative group sets the agenda). Trying to influence a decision
on the kinds of public reasons that ought to carry weight after the fact places marginalized
deliberants in a position of procedural and structural inequality. While the extent to which the
principle of reciprocity can influence publicity and accountability (and the substantive principles) is
limited, the constraints that come from the other five principles are far weaker than the constraints
that reciprocity places upon them, and so the overall interpretation of the six principles depends very
much upon the regulatory work that reciprocity does.

A problem occurs when the deliberative group focusses upon the kinds of reasons that
deliberants can offer before it pays attention to the forum and agents of reason-giving. When the
kinds of reasons come first, people’s subject positions will inevitably influence the particular kinds of
reasons that they are likely to have. If the kinds of reasons that people are supposed to deliberate
upon are predetermined then deliberants, if they object to these kinds of reasons, will have a difficult
time changing them after they ask further questions about the impact that the forum and agents have
upon the conception of public reason. We see an illustration of this in the NWMO deliberations.
The problem with this example from a standpoint of effective inclusion is that the criteria framing
the deliberative talks neglects to take into account the main concerns of some of the deliberants.
This happens because the deliberative agenda was set before specific deliberants were invited to put
forth their reasons for and against nuclear waste management (an already limited part of a larger discussion on the legitimacy of nuclear energy itself). While deliberation about the priorities that deliberants should recommend to the AECL included different arguments that people might put forth, and where these were arguments that changed throughout the course of deliberations to reflect new information from other deliberants, the prior decision about the scope of deliberations themselves prevented deliberative participants from affecting the basic kinds of reasons that deliberants could exchange—hence the focus upon nuclear waste and not upon the larger question of nuclear energy that generates the waste (which, as I discussed in the previous chapter, there was significant disagreement over). In the NWMO case, as in Gutmann and Thompson’s deliberative framework, the evaluation of the kinds of reasons that ought to carry weight began before other factors were taken into account. In both cases the specific perspectives that differently-situated people brought with them to the deliberative forum did not affect the agenda and ultimately the deliberative group was unable to establish a fair deliberative playing field that could treat all people as equals because it effectively ruled this out with its initial framing decision.

In real-world deliberations, as in the NWMO case, the terms of deliberation are set by state officials and, once the terms are established, it is difficult to effectively challenge the starting point (which is why the NWMO deliberations did not discuss the generation of nuclear waste). One of the problems with the kind of participation that Gutmann and Thompson’s criteria encourages is that not all deliberants have the economic and communicative resources to convince deliberants that their reasons ought to carry more weight. The lack of deliberative resources that marginalized people have to challenge the initial formulation of the acceptable kinds of reasons has structural support in the way that Gutmann and Thompson weigh deliberative principles; their construction of public reason unduly limits the types of arguments that people can put forth, marginalized people suffer the disproportionate effects of this, and it poses a significant problem to the inclusive capacity of deliberative democracy.
The principles that Gutmann and Thompson set out are quite broad and deliberants can (and do) interpret them in different ways. This is the source of a considerable divide in deliberative theory. Indeed, much of the division within theories of deliberative democracy – as well as many of the criticisms levelled against it – stem from disagreements over the scope of, and restrictions within, the types of reasons that deliberants can exchange.\textsuperscript{90} Gutmann and Thompson attempt to limit the ambiguity that arises out of this broad scope by arguing that their procedural principles need to be read with their substantive ones. These principles further complicate the problems that their deliberative constitution runs into because, on the one hand, the emphasis upon equality and liberty support the effective inclusion of marginalized deliberants, but, on the other hand, since these substantive principles can be interpreted in different ways there is the risk that they will limit the kinds of reasons that deliberants can introduce – thus limiting deliberations without any prior discussion as to whether or not this exclusion is fair.

The flaw that their weighting of the principle of reciprocity creates is part of their deliberative constitution’s institutional design. As a result it is difficult (and highly unlikely) that Gutmann and Thompson can address it via provisionality (and therefore deal with this problem within the scope of their theory). In many ways, provisionality is an important normative addition to deliberative democratic theory. Provisionality – the acknowledgment that deliberative democracy’s procedural and substantive principles are subject to contestation and that, as such, deliberative democratic theory should include institutional measures to ensure that this reconsideration occurs\textsuperscript{91} – is necessary because deliberative processes are imperfect and because “most decisions are not consensual.”\textsuperscript{92} Provisionality is an important part of deliberative legitimacy. Gutmann and Thompson are right to argue that we need to acknowledge that deliberative decisions might not be

\textsuperscript{90} For a discussion of this see Chapter 5.
\textsuperscript{91} Gutmann and Thompson, \textit{Why Deliberative Democracy?}, pp. 97, 111.
\textsuperscript{92} Gutmann and Thompson, \textit{Why Deliberative Democracy?}, p.6.
the best ones and that they might, in fact, be proven to be wrong at a later date. The fact that provisionality “not only permits but encourages revision” of deliberative processes and outcomes is also encouraging in terms of social pluralism and the disagreement that deliberative theorists have over the constraints that we ought to place upon public reason. While provisionality does have many important benefits, addressing the problem with Gutmann and Thompson’s particular construction of public reason (that gives weight to the principle of reciprocity and the kinds of reasons that deliberants can exchange) is not one of them. Provisionality allows deliberants to revisit past decisions, but in Gutmann and Thompson’s deliberative constitution the moral basis of provisionality lies in the principle of reciprocity and, as such, it cannot escape the structural problems that occur because of the way that they favour the principle of reciprocity itself. Deliberants might be able to revise the kinds of reasons that ought to be acceptable, but marginalized deliberants will still be at a disadvantage because the principle of reciprocity does not address the root cause of their inequality. This cause lies in the initial formulation of the kinds of reasons that ought to carry weight and these reasons still have the advantage of the initial (effectively exclusive) formulation. The consequence of this is that any revisiting will occur in a situation where marginalized deliberants are, again, at a disadvantage.

Gutmann and Thompson would likely deny the impact that the weighting of reciprocity has upon public reason. The principle of reciprocity is not meant to stand alone. Gutmann and Thompson allow that reciprocity shapes the meaning of the other two procedural principles and that it influences the interpretation of liberty and opportunity, but they emphasize that it must function within the limits that these other five principles set out. As a result reciprocity does not stand alone

93 Gutmann and Thompson Why Deliberative Democracy?, p.111.
94 Gutmann and Thompson, Why Deliberative Democracy?, p.118.
95 Gutmann and Thompson, Why Deliberative Democracy?, pp. 97-111.
96 Gutmann and Thompson, Democracy and Disagreement, p.52.
97 The other five principles, Gutmann and Thompson argue, cannot be derived from reciprocity and are not subordinate to it “in any formal way” Democracy and Disagreement, pp.200-1. They also assert that “the moral standing of one kind of principle is not superior to or prior to that of the other kind” p.348.
in terms of the normative origin for the criteria of public reason, nor can it stand alone if deliberants were to attempt to interpret it this way. Indeed, any attempt to sever reciprocity from the constraints that the other five criteria impose would violate deliberative legitimacy. The problem with the principle of reciprocity, however, is that we do not need to try and sever reciprocity from the other five principles in order to get the kinds of undue influence that I discussed above. Without closer attention to agenda-setting and the way that principles of publicity and accountability (ought to) play here, the starting point will unfairly advantage more powerful deliberants – something that comes across in *Democracy and Disagreement* with the top-down examples that Gutmann and Thompson favour [Health Care policy in Arizona State Legislatures (Chapter 6) and Welfare reform in Wisconsin (Chapter 8), for example].

While the principle of reciprocity does not stand alone or apart from the other principles, the fact that deliberants cannot isolate reciprocity does not negate the power that the principle exerts. As the leading principle, reciprocity comes first and its influence has a significant domino effect. Deliberants read and interpret the other principles in light of what is implicitly acceptable within reciprocity itself. Even though deliberants must, in turn, read reciprocity in light of the other five principles, deliberants think about reciprocity first and so when they go back to read this principle in light of the other five they already have a biased notion of the role that reciprocity plays. This limits the extent to which they will be willing and able to re-read reciprocity. Despite Gutmann and Thompson’s claim that the other five principles are not derived from reciprocity, nor are they subordinate to it, reciprocity shapes them to an extent that is greater than Gutmann and Thompson acknowledge.

The substantive principles do rein in the procedural ones to a certain extent because there are limits on the ways that reciprocity can limit the deliberative starting point. However, since effective exclusions often result from seemingly fair and equal deliberative processes (which I will

---

98 Gutmann and Thompson, *Democracy and Disagreement*, p.52.
discuss later in the chapter), interpretations of what is free and equal still contain a considerable amount of room for disagreement. Just as importantly, substantive principles can only limit the exclusionary effects of Gutmann and Thompson’s weighting of reciprocity because the substantive principles themselves limit the discussion that can take place in deliberations. Again, given the different ways that deliberants can interpret equality and liberty, the substantive principles reinforce a restricted scope – a problem that is significantly compounded by Gutmann and Thompson’s moral pluralism framing that effectively excludes people.

The problematic weighting of the deliberative constitution is in large part, I think, due to Gutmann and Thompson’s focus on moral pluralism. Gutmann and Thompson’s requirement that deliberants must “seek agreement on substantive moral principles that can be justified on the basis of mutually acceptable reasons” is more demanding than agreement on interests (for example); this demanding requirement sheds light on their principle of reciprocity (insofar as they weight it) because of the constraints that limit the deliberative starting point. Gutmann and Thompson’s approach to the principle of reciprocity makes sense because it will be much easier for deliberants to agree upon moral principles if the starting point narrows the range of debate. Insofar as Gutmann and Thompson address the exclusionary role that power imbalances play in deliberations they do so in a way that foregrounds the benefits of deliberative democratic processes as a way to combat these power differentials. They argue that “[w]hen the representatives of disadvantaged groups are less successful in politics, it is rarely because of any disadvantage in deliberation. They argue that the lack of political success of marginalized groups stems not from a deliberative deficit but from a lack of power.” They then go on to argue that “[t]o the extent to which political struggle takes place on the basis of deliberation rather than power, it is more evenly matched,” and that “the deliberative playing field is more nearly level.” On their view marginalized people benefit from the moral pluralist focus because their use of moral appeals as “the weapon of the weak . . . gives them an

99 Gutmann and Thompson, *Democracy and Disagreement*, p.55.
advantage over the powerful.” The problem with Gutmann and Thompson’s reasoning here is that they take the advantages that deliberative democracy has over aggregative conceptions of democracy – and here I agree that deliberation does give marginalized people an advantage – but they do not do enough to consider the way that their own construction of the deliberative constitution entrenches the lack of power that marginalized deliberants have when they weigh the six principles to favour reciprocity (and therefore agenda setting that effectively excludes marginalized people). While deliberative democracy has an advantage over aggregative conceptions of democracy it is not enough that “the deliberative playing field is more nearly level.” The discrepancy in power that remains is one that has a significant impact upon effective exclusions and is one that a focus upon moral pluralism (as opposed to social pluralism) cannot sufficiently account for.

In many ways, reciprocity is a valuable principle. As Gutmann and Thompson explain, the principle of reciprocity requires that deliberants show good faith and fairly consider all reasons before they attempt to reach deliberative agreement. In doing so deliberants show their commitment to solving disagreements in a way that takes the challenge of moral pluralism seriously. The principle of reciprocity’s requirement that deliberants must “appeal to reasons that are shared or could come to be shared” by other deliberants is, while broad, a criterion that appears to have justificatory neutrality as its aim. The accessibility of reasons is an essential component of public reason. When Gutmann and Thompson ask that deliberants be able to share reasons they do not mean that people must share the belief that a reason is a correct reason, only that deliberants will recognize that a reason is public. Once a reason gets past this checkpoint deliberants must go on to grant the claim fair and equal weight in deliberations. Without the requirement of reciprocity deliberations would be over-inclusive, and self-interested, first-order, and unsupported claims would compete with public

---

100 Gutmann and Thompson, Democracy and Disagreement, p.133.
101 Gutmann and Thompson, Democracy and Disagreement, p.133.
102 Gutmann and Thompson, Democracy and Disagreement, p.14.
reasons, and without a way to negotiate between people’s different claims deliberative democracy would be unable to deal with moral disagreements.103

Gutmann and Thompson’s way of framing this deliberative response to disagreement obscures (at least) two things at the same time as they make an important contribution to deliberative democracy with their discussion of disagreement. First, the critique that I make against Gutmann and Thompson’s principle of reciprocity is not a critique against the principle of reciprocity as a general deliberative principle. This problem is not with the principle of reciprocity as a deliberative concept; my critique is of the context in which Gutmann and Thompson apply it. Moral pluralism limits the scope of deliberations and this limits the way that we can employ a principle of reciprocity so that what I argue ought to be a principle that exists to treat all people as moral and political equals ends up in Gutmann and Thompson’s reading limiting the kinds of reasons that people can make and consequently failing to treat all people in this way. Additionally, the specific way that Gutmann and Thompson deploy the principle of reciprocity is uneven and because it is weighed against their other principles it reinforces the influence of deliberants who already have more social and discursive power. If we take moral pluralism and the way that Gutmann and Thompson weigh reciprocity against other principles out of the equation then reciprocity proves to be a valuable principle that is necessary for a rich account of deliberative legitimacy.

The second (related) thing that Gutmann and Thompson’s account obscures is the extent to which deliberative democracy has the potential to effectively include people and increase marginalized people’s efficacy. This gets lost in Gutmann and Thompson’s account because of their emphasis upon moral pluralism. The benefits of a (general) principle of reciprocity and the inclusive potential of deliberative democracy are much more evident when deliberative theorists reframe the theory so that social, not moral, pluralism is the focus. I will discuss social pluralism in greater detail later on, but the obvious advantage to deliberative inclusion when we change the focus in this way is

103 Gutmann and Thompson, Democracy and Disagreement, pp. 93, 98.
that dropping the more demanding requirement that deliberants need to reach agreement on moral principles automatically opens up a wider space for both agreement and the accommodation of difference. Although the critiques that I level against Gutmann and Thompson seriously challenge their theory, their focus upon deliberative disagreement is of great importance to deliberative democratic theory. Their argument that deliberative democracy is well-equipped to address disagreement in a way that accommodates differently-situated people is sound in principle. Although they cannot live up to this promise with a focus on moral pluralism and with their deliberative constitution, the wider scope that social pluralism permits as well as the normative argument for reciprocity and mutual respect are very important principles for a richly inclusive account of deliberative democracy.

2.2.2 Inclusion and Exclusion

In her contribution to the essays centred upon Gutmann and Thompson’s *Democracy and Disagreement*, Iris Young supports the deliberative project but critiques their deliberative constitution. Young’s concern with the criteria that Gutmann and Thompson set out is that it is “too broad in one respect and too narrow in another.”\(^{104}\) Young’s two main critiques are that 1) Gutmann and Thompson ought to remove their substantive constraints because they unduly limit the deliberative agenda, and 2) they ought to supplement the procedural constraints with a principle of inclusion.\(^{105}\) Both of Young’s critiques are relevant to a larger discussion of effective inclusion and exclusion. I focus on Young’s second critique here because the idea of a fourth principle of inclusion addresses who can deliberate and how they can do so (considerations that we ought to address before we move on to the question of what kinds of arguments deliberants ought to be able to introduce in the deliberative group) and how the deliberative group ought to set the agenda. Young’s concern with Gutmann and Thompson’s procedural principles is that they are not sufficient to secure the legitimacy of

---

deliberative decisions. The shortcoming of their procedural principles could be addressed, Young argues, if Gutmann and Thompson were to supplement reciprocity, publicity and accountability with a principle of inclusion.106 Young’s concern is that it is possible to fulfil the three procedural principles without being inclusive,107 and given the critiques that I make regarding the deliberative agenda I think that this is certainly the case. Given this possibility, and since liberal societies often do badly in terms of inclusion, Young argues that if inclusion is a separate principle then deliberants will be better equipped to recognize and deal with “passive” exclusions that prevent the fair exchange of reasons amongst effectively free and equal moral agents.108

As Gutmann and Thompson respond to Young’s critique they maintain that their conception of deliberative democracy does not need a separate principle of inclusion. Their theory can operate without it, they argue, because they incorporate “the basic values of inclusion” in each of their procedural principles.109 On Gutmann and Thompson’s account, deliberants meet the requirements of inclusion when they interpret and apply the individual principles of reciprocity, publicity, and accountability. Because Gutmann and Thompson’s intent is that inclusion will guide a reading of their principles, they argue that the practical implications of their theory and Young’s coincide.110

Although the criteria that Gutmann and Thompson explicitly set out in their procedural principles do require that deliberants be inclusive, they are wrong to conclude that their treatment of inclusion offers the same normative protection against exclusion as does Young’s. Despite their insistence that deliberants must read inclusion into the criteria of deliberative democracy, the conception of public reason that Gutmann and Thompson put forth falls short of full and effective

105 Young, “Justice, Inclusion, and Deliberative Democracy”, pp. 151-152.
inclusion (for the reasons that I detail earlier). The greater part of “the basic values of inclusion” that Gutmann and Thompson would have us read into the procedural principles end up, for the most part, in just two of the principles: publicity and accountability (which is why the weighting of reciprocity is so problematic). This weighting goes to show that reading inclusion into the principles is not sufficient to ensure an effectively inclusive deliberative process. Because the principle of reciprocity influences the deliberants’ reading of other procedural principles, the structure of the procedural principles makes for an ineffective “reading-in” of inclusion.

The principles of publicity and accountability are more likely than the principle of reciprocity to carry the weight of the inclusion that Gutmann and Thompson ask us to read into the procedural principles. In order to meet the publicity criterion deliberants must have full access to information and a full range of perspectives from differently-situated deliberants. This means that deliberants need a deliberative arena or background that is necessary if they are (as they ought) to formulate policies only after careful deliberation on a full range of public reasons. Publicity demands a great deal in terms of inclusion because the forum for the weighing of reasons must include a broad range of moral and political perspectives.\footnote{Gutmann and Thompson, \textit{Democracy and Disagreement}, pp. 100-101.} Similarly, because the principle of accountability addresses the agents of reason-giving, all people whom moral disagreement affects must have an effective role if they are to meet the criterion. We can read inclusion into this criterion because 1) it demands that all people affected be present, and 2) it has the stronger requirement that people need to be able to impact the process if we are to speak of anything more than a minimal sense of accountability.

Publicity and accountability deal more specifically with inclusion than reciprocity because the focus of reciprocity is on the kinds of reasons that deliberants ought to find acceptable as public reasons. The kinds of reasons that we ought to find acceptable should take issues of inclusion into account, and Gutmann and Thompson do not suggest that inclusion bears any less significance for reciprocity. Despite this, Gutmann and Thompson are silent on the specific ways that inclusion
impacts acceptable kinds of reasons. This is problematic for two interrelated reasons. First, this silence gives the impression that inclusion does not factor into the criteria of public reason – or rather that it does so only indirectly (through the principles of publicity and accountability). Second, because Gutmann and Thompson overlook inclusion in their discussion of reciprocity it is not difficult to imagine deliberants running into problems – as they did in the NWMO case – trying to make the criteria of public reason inclusive when it is time for them to put deliberative theory into (Gutmann and Thompson’s) practice.

The problems that arise from the way that Gutmann and Thompson structure their procedural principles will not disappear if we add inclusion as a separate principle. Young is right to argue that we need inclusion to play a much more substantive role in deliberative democracy’s criteria, but we need to do more than “add in” a principle of inclusion to Gutmann and Thompson’s procedural criteria. Their construction of public reason, with the weighting of their criteria, is not conducive to a principle of inclusion that does the kind of work that Young wishes it to do. Instead what we need to do is change the way that we construct public reason (abandoning the skewed weighting that Gutmann and Thompson call for) so that deliberants do not encounter problems of exclusion when they set out the scope and requirements of public reason. Later accounts of deliberative democracy take up this challenge and are more successful because they shift their focus from moral pluralism to social pluralism (which expands the range of admissible arguments).

2.3 From Deliberative To Communicative Democracy: Iris Young

In response to the undertheorization of inclusion, several deliberative theorists revisit the normative discourse of deliberative democracy. These theorists are sympathetic to many of the arguments that Gutmann and Thompson set out. However, there are an increasing number of theorists who take issue with the theory’s ability to effectively include people and argue that deliberative democracy ought to pay more attention to this. These inclusion-based critiques point to a significant weakness in deliberative theory. In this section, I will focus upon the two problems that Young identifies.
First, she warns against deliberations that unfold according to an assumption of unity. Second, and relatedly, she critiques a culturally biased conception of discussion that silences and devalues people and groups. As I set out these critiques I will bring in other theorists and detail the ways that both problems relate to the rich standard of inclusion necessary to secure democratic legitimacy. I will then look at the solutions that Young proposes. The procedural requirements that she sets out let deliberants speak from their differently-situated positions and, in doing so, do a lot to address deliberative democracy’s shortcomings.\footnote{Iris Marion Young, “Communication and the Other: Beyond Deliberative Democracy,” in Seyla Benhabib (ed.), \textit{Democracy and Difference: Contesting the Boundaries of the Political} (Princeton: Princeton University Press, 1996), 2000, pp. 120-136.} The impacts that Young’s amendments have on the criteria of the deliberative exchange of reasons in deliberative democracy create a break significant enough to prompt Young to call for a broader deliberative theory of “communicative democracy” that is normatively stronger than previous accounts and does more to effectively include marginalized people and increase their efficacy in deliberations.

Young’s amendments take seriously the extent to which effective inclusion has to play a stronger role in order to secure a rich account of democratic legitimacy. Given that the foundation of deliberative democracy rests upon the requirement that people only make decisions that they can justify to one another by exchanging reasons – a requirement that depends upon the mutual benefits that follow from this way of organizing the polity – there is a strong collective component to deliberative democracy which leads deliberative theorists (for the most part) to speak of a common good. One main challenge to the legitimacy of deliberative democracy follows from the assumption that a particular type of unity is necessary if members of a deliberative group are able to engage in deliberations. The justification for this call to unity lies in the argument that all deliberants should reasonably expect to share an understanding of the goals that the political community ought to strive for. The assumption here is that deliberation at a second-order level depends upon a common good: something that unites all deliberants, that they can all agree to, and that will consequently allow
everyone to treat the reasons of others impartially (and therefore fairly). The hope is that a common
good will provide a thin, but sufficient, basis for the deliberative community.

The problem with this type of unity is that it does not do enough to address the problems of
effective exclusion that differently-situated people encounter in deliberations. The condition of unity
favours pre-existing power structures and the deliberative exchange of reasons takes place in a way
that requires marginalized people to fit into what the more powerful deliberants who effectively set
the agenda perceive to be what is common to all people and good for everyone – perceptions which
may (and often do) neglect particular experiences that challenge this “common” understanding as an
imposition of the status quo. This problem of effective exclusion deals with the kinds of reasons
that deliberants can exchange. Privileged groups often predetermine understandings of what they
think is “common” to everyone. The problem with this is that they interpret “common” as “most
frequently occurring” and not as something that everyone shares. While there will be instances in
which only some people face injustices that need remedying (justice requires that the deliberative
group address these even though everyone does not encounter them), the real problem to
deliberative democracy – that arises in this particular type of unity – is when the deliberative group
falsely assumes that all people share a common understanding when this is not the case. Deliberation, after all, occurs in a context where a majority who benefit from social structures is
responsible (even if unintentionally) for a significant part of the marginalization that minority groups
experience. Because existing common premises are the product of a socially unjust society, it is unfair
to use them as a basis for deliberative criteria – but impossible to avoid doing so if a common good
needs to exist before deliberations begin. As a result of the way that the deliberative group
determines the common good, what is supposed to be impartial discourse serves a particular purpose
in deliberation – to perpetuate the status quo.

When we insist upon a type of deliberative unity that appeals to impartiality and the
common good we reinforce the power that privileged people in society already have. The dominant
group is able to “convert its perspective on some issues into authoritative knowledge without being challenged by those who have reason to see things differently.”

This is Young’s problem with the requirement of unity. She argues that deliberative democrats need to understand conceptions of the good in light of institutionalized and systematic injustice, and then go on to challenge these in deliberative institutions. Deliberative theorists who insist upon unity may not intend their requirement to have this exclusionary effect, but it happens nonetheless. Deliberative democrats treat difference as a “problem” in need of a “solution”, and as a result they assume that “difference itself is something to be transcended, because it is partial and divisive.”

As Anne Phillips argues, however, “deliberation matters only because there is difference.” People disagree because they have different interests and values and any account that does not address this in a way that allows all people to resolve disagreement collectively – a process that requires effective inclusion – undermines the foundation of justification and reason-giving that deliberative democracy rests upon.

When the deliberative group looks to a common good as a normative foundation on which they should structure fair and impartial deliberations then the foundation itself limits the inclusive capacity of the deliberative exchange of reasons. The sense of unity derives from the types of public reasons that the majority of deliberants think are fair; however, because this “can easily mask subtle forms of control” deliberative democrats need to rethink the way that deliberative criteria are able to effectively include all deliberants.

Melissa Williams critiques deliberative democracy on the grounds that it is not sufficiently inclusive. In The Uneasy Alliance of Group Representation and Deliberative Democracy (2000) Williams takes a sympathetic approach to the deliberative project. She recognizes that deliberative democrats and marginalized groups are “natural allies” but she argues that there are important tensions between the

---

113 Young, “Communication and the Other: Beyond Deliberative Democracy,” p.399.
two. As Williams examines the (moral and social) pluralist challenge to deliberative democracy she critiques deliberative conceptions of reasonableness and she argues that until deliberative democrats change their account of reason-giving to take social difference into account then the account of deliberative legitimacy is incomplete.\(^\text{118}\) Much of her concern about the shortcomings of deliberative democracy deals with how difficult it actually is for the deliberative group to agree upon what should count as reasonable and what should not.\(^\text{119}\) The requirement of impartiality prevents deliberants from participating in a way that enables them to communicate across and from their differences, it makes deliberations less equipped to be fully and effectively inclusive, and it is more likely to systematically produce outcomes that continue to marginalize marginalized groups.\(^\text{120}\) Lynn Sanders makes the same argument, but with the stronger claim that deliberation can work undemocratically and will disadvantage people “who are less likely to present their arguments in ways that we recognize as characteristically deliberative.”\(^\text{121}\)

When deliberants have to bracket their difference then the requirement of unity causes exclusion. If differently-situated deliberants adhere to this kind of unity then they will not be able to speak from their own subject positions because deliberative criteria exclude the type of partial discourse that marginalized groups need in order to challenge the biases that follow from conceptions of the common good. If, on the other hand, deliberants try to draw from their particularly-situated set of experiences then their arguments will not be taken seriously because they do not fit deliberative criteria. Either way, marginalized deliberants will not be able to participate effectively and as equals.


\(^{119}\) As Williams notes: “the judgements that another's arguments are reasonable is a much more contingent matter than deliberative theory suggests”, “The Uneasy Alliance of Group Representation and Deliberative Democracy,” p.137.

\(^{120}\) Williams, “The Uneasy Alliance of Group Representation and Deliberative Democracy,” pp.129-131.

A better approach – one that does not undermine deliberative democracy’s stated goal of inclusion – is to treat difference not as something that marginalized people ought to bracket, but as something that deliberants can, and should, draw from in deliberations. This approach is in line with James Bohman’s argument, in response to the effective exclusions that marginalized deliberants face, that deliberative theorists ought to focus upon people’s “equality of effective social freedom, understood as equal capability for public functioning” (emphasis in original).122 Young’s proposed solution to the problem that she identifies with deliberative unity is for deliberants to treat difference as a resource. Difference is “social perspective as it arises from group differentiation.”123 Differently-situated perspectives exist because of different relations in social power and resources, and are normatively significant because these differences are systematic. Differently-situated people experience oppression and disadvantage because of these structurally-entrenched power imbalances.124 Given that deliberative inequalities exist because marginalized people have been excluded from decision-making systems (and resources, etc), it is important that deliberative theorists treat difference in a way that challenges these existing power structures.

Young argues that we should not look at claims that people make from their specific social group positioning as ones that obstruct justice, but rather as ones that expand the range of democratic communication and improve the quality of deliberations.125 Without the constraints of a falsely universal standard of reason-giving that depends upon impartiality, a move to change the institutional requirements of deliberative democracy to include dialogue across difference will serve three functions. First, it makes the case for effective inclusion by requiring that all deliberants appeal to justice. Second, it offers a better measure of inclusivity because when we ask deliberants to reach

---

125 Young, Inclusion and Democracy, pp.82-83.
understanding on the basis of people’s partial perspectives then the deliberative group, as a collective, has a better understanding of what is necessary to meet the requirement of deliberative legitimacy. Finally, the knowledge that dialogue across difference – because it aims to form a new, and better developed, understanding of people’s claims – better equips the deliberative group to reach more inclusive and just solutions.126

Contrary to deliberative theorists’ arguments for adhering to a common good, the contributions that difference as a resource makes strengthen the inclusive capacity of deliberative democracy. This is because, as Young points out, the necessary unity that the deliberative group actually needs is much weaker than deliberative theorists assume. This weakness turns out to be a strength because the kind of (weaker) unity that Young calls for is the kind of unity that everyone builds. Instead of requiring that people fit into a preconceived mould imagined by the dominant group, when we use difference as a resource (using the criteria that Young sets out and which I will discuss shortly) people create the standard of unity as a collective and in doing so it is more inclusive.

Young highlights a second problem with the deliberative criteria of reason-giving. This issue, which relates to the previous one, is a culturally biased conception of discussion that silences and devalues people and groups. The problem here is with the way that deliberants can exchange reasons. In addition to requirements that people must exchange reasons at a second-order level, the assumption is that deliberants need a particular environment in order to be able to weigh different public reasons fairly. Following from the conception of deliberative fairness, there is an expectation that the reasons that deliberants exchange be calm and rational statements of fact, and an assumption that any deviation from this raises suspicion that deliberants may be “too emotional” and therefore unable to fairly evaluate different public reasons. This assumption is problematic given the first problem that Young identifies. Since deliberants need to be able to speak from their differently-situated positions in order for deliberants to exchange reasons as equals and in order to make

126 Young, “Communication and the Other: Beyond Deliberative Democracy” p.128
effective use of difference as a resource, the deliberative group’s criteria ought not to favour some ways of presenting public reasons over others. The ways that deliberants present their claims has a great deal to do with how seriously the deliberative group responds to the public reasons and the weight that they give them.

As Young notes: “the ideal of disembodied and disembedded reason that [impartiality] presupposes is a fiction”\textsuperscript{127} and the rhetoric that deliberative democrats are quick to denounce in favour of impartial reasons is in fact an aspect of all discourses.\textsuperscript{128} Deliberative democrats reject rhetoric because they fear that people who employ rhetoric do so to manipulate other deliberants and to compensate for insufficiently meritorious arguments. Rhetoric appeals to people’s emotions, and this evokes a strong (negative) reaction from deliberative theorists. Deliberative democrats do not want to be persuaded, they want to be convinced via a rational deliberative exchange of reasons. There is a fear that because rhetoric appeals to people’s specific emotions that it: 1) is necessarily at odds with the general (and accessible) measure that deliberants use to determine whether or not the reasons that people put forth are public reasons; and 2) is a threat to deliberation because it draws on emotions and the fear with emotion is that it is the antithesis of reason. On this view rhetoric presents a threat to deliberative fairness. The critique of this however – and the problem for deliberative democracy – is that this negative view of rhetoric denies the partiality of the majority’s own preferred processes and criteria. As Young notes, calm and rational discourse itself is a distinct form of rhetoric (albeit one that we do not like to acknowledge as such). That is, the assumption that the most reasonable people – and the people most likely to have the best arguments – are those who present their arguments in technical and dispassionate ways is itself a particular form of persuasion.\textsuperscript{129} If this is the case, as Young argues it is, then we need to pay normative attention to the way that this rhetoric works to maintain the dominant group’s power.

\textsuperscript{127} Young, Inclusion and Democracy, p.63.
\textsuperscript{128} Young, Inclusion and Democracy, p.64.
\textsuperscript{129} Young, Inclusion and Democracy, pp.64-5.
Young takes up this question in the response that she sets out to the second problem with deliberative democracy. She expands the conception of democratic discourse to incorporate three modes of communication – greeting, rhetoric, and narrative – that deliberants can use to address effective exclusions. These three ways of engaging in deliberation expand the inclusive potential of deliberative democracy. They challenge the assumption that deliberations, in order for them to be legitimate, must only consist of calm and dispassionate instances of reason-giving. This new way of engaging in deliberative communication challenges deliberative assumptions about what ought to count as a reason and it does so in a way that uses difference as a resource, giving differently-situated people the tools and the institutional recognition to engage in deliberation in a way that they previously could not, thus expanding the inclusive capacity of the deliberative group.

The purpose of greeting is to publicly acknowledge deliberants. With this public acknowledgment, people are meant to communicate their recognition of fellow deliberants in their differently-situated positions – to speak with them as they are, instead of restricting dialogue to “common” beliefs that effectively exclude people. The kind of acknowledgment that Young looks to with greeting is the explicit (and formal) action of recognizing others and their subjectivity, both in terms of acknowledging that we have an obligation to deliberate with others and that we ought to deliberate in a way that respects people’s particular attachments. The idea behind this is that once deliberants greet others there is a better chance at fostering trust. This is why greeting is particularly important between people whose current relationship is marked by conflict.

Given that one of Young’s critiques is that rhetoric is an aspect of all discourses, she calls for deliberative democrats to acknowledge this and she looks at the specific ways that everyone (not just the dominant group) can use rhetoric to build a more inclusive conception of reason-giving. The purpose of rhetoric is to call attention to claims that deliberants make and the purpose of reframing rhetoric as a form of inclusive political communication that strengthens deliberative legitimacy is to

---

130 Young, Inclusion and Democracy, pp.52-80.
call attention to the particular ways that “speakers and audience [are] in relation to one another.”\textsuperscript{132} When we use rhetoric to establish this then differently-situated people can find a logical place to begin to exchange reasons. This positioning requires that claims and arguments (and the ways that people present them) change according to the specific audience/speaker.\textsuperscript{133} Through explicitly recognizing the partiality of different modes of communication Young argues that rhetoric will increase the inclusive capacity of deliberations in two ways. First, it will expose the implicit values in “impartial” discourses (something that we continually need to do in order to combat the assumption that rhetoric does not have a place in deliberations). Second, it will legitimize the modes of communication that differently situated people need to use in order to communicate their claims effectively.

Narrative is an important component of inclusive political communication because it helps deliberants to reach a common understanding. If deliberants lack a shared and accessible starting point then they will not be able to exchange reasons in a way that contributes to the same deliberative goal. Similarly, when people disagree upon the facts that they are discussing (the extent of police profiling and discrimination amongst different ethnic communities, for example) or when traditions read differently across cultures (the dominant belief in North America is that looking people in the eye is a sign of respect and looking away implies guilt, whereas in Aboriginal communities looking away is a sign of deference and respect\textsuperscript{134}) and when these misunderstandings cause problems and hinder the pursuit of justice. When deliberants do not share deliberative starting points they speak past one another and will not be able to exchange public reasons. The purpose of narrative is to help marginalized people communicate their arguments by legitimizing modes of dialogue that help to bridge this communicative gap. Deliberants use narrative to present their

\textsuperscript{131} Young, \textit{Inclusion and Democracy}, pp. 53, 57-62.
\textsuperscript{132} Young, \textit{Inclusion and Democracy}, p.53.
\textsuperscript{133} Young, \textit{Inclusion and Democracy}, p.67.
\textsuperscript{134} Sherene Razack. \textit{Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms}. (Toronto: University of Toronto Press, 1998), pp.73-75.
claims in a way that is accessible to deliberants who are initially unable to understand the starting point of the argument. Narrative (or storytelling as Young calls this in her 1996 discussion) aims to re-present the argument that deliberants have in a different, more accessible form. Narratives are designed to appeal to shared experiences and values, and the fact that people do so in an unconventional (storytelling) format ought not to detract from the normative work that this does in making the public reasons behind people’s stories accessible. The aim of reframing a claim in a different format is to reach a set of shared understandings so that all deliberants can pursue arguments with a shared starting point.

These new modes of deliberative communication are not only acceptable in terms of deliberative criteria but are also necessary in terms of democratic legitimacy. This expansive conception of deliberative criteria calls for significant conceptual changes to deliberative democracy. These amendments reframe deliberative expectations to such an extent that Young breaks with the label deliberative democracy and calls her amended version of deliberation “communicative democracy”. Young uses this new terminology in order to “indicate an equal privileging of any forms of communicative interaction where people aim to reach understanding.”135 Young’s communicative framing is not meant to replace the exchange of deliberative reasons with a less rigorous process of communication; instead, her intent is to allow a broader range of deliberants to be able to engage in an exchange of public reasons from their differently-situated positions. This deliberative reframing helps differently-situated people to avoid the unfair implication that they are unreasonable and better equips deliberative democracy for socially plural societies.

John Dryzek emphasizes the importance of deliberative institutions that enable people to communicate across differences. Like Williams and Young, Dryzek rejects calm and reasoned argument as “unnecessarily constraining.” In the discursive strand of deliberative democracy that he favours, Dryzek calls for a more expansive approach to deliberative communication and supports

135 Young, “Communication and the Other: Beyond deliberative democracy”, p.124-5.
contestation that occurs across discourses.\textsuperscript{136} Dryzek envisions this contestation taking place in the public sphere, and his discussion of the relationship between formal and informal deliberations is particularly beneficial to deliberative theory, as I will argue in Chapter 6. In the meantime, the kinds of communication that Dryzek calls for to support this more expansive, contestatory conception of deliberative democracy are ones that enable deliberants to “communicate across difference without erasing difference.”\textsuperscript{137} In particular, Dryzek argues that we should expand the ways that deliberants can engage in deliberation by including such things as “rhetoric, humor, emotion, testimony or storytelling, and gossip.”\textsuperscript{138} The only condition on deliberation, he argues, ought to be the much less demanding criterion “that communication induce reflection upon preferences in a non-coercive fashion.”\textsuperscript{139} While the implications of this requirement need unpacking (and more specific criteria are helpful in terms of incorporating those modes of communication that will help to prevent exclusion), Dryzek’s recommendations for a discursive form of deliberative democracy fit well with Young’s communicative approach.

Dryzek does, however, have reservations about Young’s discussion of inclusive political communication. Dryzek’s main reservation is that greeting, rhetoric, and storytelling\textsuperscript{140} may run into the same kinds of problems that (traditional) deliberation does.\textsuperscript{141} Before he accepts the benefits of the kind of inclusive political communication that Young sets out, Dryzek argues that deliberative democrats need to establish that these new forms of communication “do not simply generate other kinds of hierarchy.”\textsuperscript{142} When Dryzek looks at greeting, rhetoric, and storytelling, he offers examples to demonstrate the ways that they can work to undermine inclusion. As he does this he applies two

\begin{itemize}
  \item \textsuperscript{136} Dryzek, \textit{Deliberative Democracy and Beyond: Liberals, Critics, Contestations}, p.vi.
  \item \textsuperscript{137} Dryzek, \textit{Deliberative Democracy and Beyond: Liberals, Critics, Contestations}, p.3.
  \item \textsuperscript{138} Dryzek, \textit{Deliberative Democracy and Beyond: Liberals, Critics, Contestations}, p.1.
  \item \textsuperscript{139} Dryzek, \textit{Deliberative Democracy and Beyond: Liberals, Critics, Contestations}, p.2.
  \item \textsuperscript{140} Dryzek is responding to Young’s 1996 discussion, where her terminology differs to the 2000 discussion that I draw from above.
  \item \textsuperscript{141} Ian O’Flynn also shares this concern. He focuses his objections upon the potential misuse of narrative at the hands of political elites who may use it to manipulate deliberations and advance particular ethnic interests while repressing others. \textit{Deliberative Democracy and Divided Societies}. (Edinburgh: Edinburgh University Press, 2006), pp.137-8.
\end{itemize}
tests: first, he looks at ways that coercion, or the threat of coercion, can lead to inequalities, and second he looks at ways that these forms of communication can fail to connect the particular to the general (and thus fail to meet deliberative criteria and perpetuate biases). Dryzek’s purpose in this analysis is to emphasize that alternative forms of political communication – while they can have their benefits – should have only conditional admittance into deliberations. The test that he applies in his analysis shows us that, at a minimum, we need to ask questions about the ways that deliberants employ a conception of inclusive political communication. The problems of exclusion that he unearthed in his analysis prompt him to ask what we might do about this type of failure. While his answer draws heavily upon the work that we ought to do in the public sphere, his discussion also points to the need for deliberative criteria that account for this expansive conception of political communication.

2.4 Deliberative Criteria

The differences between the normative criteria of deliberative democracy and communicative democracy are the result of significant changes in the scope of and constraints upon the theory. The communicative democratic criteria that Young and Dryzek set out do not remedy all the problems that deliberants encounter when they engage in a deliberative exchange of public reason – indeed, serious problems of effective exclusion and efficacy remain and I will address this in the next chapter. The conceptual amendments that they do make, however, begin to address some of the significant problems that make deliberative democratic criteria unable to account for social pluralism, and significantly they draw normative attention to some of the obstacles that marginalized deliberants face when they try to influence the deliberative agenda and decision. In this way, communicative democratic theory does important work to begin to address the role of power and influence in

---

142 Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, p.67.
143 Dryzek *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, pp. 68-71.
deliberative democratic theory. In contrast to Gutmann and Thompson’s procedural and substantive principles, deliberative criteria that emphasize inclusion by encouraging the kind of contestation that is particular to a socially pluralist exchange of reason-giving are much better equipped to offer a richer account of deliberative legitimacy. The criteria that Young sets out (as an introduction to *Activist Challenges to Deliberative Democracy*, which I will discuss in the next chapter), still appeal to principles of reciprocity, publicity, and accountability and still incorporate requirements of equality and liberty. What sets them apart from Gutmann and Thompson’s criteria is the way that Young expands how a process of reason-giving ought to take place and, in particular, how she reframes the criteria of reason-giving to emphasize that we can only meet requirements of reciprocity and legitimacy if deliberations are effectively inclusive and address social pluralism.

I set out Young’s normative criteria as a reference to the kind of procedural constraints that ought to guide deliberations. The list is not meant to be exhaustive. While it does provide a good overview of the core set of criteria that should guide deliberations, I build upon this criteria in later chapters, both by looking at the more specific recommendations of other deliberative theorists, and also in terms of expansive readings of deliberative criteria that strengthen the inclusive potential of deliberative democracy and the extent to which it can foster marginalized people’s efficacy even further. For now though I will set out Young’s criteria, along with a justification of what I think is the most inclusive approach to deliberative theory and therefore the one best equipped to deal with problems of exclusion and a lack of efficacy. In the next chapter I will take this conception of deliberative democracy as my starting point when I continue my critique of deliberative democracy, this time focussing on the unique challenge that protest presents to deliberative legitimacy.

---

144 Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, p.68.
145 I will develop this later on: see especially Chapters 5 and 6. This contribution of communicative democracy takes seriously critiques of the kind that Jack Knight and James Johnson make when they critique deliberative democracy for failing to pay sufficient attention to people’s inability, brought on by the structures of deliberations that take place in a context of background inequality, to have equal access of political influence in deliberations. “What Sort of Equality Does Deliberative Democracy Require.” In *Deliberative Democracy: Essays on Reason and Politics*, eds. James Bohman and William Rehg. Cambridge, MA: MIT Press, 1997), p.280.
i) Deliberants should propose solutions to their problems and offer reasons for them

Young’s first criterion notes that deliberants ought to take constructive steps to address the problems that they identify. Any solutions that they propose must, of course, be ones that they can support with public reasons. Whenever the deliberative group addresses a problem, it is important that the framing of the problem is one that takes all affected people’s perspectives into consideration. Because differently-situated people are the most familiar with the issue(s) that they face, this means that they are best able to explain the particular injustices that they want to address. When deliberants propose solutions, they must frame their arguments according to this criterion in order to meet the conditions of mutual respect\footnote{Gutmann and Thompson, Democracy and Disagreement, p.43.}; this mutual respect only meets standards of deliberative legitimacy when the deliberative majority stops speaking for marginalized people and when differently-situated people are able to participate without bracketing their real concerns. Deliberants must use reasons that are acceptable from a normative democratic standpoint so that all concerned parties can participate effectively in deliberations. The types of claims that people bring to deliberations undergo evaluation in order to ensure that deliberants’ arguments appeal to justice\footnote{Young, Inclusion and Democracy, pp.28-31 and “Activist Challenges to Deliberative Democracy.” In Political Theory 29:5 (2001) p.672.}; this appeal to justice depends upon the kind of inclusion that Young calls for. In other words, deliberants do not satisfactorily appeal to justice if the “appeal”\footnote{This does not mean that all deliberants have to present their claims in a way that includes all relevant concerns; this requirement would be far too demanding (and not possible given the particular knowledge that affected groups have). Rather the claim is that the deliberative group as a whole needs to ensure that they include all affected people and that deliberative criteria of reason-giving allow everyone to present their arguments.} overlooks relevant public reasons. Issues surrounding equality, freedom, and rights take precedence over deliberation that seeks to satisfy individual preferences. If communicative democracy is to avoid marginalizing and effectively excluding people then the deliberative process must have safeguards in place to ensure that the more powerful participants do not unfairly set the agenda or undermine people’s voices.

ii) Deliberants should criticize others’ proposals and remain open to criticism
This second criterion requires that deliberants engage with the arguments that others put forth. Part of what it means to engage with arguments is to listen and respond to the public reasons that other deliberants offer. In turn, the dialogue that this is supposed to encourage means that deliberants will be held accountable for their claims. The consequence of this is that they will be more likely to advance reasons that appeal to justice (given the challenges that this engagement will provoke) rather than to offer selfish justifications. The arguments that deliberants offer need to be subject to public examination so that deliberants can determine if an argument has its basis in acceptable public reasons. Once deliberants establish this, further engagement is necessary to determine the weight that people’s public reasons ought to play when it is time for the deliberative group to evaluate them and reach a deliberative decision.

iii) Deliberants must bracket the influence of unequal power

Creating a level deliberative playing field is a criterion common to the various accounts of deliberative democracy. At the same time, deliberants consistently face difficulties facilitating equal and effective participation and as a result a lot of people level criticism at deliberative theory. The reason to mitigate unequal power is obvious; if deliberants have unequal power, and if the distribution of this power systematically marginalizes people, then deliberants will not be able to evaluate the merit of public reasons fairly, all people will not be able to participate as equals, and the deliberative process will not be inclusive. Different theorists try to pursue deliberative equality in different ways. Young’s proposal to restrict the unequal use of power in deliberations takes on a particular institutional focus. She argues that we can minimize barriers that stand in the way of inclusion if we amend deliberative criteria to expand the kinds of dialogue that the deliberative group takes seriously and if we widen the scope of acceptable public reasons. Institutionally, Young’s

149 Gutmann and Thompson, Democracy and Disagreement, pp.95-127.
conception of deliberative (communicative) democracy changes with the two amendments that she proposes.

**iv) Deliberants must bring all potentially affected people together to make decisions**

The normative values that guide communicative democracy state that “decisions ought to be made by processes that bring all the potentially affected parties or their representatives into a public deliberative process.” This requirement ties full participation with legitimacy. Claims are only valid if people present them in a deliberative group where deliberants can monitor each others’ public reasons. Without this kind of monitoring there is no way to ensure that deliberations adhere to normative criteria. Only a fully inclusive debate can bestow legitimacy upon public policies, and the only way to ensure inclusivity and equality is to monitor the exchange of reasons. The deliberative process is only legitimate if the deliberative group functions in such a way that it can ensure that all affected people can participate as free and equal deliberative partners, and if the reasons that deliberants exchange are public reasons that merit sufficient attention and careful evaluation in the deliberative group.

I endorse the deliberative criteria that Young sets out and think that they are helpful in developing a richer account of inclusion that is better equipped to deal with social pluralism. Her criteria, however, are not sufficient to address all effective exclusions and questions of efficacy and more work needs to be done on this front. As a result of Young’s last criterion, arguments that come from outside a deliberative group are illegitimate and this is where my main concern with the (rich) inclusive capacity of deliberative democracy lies. Because there is no way to monitor the kinds of reasons that people offer when they leave the deliberative group, deliberative democracy cannot take external claims into account because the risks to deliberative legitimacy are too great. As the reasoning behind Young’s fourth criterion sets out, the fear is that without deliberative monitoring,

---

151 Young, “Activist Challenges to Deliberative Democracy,” p.672.
self-interested and first-order preferences would upset the fair exchange of reasons and deliberants would not be able to engage in the process of justification that is necessary for deliberative evaluation. This last criterion, as I will explain over the next two chapters, is both a necessary requirement and, at the same time, it poses a significant problem of exclusion because the way that most deliberative theorists currently read it is to rule out protest as incompatible with deliberative democracy.

The central question of this chapter is the extent to which deliberative democratic theory is inclusive. The answer to this question has great significance for deliberative legitimacy. If deliberative theorists cannot put forth deliberative criteria that work to effectively include all affected people then the theory fails on its own terms. The three approaches to deliberative democracy that I look at in this chapter each make important contributions to deliberative theory and each speaks specifically to issues of inclusion.

The normative attention that Habermas gives to the public sphere stands in contrast to Gutmann and Thompson’s focus on administrative bodies. As Habermas expands the scope of deliberative democracy he hopes to draw from the contestatory nature of the public sphere as a way to strengthen deliberative inclusion. He hopes to do this by linking the public and administrative spheres together. The circulation of power that is essential to Habermas’s theory takes input from the public sphere and, through a process of communicative power, uses it as a check on the administrative sphere. Legitimacy, in this process, depends upon the interaction between the two spheres. The problem with his theory, however, is that Habermas fails to provide sufficient institutional protections for the process. Habermas’s faith in an ideal speech situation is overly optimistic. The way that he envisions his process unfolding does not have the necessary checks to ensure that differently-situated people will be able to communicate the gravity of their claims either
in the public sphere or to the administrative sphere. The result of this is that Habermas’s theory fails to be effectively inclusive.

Gutmann and Thompson’s emphasis on deliberative disagreement is particularly important in terms of the space that they make for deliberative contestation. Without the argument that contestation is necessary for deliberative legitimacy the theory would be out of touch with the practical context in which we need to apply it and deliberations would not be able to include people in a morally and socially plural society. Despite their contribution in this area, Gutmann and Thompson’s conception of deliberation does not do enough to promote effective inclusion, especially at the level of agenda-setting. Their focus upon moral pluralism and the weight that they assign to the principle of reciprocity in this context narrows the scope of deliberations in a way that denies marginalized people’s effective inclusion and efficacy. As a result their conception of deliberative democracy is insufficiently inclusive.

The third approach to deliberative democracy takes up the challenge to the theory that comes from the failures to account for differently-situated people. Young revisits the normative criteria of deliberative democracy and, after she identifies two problems with the deliberative standard of unity and the requirements that govern deliberative discourse, she makes two amendments to deliberative democracy that she presents as a new, normatively stronger, deliberative theory of communicative democracy. Young’s call to use difference as a resource goes a considerable way to address the challenge of social pluralism. Similarly, her call for an expansive conception of inclusive political communication that encourages greeting, rhetoric, and narrative as forms of deliberative communication also enriches the inclusive potential of the theory.

It is this third approach to deliberative democracy that, I argue, is the one that is best equipped to effectively include all affected deliberants and to strengthen their efficacy in the deliberative group; it is therefore the one that is best able to meet the requirements of deliberative legitimacy. For this reason I set out the normative criteria of deliberative (communicative)
democracy that Young puts forth. While Young’s criteria do leave out some important considerations, the principles that she sets out are sound. There are, however, problems with the application of her principles, particularly with the fourth one that only accepts arguments if they occur within deliberations. Because problems such as the ones that I discussed in the context of Gutmann and Thompson’s procedural principles could arise in communicative democratic exchanges of reasons, it is important that communicative democratic criteria do not rule out the possibility that deliberants might not give due weight to people’s reasons as they present them in the deliberative group. My intention in setting out these criteria is to offer a picture of the best available normative account of deliberative democratic theory. In later chapters I will revisit these criteria to add to and critique them as I move on to address the challenges to effective inclusion and efficacy that arise when we look at the role (or lack thereof) of protest in deliberative theory.
Chapter 3

PROTEST: A PROBLEM FOR DELIBERATIVE DEMOCRACY

One of deliberative democracy’s main concerns is to ensure that deliberative processes treat all people as equals. This is the motivation for the theory and the drive behind many of the critiques and amendments that I discussed in the previous chapter. However, in the drive to develop a theory that takes full and effective inclusion seriously, deliberative theorists’ focus upon the deliberative group unintentionally results in effective exclusions. Deliberative democrats, by and large, do not discuss protest. The few who do acknowledge protest do not explain how deliberative democratic theory can reconcile deliberative criteria with this external protest. The implicit argument for this omission is that because the theory is so inclusive all affected people with legitimate claims will be able to make their arguments from within the deliberative group; the assumption is that people will be able to do so effectively so that when it is time for decision-making no one’s argument is undervalued and all people can accept the outcome. On this view, protest is unnecessary. Deliberative democracy’s procedural criteria are sufficient to ensure that people will not need to go outside the deliberative group to appeal their lack of efficacy in the deliberative group. If people do not accept the deliberative decision, then theorists argue that it is because they make unreasonable or unconvincing claims; deliberative democrats assert that this does not pose a problem for the legitimacy of deliberative theory because unreasonable claims are incompossible with an account of democratic legitimacy and unconvincing arguments do not succeed because they are weaker (and less meritorious) than the prevailing ones. Deliberative theorists do not discuss protest because the argument is that in violating deliberative criteria people also violate the normative justification for (legitimate) protest and, as such, are rightfully excluded from the deliberative group without recourse. This conclusion is, I argue, problematic. While the deliberative group must exclude people who do not respect the fundamental normative criteria of deliberative democracy, it does not follow that if
people leave the deliberative group they no longer value deliberative principles. This deliberative assumption does not take seriously the procedural problems that arise in the course of deliberations and that give marginalized people with limited efficacy good reason to leave deliberations. Deliberative theorists, I argue, should allow both for the possibility that some deliberants face effective exclusions, and that marginalized people’s lack of efficacy may, even if they are effectively included, trap them in a process of deliberation where they know, from the start, that their participation will not affect the outcome. When deliberants cannot remedy these problems from within the deliberative group then these problems of effective exclusion and efficacy may be so significant so as to motivate them to leave the deliberative group in protest. The way that the deliberative group draws boundaries of inclusion and exclusion currently means that the scope of deliberative inclusion works to effectively exclude marginalized deliberants who lack efficacy in the deliberations and to exclude protestors who, in other democratic defences of protest, warrant a role in democratic politics. This exclusion is, of course, at odds with deliberative democracy’s own normative justification.

The reason for this oversight, I argue, is that deliberative theorists place too much faith in deliberative processes. While normative criteria are necessary if deliberants are to weigh competing claims fairly, I take issue with the “either or” approach that deliberative democrats take -- specifically the claim that deliberants either exchange public reasons from within the deliberative group and which are therefore legitimate, or that people’s reasons are illegitimate because they are not public reasons and/or because they are external to the deliberative group. What makes this assumption really problematic are the inadequate avenues of recourse that are available for people who argue that particular deliberations unfold on grounds of effective exclusion and who argue that their claims do not carry sufficient weight in (or are altogether excluded from) the deliberative group.

In this chapter I offer a democratic defence of protest and I extend this defence to deliberative democracy. I challenge the deliberative assertion that if we are to consider arguments
legitimate then people must present and defend their claims within the deliberative group. This requirement is problematic when deliberants take it to mean that public reasons cannot exist – at all – outside it. On the one hand, it is easy to see why deliberative democracy makes this requirement. Part of deliberative legitimacy, after all, requires that deliberants justify their reasons to each other, which is something that can only occur (with any reliability) within a deliberative group in which people are held accountable to deliberative criteria. On the other hand, this requirement means that deliberative democracy cannot account for any contestation that might arise within the deliberative group and given the obstacles that marginalized people need to overcome this kind of contestation is inevitable. If the objections that typically give rise to protest (in democratic theory’s argument for civil disobedience) arise in relation to the deliberative group then deliberative democratic theory ought to respond to them. Deliberative democracy, after all, does not have a special claim that renders it immune from these arguments and there is no good reason why we should expect deliberative processes to be failsafe. Deliberative or not, democratic theory must be able to respond to protest. Instead of trying to make sure that deliberative democracy will not need to offer a justification for protest (of the kind that aggregative accounts offer), deliberative theorists need to acknowledge the deliberative group’s limitations, admit that protest is sometimes necessary in deliberative accounts of democracy, and offer a specific account of the way that the deliberative group ought to respond to protest.

As I set out the problem I will outline the ways that protest is different from disagreement and I will argue that the difference, which rests upon the deliberative group’s potential for effective exclusion and people’s lack of efficacy within the deliberative group, is a serious one that calls deliberative legitimacy into question. I argue that there are, contrary to deliberative democracy’s arguments, structural ways to enable people who dispute deliberative decisions and who suffer effective exclusion or a lack of efficacy to challenge their position by engaging in protest from outside the deliberative group.
After I offer this normative defence of protest I turn my attention to the deliberative literature in this area. I focus primarily on Iris Young’s *Activist Challenges to Deliberative Democracy* (2001). Young is sympathetic to the need to account for protest and so I look at her recommendations as to the way that deliberative democrats ought to approach it. Despite her positive acknowledgement of protest’s contributions, Young fails to address the specific problem that it poses to deliberative democracy. I set out this problem and I argue that if deliberative democrats do not address it then their claims to inclusivity do not do enough to establish democratic legitimacy and to treat all deliberants as equals. As a result, we are left with a serious flaw in deliberative theory.

3.1 Disagreement

Protest is categorically different from disagreement. In deliberative democracy not everyone has to agree with a proposed course of action; in fact, as Gutmann and Thompson illustrate, disagreement is something that deliberative democracy deals with particularly well. The task of people in the deliberative group is to reach a mutually justifiable decision. People do not have to agree that it is the best decision, but it must be one that everyone can accept. The distinction between agreement and acceptance is important. Deliberants are unlikely to reach decisions by consensus. Deliberative theorists do not expect this because deliberants will often disagree about the best way(s) to resolve issues and this is why decision-making mechanisms are a part of deliberative democracy. Disagreement, while it can make the process a complicated one, does not pose a problem for deliberative theory but is an inevitable part of a conception of deliberative democracy that takes social pluralism seriously. All public reasons belong in deliberations regardless of the dislike that some people may have for particular arguments, and deliberants have to negotiate amongst these conflicting public reasons in order to settle upon a mutually justifiable decision. Agreement makes deliberations easier but it is not necessary. The only requirement is that the deliberative group must
only reach a decision after a full and inclusive exchange of all public reasons and that the process and
decision are ones that all people who are affected by it can reasonably be expected to accept.
Acceptance will often carry with it reservations, but continued disagreement over the best policy
does not affect the legitimacy of the decision, and deliberants deal with reservations by making
deliberative decisions provisional and ensuring that people can revisit them at later dates.

Gutmann and Thompson detail the benefits that follow when a democratic process not only
accepts but encourages disagreement. Disagreement is beneficial to deliberative democracy because
it enables deliberants to clarify their opposition to conflicting public reasons, which is necessary if
they are to engage in a productive and legitimate debate. Clarifying the nature of the dispute helps
deliberants to make sure that they argue on the basis of public reasons and that they understand how
competing claims impact one another.

While it is true that addressing disagreements (instead of avoiding them) might exacerbate
the problem, there are criteria in place to guide discussions of disagreement that are consistent with a
principle of reciprocity. Although disagreements are not easy to deal with, engaging in reasoned
discussion is preferable to bargaining and/or avoiding the disputed issue(s), neither of which offers a
principled solution to the problem of disagreement and both of which place marginalized people at a
disadvantage.

As Gutmann and Thompson argue, deliberative democracy’s approach to disagreement is
still beneficial even when deliberants offer public reasons that some people think are morally wrong.
Intuitively, this may seem strange given that one of the main requirements for deliberative legitimacy
is that all deliberants can accept an outcome. Instead of stopping deliberations when there are moral
objections it is still possible for those who are in deep disagreement to reach a deliberative decision;
this is the case because the criterion for inclusion in the deliberative group is not the moral
correctness of an argument, but rather its moral respectability. This distinction goes back to the

152 Amy Gutmann and Dennis Thompson, Democracy and Disagreement (Cambridge, MA: Belknap Press, 1996).
importance of dealing only with second-order agreement. Deep disagreement is acceptable within a deliberative framework because people do not have to compromise their values to deliberate at this level. Deliberative democracy, because it focuses on whether arguments are morally acceptable (and not morally “correct”), widens the scope of deliberative debate to include people who have deeply conflicting values. Deliberations are able to proceed because the deliberative group reframes debate from a discussion of the correctness of these values to the less-demanding criterion that deliberants agree as to whether or not people’s arguments meet the criteria of public reason. This move is important because finding the best way to accommodate disagreement when the conflict deals with issues that are of public concern is important for people who want to continue to live in the same political community. In order to meet standards of deliberative legitimacy, deliberants must address the full range of public reasons, regardless of whether or not they agree with all of them. Importantly, deliberants must give all public reasons equal consideration before they can fairly decide, as a collective, which public reasons offer the best justification for a deliberative decision.\textsuperscript{154}

Given the above scope of inclusion, deliberations will inevitably include incompatible public reasons. While deliberants cannot resolve the first-order conflict (and ought not to try), deliberation might still help them to find areas of agreement. When we deal with disagreement on a second-order level there are things that people on both sides of the debate can take from the disagreement and work with in order to find at least some mutually acceptable policies. This accommodation is particularly important given that second-order resolutions are the best that deliberants can reasonably hope for. The benefits of this approach are significant, as Gutmann and Thompson argue when they discuss abortion. While there is fundamental disagreement upon the issue because the first-order problem is irreconcilable, a shift to second-order debate provides ground for deliberative agreement.

\textsuperscript{153} In Gutmann and Thompson’s case but also the principle of reciprocity in general.
\textsuperscript{154} Gutmann and Thompson, \textit{Democracy and Disagreement}, pp.2-3.
Deliberation in cases of fundamental disagreement such as abortion depends upon the distinction between a morally mistaken argument and a morally acceptable one.\textsuperscript{155} Parties on both sides of the abortion debate can accept that the others’ argument counts as a public reason despite their fundamental disagreement with the reason itself. Pro-choice deliberants can accept the argument that “innocent people should not be killed” is a public reason, and they can also accept that anti-abortionists judge the foetus to be a person from conception and that they take this assertion as the basis for their argument against the permissibility of abortion. Insofar as it is not unreasonable to make this link (neither side on the abortion debate can irrefutably reject the others’ claims), at the same time they do not agree with the anti-abortion deliberants’ assertion that “the foetus is a full-fledged constitutional person”\textsuperscript{156} and because of this they disagree with the link that anti-abortion deliberants make between innocent people and the foetus. The result of this is that even though they disagree with the argument to ban abortion they can accept that deliberants who oppose abortion have valid public reasons. From the other side of the debate, anti-abortion deliberants can accept the argument that “women have a basic liberty to live their own lives and control their own bodies”\textsuperscript{157} is a public reason and they can accept that pro-choice deliberants ground their arguments in this public reason. Anti-abortionists, however, do not find this argument persuasive when this right conflicts with the life of the foetus. The fundamental disagreement occurs despite the fact that the opposing sides ground their arguments in public reasons and therefore offer justifications that are, according to deliberative democracy’s criteria, normatively acceptable. The fundamental disagreement arises when deliberants situate these public reasons within the context of their larger moral frameworks – frameworks that have their basis in (conflicting) first-order principles. Because deliberants cannot agree upon a moral foundation that would help them to reconcile the dispute over women’s autonomy and the moral rights of the foetus, deliberants on both sides disagree with the

\textsuperscript{155} Gutmann and Thompson, \textit{Democracy and Disagreement}, p.3.
\textsuperscript{156} Gutmann and Thompson, \textit{Democracy and Disagreement}, p.74.
\textsuperscript{157} Gutmann and Thompson, \textit{Democracy and Disagreement}, p.74.
moral correctness of opposing public reasons. As a result they cannot, in good conscience, accept the implication of the other sides’ public reasons.

In the abortion example, the conflicting premises create a fundamental and irreconcilable disagreement about the permissibility of abortion. At the same time, because the reasons that both sides offer are public reasons, and because neither side can show that the claims that the other side makes “are implausible on their face”158, they cannot reasonably reject the conclusions that the other side draws from these public reasons. Once people concede that another viewpoint, however distasteful they might find it, counts as a public reason then deliberative democratic criteria dictate that there is an obligation to deliberate on the basis of these public reasons.159

The point of inclusion and continued deliberative dialogue when deliberants disagree is not to try and change some deliberants’ minds. The reason for engaging in deliberations despite fundamental disagreement is twofold. First, deliberation is important in order to try to make those who vehemently disagree with a viewpoint understand why some deliberants hold a particular position. The hope then is that with this knowledge deliberants will be better equipped to treat each other with mutual respect.160 This combined with the information that deliberants learn when they continue to deliberate despite deep disagreement makes them better equipped to benefit from the second reason to deliberate, which is to formulate policies that address areas of mutual concern. When deliberants discover that parts of their conflicting moralities overlap, they can then “try to minimize the range of their public disagreement by promoting policies on which their principles converge.”161 In the case of abortion, practical agreement is possible in areas such as sex education

158 Gutmann and Thompson, Democracy and Disagreement, p.74.
159 Whether or not deliberants will be able to do so is another question. The case of abortion is a good example of why deliberative democracy needs to offer a normative account of protest since people on both sides of the abortion debate will not be able to (simultaneously) affect deliberative policy and, because of this, might contest their efficacy in deliberations.
160 Gutmann and Thompson, Democracy and Disagreement, p.9.
161 Gutmann and Thompson, Democracy and Disagreement, p.89.
and social and economic support for parents, and can play an important role in addressing some of the issues that surround abortion.\textsuperscript{162}

In cases of fundamental disagreement, opposing sides have strong views on the content of the policy and disagree over which public reason is the “correct” one. However, deliberants still agree that the issue is of great significance and should be subject to policy debate within the deliberative group. The fact that disagreement does not stop deliberative proceedings is a distinct strength of deliberative democracy. Instead of avoiding the debate-stopping conflict that disagreement typically poses, deliberative democracy enables citizens to pursue a political resolution for some aspect of the problem. In doing so the theory is better equipped to deal with the types of deep disagreement that characterize a socially pluralistic society.

\section*{3.2 Protest}

Protest is categorically different from disagreement. Simply holding a different opinion on a particular policy issue does not qualify one as a protestor. If this difference of opinion translated into principled protest then theories of deliberative democracy would be weak and a practical application of deliberative values would be unworkable. As I set out above, in cases of deliberative disagreement deliberants may object to the conclusions that people draw from public reasons and disagree with the deliberative decision; however, they do not object to the deliberative agenda, nor do they dispute the legitimacy of the outcome. People may disagree so strongly with the deliberative decision that they register their dissent. This internal dissent is, however, compatible with deliberative democracy’s criteria and with continued deliberation. When people register dissent and choose to remain part of the deliberative group their willingness to engage in future discussions indicates that they still acknowledge the legitimacy of the process. This disagreement is an inevitable part of any conception of democracy that utilizes decision-making mechanisms and the deliberative group has ways to deal with internal dissent. Provisionality (which I discussed in Chapter 2 and will revisit later on in this

\textsuperscript{162}Gutmann and Thompson, \textit{Democracy and Disagreement}, pp.82-90.
chapter) gives people a reason to deliberate even when they disagree with particular outcomes because the institutional structures of deliberative democracy allow them to revisit these contentious issues as new developments arise and as attitudes change over time. As a result, no decision ever has to be final and disagreement’s consequences are mitigated by this. It is the ability to engage in deliberation on the basis of public reasons, to accept a solution (even if it is a partial one), and to remain within the deliberative group even when there is deep disagreement that sets disagreement apart from protest.

Protestors challenge the legitimacy of a process that does not take what they argue to be important seriously (and by seriously I mean that deliberants’ arguments are either effectively excluded or they lack efficacy in the deliberative group). This poses an entirely new set of concerns for deliberative democracy. The fundamental difference between deliberative disagreement and protest is that in instances of protest the nature of the disagreement centres upon the legitimacy of the deliberative process. Protestors challenge the legitimacy of the deliberative group to include marginalized people as equals and the deliberative group is unable to contain the disagreement as internal dissent; because the objection deals with effective exclusion – a serious challenge to deliberative legitimacy and treatment as equals – protestors withdraw their support.

When I discuss protest I mean conflict that: i) originates within (or because of) deliberative proceedings, ii) centres upon disagreement surrounding either what the deliberative group accepts as a public reason, or, as is more typically the case, the weight that people’s arguments have in deliberations in terms of agenda-setting, scope, and the deliberative outcome, and iii) deals with issues of marginalization and exclusion that prevent people from having efficacy within the deliberative group so that iv) deliberants leave the deliberative group in protest and pursue the issue from outside of and in opposition to the group.

When protestors try to persuade the deliberative group to engage with them they have to deal with the deliberative group’s conception of reason-giving – both because they have to persuade the
deliberative group that their arguments ought to play a stronger role in it and because deliberants are suspicious of arguments outside the space that the deliberative group designates for an exchange of reasons. The conception is, as I have said, one in which deliberants have to justify the claims that they make upon each other via an exchange of public reasons. Arguments have to be public in this way so that they meet criteria of mutual justifiability and so that deliberants can make sure that people do not bring selfish or private claims to the deliberative group because these reasons are not ones that deliberants can justifiably use when they make claims upon others. Deliberative legitimacy requires this mutual justifiability and this is absent in private and selfish claims. On top of this deliberative requirement that people exchange public reasons is the additional requirement that the deliberative group treat all people as equals. In addition to forming the normative justification for a deliberative account of protest, the requirement that the deliberative group must treat all people as equals complicates the deliberative requirement of reason-giving. Deliberative theorists disagree about the specific role of public reason in deliberative democracy and about what it means to effectively include people. While I will offer an extended discussion of this in Chapter 5 and explain why this disagreement further contributes to deliberative democracy’s need to offer a normative justification of protest, it is useful to set out a general idea of the account of public reason here because the criteria that regulate the deliberative exchange of reasons are what deliberative democrats point to as a justification for not engaging with protestors. In this chapter I will offer a brief account of the areas of contention within conceptions of public reason, set out the basics of what I accept from the idea, and then I will turn my attention to the specific areas where protestors clash with the deliberative group over a combination of the (specific) deliberative criteria of reason-giving and their effective exclusion from and lack of efficacy within the deliberative group when it comes to agenda-setting and deliberative decisions.

There are three main areas where deliberative theorists disagree over the specific way that we ought to set out requirements of public reason. Disagreement exists over the scope of public
reasons, the constraints that we ought to place upon them, the force that public reason ought to have in deliberation in terms of requirements for inclusion (can people only participate in deliberations if they have public reasons?), and with the place (if any) for strategic argumentation in deliberative exchanges. All of these points of contention bear upon issues of effective exclusion and efficacy. When it comes to the scope of public reason, deliberative theorists disagree not only over the best way to resolve disagreements, but upon the kinds of disagreements that the deliberative group ought to address. This is particularly evident when we look at the kinds of pluralist challenges that deliberative theorists focus upon. Gutmann and Thompson focus upon moral pluralism, whereas Monique Deveaux focuses upon cultural pluralism. As I discussed in Chapter 2, a deliberative focus upon moral pluralism has a narrower scope than deliberations that focus upon cultural or social pluralism (which I will discuss in greater detail in Chapter 5). The second area of contention – constraints upon public reason – presents us with a decision to place either weak substantive constraints upon the exchange of public reasons (the reasons must just be reasons), or to place stronger substantive constraints that are meant to help deliberants negotiate between different claims and help them to evaluate the reasons themselves (ie: not as many reasons are admissible in deliberations).\(^{163}\) Again, these constraints deal with the kinds of reasons that deliberants can exchange. The decision that the deliberative group makes when setting out constraints on public reason allows either a greater or lesser number of claims into the deliberative group. Finally, deliberative theorists disagree over the kind of participation that the deliberative group ought to support, particularly in terms of the extent to which people can exchange reasons that appeal to interests and which are strategic and “manifestly political” (to borrow from Deveaux) in nature,\(^{164}\) or whether deliberants ought to stick to exchanging reasons that concern issues and values (as Gutmann

\(^{163}\) I discuss this in Chapter 5. This brief discussion comes from Weinstock.

and Thompson do). This disagreement is further complicated by disagreement over whether or not people who do not (at least initially) have articulated public reasons can participate in deliberation.

Since deliberative theorists disagree on the kinds of reasons that are acceptable in deliberations, it only makes sense that people within the deliberative group also disagree (hence the fact of protest and the need for a larger deliberative framework to take this into account). I take the above disagreement on theorists’ accounts of public reason as a justification for the deliberative account of protest that I set out. My own position on the above debates (that I will develop after I set out more substantive discussions of the above issues) is that the deliberative group ought to adopt a wide scope of public reason. I favour framing deliberations so that they deal with social pluralism, support substantive constraints (to an extent), and I argue that deliberations benefit when they are more inclusive – when clearly-articulated public reasons are not a requirement for initial participation and we frame exchanges to deal with people’s interests (instead of a sole focus upon people’s values). There is, however, more to be said about this, and about whether or not (and I think there is) room for an account of deliberative criteria of reason-giving that balances the tension between the requirement of public reason with the fact that (because of the disagreements that I note above) some framings of public reason in deliberative exchanges of reason-giving will effectively exclude deliberants (by narrowing the scope or by increasing constraints) and some will limit their efficacy. The short explanation for the solution for this is that deliberative criteria of reason-giving do not need to exclude all reasons that do not meet the criteria of public reason; instead, the deliberative group can hear people out, particularly when the reasons that they offer are ones where they try to articulate why people in the deliberative group ought to listen to them. I will pick up on this in Chapter 5.

There are several reasons why deliberants may legitimately declare their opposition to the deliberative group. The first instance is when deliberants argue from different starting points. This poses a problem because, logically, two simultaneous but non-overlapping lines of argumentation on
a single issue will not allow deliberants to exchange public reasons in a meaningful way. Disagreement about the starting point is different from disagreement on the decisions that the group reaches. When there is disagreement over the starting point then the ability for the deliberative group to give equal consideration to all public reasons is at stake. If the deliberative group chooses to frame deliberations one way at the expense of another, and without convincing the other deliberants that this is the normatively best decision, then deliberants can no longer claim to engage in a process of mutual justification. Instead, the deliberative dialogue assumes a bias to a particular framing that all deliberants demonstrably do not accept. When this happens then the process is no longer legitimate.

On the face of it the problem that arises here is one that should not be too difficult for deliberative theory to deal with. Disagreements are not uncommon in deliberative democracy, and if it is the case that the deliberative group frames discourse in a way that limits the reasons that deliberants can put forth to those that fall under the scope of this particular framing then the effectively excluded deliberants ought to be able to register their complaint. Assuming that there was deliberation on the initial framing decision and as long as the dissenting deliberants can show that their starting point rests upon a public reason then their objection to the deliberative group choosing to frame deliberations in a particular (exclusionary) way ought to be one that they can pursue within the deliberative framework. Since mutual justification is a requirement of deliberative legitimacy, effectively excluded deliberants ought to be able to turn their objection into an appeal (based on the normative criteria of deliberative democracy) to reframe deliberations to take these effectively excluded arguments into account and the rest of the deliberative group ought to take these objections seriously. Simply put, deliberations should not be able to continue if the deliberative group demonstrably fails to meet deliberative criteria.165

The problem, of course, is not as easily resolved as this would suggest. Disagreement over the framing of deliberations poses a problem to deliberative democracy because in practice it is not as simple as lodging this kind of complaint. The rejected starting point can (and often will be) be one that the deliberative group recognizes as a valid framing grounded upon public reasons. This has two implications. First, when there is no disagreement over whether or not a claim is a public reason, the complaint is not that deliberations exclude people (via their reasons) outright by dismissing the validity of their claims. The deliberative group’s justification for selecting one starting point over another is that the preferred starting point is the best (most productive) one and that because deliberations have to begin somewhere, the better argument (starting point) won. Consequently, they argue that there is no reason to oppose the deliberative group on the grounds that deliberants do not recognize the fact that dissenting deliberants have (public) reasons to frame deliberations differently.

An instance of two conflicting starting points poses a problem for public reason. The second implication brings us back to the question of why the problem of conflicting starting points poses a problem to deliberative democracy. The deliberative group accepts that the rejected starting point has a basis in public reasons (meeting, on the face of it, the criteria of public reason); at the same time the deliberative process unjustifiably excludes deliberants if the deliberative group does not give both starting points sufficient (and equal) consideration. What makes this disagreement over the way to frame deliberations significantly different from disagreement over the weighting of public reasons in general (evaluation, of course, being necessary to deliberative democracy) is the discussion that this initial framing decision precludes. Whenever deliberants cannot accept the starting point, and when deliberations continue on the terms set out by this particular framing, then anyone whose public reasons depend upon the rejected starting point faces effective exclusions in the deliberative group.

Of course, some starting points are better than others, and there will be cases in which deliberants can resolve the initial disagreement over how to frame deliberations without encountering
this more serious problem. There is a difference, however, between one starting point having better (normatively stronger) reasons than another, and unfairly marginalizing particular framings so that deliberants lack efficacy. The point, of course, is that in the latter case the deliberative group overlooks particular framings because of insufficient deliberation on the merits of the framing itself and this creates a foundation of deliberative inequality. Disagreement on the starting point leads to protest when the deliberative group cannot offer convincing reasons – reasons that all deliberants can accept – as to why the deliberative group ought to frame deliberations around one starting point at the expense of another. If there is not an acceptable justification as to which starting point ought to prevail, then the deliberative group does not take the public reasons of a section of deliberants seriously and deliberative legitimacy is jeopardized.

At this point it is useful to discuss two examples that help to clarify the problem. I mentioned earlier in the chapter that instances of fundamental disagreement in the abortion example do not pose a challenge to deliberative criteria of reason-giving. This is the case because deliberants can accept (or cannot reject) either claim as a public reason. Here deliberants disagree about the conclusions that follow from the premises that deliberants from either side set out, but the premises themselves have their basis in first-order principles. Because people cannot engage in deliberation on first-order principles, the abortion example sidesteps the problem of conflicting starting points that I set out above. In the case of abortion deliberants do not argue from either starting point. Deliberants cannot draw conclusions from the public reasons that either side sets out and so the deliberation that actually occurs on abortion takes place over issues that do not have their basis in first-order premises and do not conflict in a way that poses this kind of problem. Instead, deliberants can discuss issues that relate to abortion but that deal with the issue on a second-order

---

166 Deliberants will not always be able to know which is which, and there is always the possibility that weak premises will, after the deliberative group rejects them, lead people to engage in protest. In cases where the argument is weak it is unlikely that engaging in protest will have an affect upon polity decisions. Misguided protest, as long as it does not violate normative democratic principles, is justifiable (though perhaps foolish).
level and can deliberate upon related childcare and sex education issues, neither of which (necessarily) pose the same problem.

Disagreement over the starting point of an argument poses a stronger problem to deliberative democracy when this occurs at a second-order level. Practically speaking, the course of deliberative action that a group chooses is likely to mobilize those deliberants who disagree with the starting point to organize around their disagreement. This dissent (when it takes the form of protest and when deliberative theory does not have a mechanism to deal with protest because deliberative democracy requires that deliberants take all public reasons into account) has its basis in public reasons, making the objection to the deliberative group all the more problematic from a normative standpoint.

The second example that helps to clarify the problem that conflicting starting points poses to deliberative democracy is the public reason-based disagreement between the direct action group AIDS Coalition to Unleash Power (ACT UP) (that formed in New York City in 1987 to protest government and corporate inaction on issues surrounding HIV/AIDS) and the Reagan administration over the desirability of a needle exchange program in New York City. One of ACT UP’s major and long-running acts of civil disobedience is its grassroots needle-exchange program. The Needle Exchange Program (NEP) began in February 1990 in response to the high rates of HIV infection amongst intravenous drug users (IVDUs) in New York. The high infection rates were due to a lack of information as to how IVDUs could prevent the spread of HIV and to the limited availability of clean needles and bleach. The underlying problem – and main source of these two and ensuring that this kind of protest can take place is a necessary part of what it means to take protest seriously.

167 The NEP operated out of 5 sites: 2 in Brooklyn, 2 in Manhattan, and 1 in the Bronx and was the first street-based NEP in the city. NEP distributed between 10,000 and 15,000 needles a month and had an exchange rate of 50-60%. The program cost the group approximately $3,000 per month. ACT UP/NY Records. Reel 24; Box 32, Folder 11. *The Mainline* (Housing Works needle exchange newsletter). Vol.1: NYC. August, 1992.

168 ACT UP was involved in a court battle over their NEP program. During the trial one witness testified that ‘addicts share needles because they cost between $2 and $5 on the black marker and because it is a crime to possess the needles.” ACT UP/NY Records. Reel 24; Box 32, Folder 11. Thomas Moran. “Good Intentions on Trial.” Bergen NJ Record. November 7, 1991.
factors in infection – were the anti-drug laws that made effective HIV/AIDS preventative measures and education campaigns an illegal activity because they contradicted the administration’s stance on drug use. One obvious solution to this problem was to call for the decriminalization of drug paraphernalia (which ACT UP did – a suggestion that was not well-received in the era of “just say no” and “narcoterrorism”). At the same time ACT UP engaged in direct action employing two main strategies. The first consisted of a series of educational zaps. Members of ACT UP embarked on a poster campaign, pasting over subway posters in violation of city bylaws and making literature that gave step-by-step instructions on how to sterilize syringes available to the public. 169 The second approach involved “direct action public health and civil disobedience” in which activists set up the first syringe-exchange programs in New York, taking clean syringes and sharps containers to areas that IVDUs frequented. 170 ACT UP’s arguments for the decriminalization of syringes failed to impact official policy and, more significantly for this specific challenge to deliberative democracy, their appeals failed to impact the agenda in any meaningful way, thus foreclosing any real chance of dialogue that might lead to the desired policy change. Instead, ACT UP worked to ensure that their direct action campaigns met with criminal prosecution so that they could challenge the official policy. 171


170 Alan Greig and Sara Kershner. “Harm reduction in the USA: a movement toward social justice.” In From ACT UP to the WTO: Urban protest and community building in the era of globalization, Benjamin Shepard and Ronald Hayduk (eds.), (New York: Verso, 2002), p.362. ACT UP’s activities show that protestors are not only capable of coming up with solutions to the policies that they oppose, but that the solutions can be practical and effective (as we see with the NEP in NY). Liverpool implemented a NEP prior to the HIV epidemic and, at a time where rates of new infection were high in other large cities, saw very low HIV infection rates. ACT UP/NY Records. Reel 24; Box 32; Folder 10.

171 Although the police were aware of ACT UP’s NEP, they were reluctant to arrest members of the group, both because there was police support, and because the police were concerned about needle sticks if they were to arrest people. In the end, ACT UP worked with a reporter to announce a needle exchange and spoke with police: this particular action was coordinated to draw attention to the NEP (ACT UP members had “a banner, and a table, and all the things that we would never do when we were actually doing a needle exchange, because no one would come over to something with a banner”) and promised police that the only needles would be 1) clean, sterile needles in packages, and 2) in a sharps container. Gregg Bordowitz. Interviewed by Sarah Schulman. ACT UP Oral History Project. Interview 004 (December 2002), pp.41-43. The typical police response to the NEP was to ignore the situation, even though the exchanges occurred a couple of times a week and at several different locations (and even though the police were well aware of this). Russel Pritchard. Interviewed
Both ACT UP and the Reagan administration had public reasons for and against the program. ACT UP argued that the availability of clean syringes was necessary from a public health standpoint: that in precluding harm-reduction in the midst of an epidemic governmental policy undermined issues of public health. A needle exchange program was necessary, they argued, in order to minimize the spread of AIDS as much as possible. Here the risk to public health outweighs the desire to discourage drug-use at all costs. Countering this, improving the quality of life, and removing stereotypes for those infected with HIV/AIDS is a more important goal than the exclusive focus on preventing drug use. On the other hand, the Reagan administration framed the issue in terms of the harm of drug addiction and the implicit support that endorsing a needle-exchange program would give to drug users. This would negatively impact both drug users and people who live in areas where drug-related crime is a problem. The administration made drug paraphernalia (and not just the drugs themselves) illegal because they argued that even tacit support for drug-related items would be tantamount to supporting drug-use itself, and would lead to governmental endorsement of the harms that they were trying to prevent. The administration did not want to be (or appear to be) contradictory by banning drug use but supporting drug-related programs (other than rehabilitation).172

This conflict is interesting for deliberative democracy because it unfolded and was ultimately settled along lines of public reason. The move in the conflict from an initial framing that excluded ACT UP’s public reasons to one that ended up revisiting both starting points and engaging in a dialogue at this foundational level offers some important lessons for deliberative theorists concerned with public reason-based effective exclusions. The administration’s position on the public benefits of discouraging drug use did not change. What is important from a deliberative democratic

---

172

by Sarah Schulman. ACT UP Oral History Project. Interview 021 (April, 2003), p.20. ACT UP members were put on trial for drug paraphernalia charges as a result of their NEP activities. They were found innocent in March 1991. ACT UP/NY Records. Reel 24; Box 32; Folder 11. Dan Rosenfeld. “AIDS Activists Found Innocent.” Jersey City Journal. April 8, 1991.
standpoint is that government officials eventually revisited the issue at the level of conflicting starting points. Ultimately the Reagan administration balanced the values that they thought were reasonable—values that initially framed the issue without any significant debate on the desirability of the starting point itself—with the public reasons offered by ACT UP. It is this move to re-open the dialogue at the level of deliberative framing that allows us to address the problem that this conflict poses to deliberative legitimacy. Although the administration maintained its opposition to drug use throughout the entirety of the conflict, mounting evidence of the threat to the public good (in the form of the continued increase of HIV infection via contaminated needles) led the administration to understand that ACT UP's public reasons ought to carry more weight. Importantly, this undertaking was due in large part to the lengths that ACT UP went to in order to persuade the Reagan administration that the starting point was problematic.

In order to let ACT UP's public reasons carry more weight, the administration had to revisit the debate at the level of the initial starting point. ACT UP's public health-based reasons did, out of necessity, condone an illegal action. Because the action was illegal due to the administration’s stance on drug-prevention, in order for the administration to take ACT UP's public reasons into account they had to see what it was about the two starting points that led to the initial framing that effectively shut out ACT UP’s public reasons. Unlike the abortion example the issue itself is not a case of deep value disagreement. The desire to prosecute people for participation in an illegal drug trade is not fundamentally opposed to the desire to reduce HIV infection rates by giving people the tools to stop sharing contaminated syringes.

After considering the pros and cons, ACT UP's needle exchange program led the New York City Health Department to implement the nation's first government-sponsored needle exchange program.

---

172 At the time that ACT UP set up the NEP there were 35,000 methadone maintenance treatment sites for an estimated 200,000 IVDUs. ACT UP/NY Records. Reel 24; Box 32; Folder 10. “Why Needle Exchange?”
program for drug addicts. This decision, while it centres upon a public policy, should not be mistaken for a conflict over what the “best policy” ought to be (and thus a disagreement over the deliberative decision). While there was clear opposition to the policy itself, disagreement occurs at a much deeper level because the initial framing of the debate occurred without all parties accepting the government’s presentation of the public health/drug addiction question. If the government’s initial decision were to have occurred in a deliberative group then, according to deliberative criteria, the framing would be illegitimate on the grounds that the process effectively excludes deliberants and because this initial disagreement means that all people cannot accept the deliberative outcome. As a result of this initial disagreement, any subsequent disagreement over the best policy is disagreement that, because it follows from an unjustified starting point, obscures the real deliberative problem. The solution, as the needle exchange policy example shows, is not an overly-burdensome one. The solution does not completely satisfy everyone involved, but because participants revisited the initial framing and expanded the scope of deliberations to effectively include all people’s public reasons, the decision is one that everyone can accept and one, therefore, that effectively includes everyone. The key point is that, after ACT UP the Reagan administration engaged in debate over the framing of the issue, the remaining disagreement over the best policy is disagreement that people can accept and therefore disagreement that does not pose a problem of legitimacy to deliberative democracy.

The second instance that can give rise to protest is when people raise concerns over their efficacy within the deliberative group. An efficacy objection can take place even when deliberants agree on the initial deliberative framing. This critique, then, poses a different challenge to the deliberative group because people’s public reasons are not formally excluded from deliberations. Again, deliberants need to evaluate people’s reasons and there is bound to be disagreement over the

---

174 This is the case if we look at this from a deliberative perspective and because the decision to frame the debate in this way occurred without any deliberation on the framing itself. There are no claims that the context
deliberative decision. This discord becomes an issue of protest (and not deliberative disagreement) when the problem with the exchange of reasons rests upon the efficacy that some deliberants have in terms of affecting the deliberative decision. Deliberative processes run into a problem whenever deliberants object to the weight that their reasons receive and if they argue that their claims are evaluated unfairly and dismissed in favour of others. Significantly, this problem of efficacy can occur even when deliberants are effectively included in the deliberative group, making it a particularly serious problem because it is one that deliberative theorists overlook on the grounds that decisions are legitimate and therefore unproblematic. If the deliberative process fails to give equal weight to all public reasons during deliberations, however, and because in doing so it marginalizes some deliberants then the dispute over the deliberative decision is more than a disagreement (some deliberants would prefer policy y over policy x), but, importantly, one that all deliberants can accept. Instead, deliberants object to the route that deliberants took to get to the unsatisfactory deliberative decision, to an exchange of reasons that effectively exclude marginalized people, and to a vote that these marginalized deliberants had little to no chance of affecting.

People’s claims may meet the criteria of public reason only insofar as deliberants accept that people’s claims constitute public reasons. This however is not sufficient on a rich account of deliberative inclusion and legitimacy. If a public reason is marginalized, either because deliberants dispute the starting point (thus dismissing entire lines of argumentation and the arguments that they want to make) or because there are problems with deliberants’ efficacy within deliberations, then some claims do not work as public reasons and some deliberants face effective exclusion and marginalization. Part of what it means for deliberations to unfold on the basis of public reasons is that we give all public reasons equal consideration and that all public reasons have a reasonable chance of affecting the deliberative decision. Whenever deliberations proceed from one starting point at the expense of a contested one and without satisfactory deliberation on this framing, or of the actual debate was deliberative, hence the shift in application here. This change in context is not meant to
when deliberants lack efficacy in deliberations, then deliberative democrats ought to revisit what a legitimate and sufficiently inclusive deliberative process ought to look like and ought to do more about what counts as a public reason. That is, the deliberative group ought to look at the effective role that public reasons play and not just the formal criterion that only asks whether or not something is a public reason.

### 3.3 Democratic defence of protest

Deliberative democratic theory ought to have a mechanism that allows the deliberative group to offer a normative response to protest. The failure to formally and effectively include people is, historically, a serious problem. A great deal of positive social change and recognition of difference makes its way into the institutional fabric of the state after going through a period of “illegitimate” and, often illegal, protest. When unjust exclusions exist, protest is a key factor in drawing widespread attention to them, urging the majority to reform institutions accordingly and with protestors’ input. Protest is necessary whenever it is not possible for marginalized people to (successfully) work against unjust exclusions from within institutional structures. Sometimes only mild forms of protest (petitions, letter-writing campaigns) are necessary in order to put an issue on the agenda and change the tone of the debate after other intra-legal efforts to reform unjust policies consistently fail (and appear unlikely to succeed in the future). At other times, it takes much more. Although illegal, acts of civil disobedience have a normative democratic defence as long as they meet certain criteria: opposition must be public, non-violent, and conscientious. Publicity is important so that protestors can communicate their desire to work with the majority toward reform (and do so in a way that shows that they respect transparency and inclusion). Non-violence is necessary in order to maintain credible links between protestors’ calls to address injustice and their extra-institutional methods that break the law. Protestors ought to avoid undermining justice by causing harm themselves. Finally, acts of protest must be conscientious: they ought to be deliberate, the actions representative of the

---

imply that the initial framing (in the Reagan administration) was democratically legitimate either.
claims that people have, and they must address their audience. These criteria are necessary in order to acknowledge the rights of the majority and (the exclusion of the contentious issue notwithstanding) the legitimacy of the democratic process, as well as to demonstrate support for the underlying moral principle (justice and treating people as equals) that both protestors and other citizens ought to be able to share.\textsuperscript{175}

Although arguments that people have successfully advanced through acts of protest have been adopted by the state and have strengthened the legitimacy of institutions, protest and (especially) civil disobedience still meet resistance. There are two main objections to civil disobedience, and both of these, as John Rawls asserts, follow from objections to civil disobedience’s (apparent) rejection of legitimate social institutions and its failure to comply with a set of laws.\textsuperscript{176} The first objection follows from our natural duty not to oppose laws. The argument here is that adherence to laws is necessary if we want the benefits of living in a just society. Shirking the political obligation to follow laws undermines the purpose of forming a constitutional democracy.\textsuperscript{177} The political community is, to the best of our knowledge, the best way to organize ourselves so that we can all pursue our own conceptions of the good without encountering unnecessary obstacles (and without hindering others in their own pursuit). Because civil disobedience rejects the law the charge is that it undermines this commitment to political justice. Acts of civil disobedience make the good faith of protestors to respect the rights of other citizens suspect, and this rejection of the law appears as civil disobedients’ failure to uphold a necessary moral commitment.

The second objection to civil disobedience follows from an obligation to do our share. The argument here is that civil disobedience undermines the efficiency of our political system. People in a political community enjoy the reciprocal benefits of belonging to a political community, and because they derive these benefits they agree to do their share (to meet certain obligations) when it is necessary. Interfering with the efficient functioning of institutions by using civil disobedience to force issues to the forefront of the political agenda is problematic because, in bypassing collective decision-making, it challenges understandings of fairness and casts doubt on what people owe to others. Additionally, when people push issues to the forefront in this way the government may experience problems balancing the rights and interests of its citizens. The concern is that civil disobedience reduces the government’s capacity to effectively manage the justice claims of its citizens, and this creates a worry that the political community will be worse off as a result of civil disobedience.

Both objections, if we accept the claims, challenge civil disobedients’ commitment to ostensibly just institutions. Because civil disobedients reject the decisions of the majority (which they are obligated to follow), actions that explicitly challenge this outcome question the minority’s commitment to democracy. These objections to the democratic and justice-based value of civil disobedience, however, are not strong enough for us to dismiss civil disobedience. On the contrary, civil disobedience is important because of the ways that it enriches our commitment to democracy and justice. The objections that people raise against civil disobedience contain legitimate concerns, but they exaggerate the negative consequences and they do not make an attempt to balance potential problems with other democratic benefits.

Civil disobedience takes place outside of (and in opposition to a certain understanding of) electoral and legislative procedures. Defenders of civil disobedience point out that majority rule demands our respect because it rests upon particular normative principles. Civil disobedience is

---

justifiable when a majority’s actions challenge these principles. When marginalized people frame their claims to address a perceived violation of democratic principles, then their appeal to this normative foundation via civil disobedience is consistent with the foundation that critics charge them with rejecting. People who engage in civil disobedience oppose the majority, but they do not challenge the principles that the majority’s power rest upon. When respect for people’s social and/or political rights is absent in particular laws or policies, then the charge that civil disobedients shirk their duty to the state with their non-compliance is problematic. People have obligations to one another because there is a collective effort to ensure mutual respect and to protect the rights of all citizens. If the majority, via governmental institutions, fails some citizens by denying their social or political rights, then the majority violates the democratic foundation and they lack the moral right to denounce the minority for their civil disobedience.

The democratic defence of civil disobedience depends upon normative democratic principles in institutional bodies. Once institutions deny people their social and political rights then there is a corresponding right to engage in civil disobedience. Given that the origin of this right to civil disobedience lies in normative criteria it makes sense that civil disobedience must adhere to its own set of criteria. In order to meet these criteria, people who engage in civil disobedience must: i) determine that there is an injustice; ii) try to remedy it within institutional structures; iii) accept that others, in similar situations, also have the right to engage in civil disobedience, and iv) respect the principles of publicity, non-violence, and conscientiousness. These criteria, as well as the motivation for engaging in civil disobedience, show that it is not only compatible with democratic justice, but that it can be, when majorities make mistakes, necessary to uphold these principles.

\[\text{Footnotes:}\]


These criteria form the normative bridge between formal democratic institutions and acts of civil disobedience. The dialogical aspect of civil disobedience provides the bridging work between the opinions and beliefs of the state and the contestatory views of civil disobedients. Civil disobedience is, as Martin Luther King Junior notes, a call for negotiation; the opposition that arises between civil disobedients and the state is a “creative tension”, the intent of which is to foster a productive dialogue between the democratic minority and majority in order to convince the majority to incorporate contested issues into state dialogue and policy.\footnote{Martin Luther King, Junior, “Letter from Birmingham City Jail”, in \textit{Civil Disobedience: Theory and Practice}, ed. Hugo Adam Bedau. (New York: Macmillan Publishing Company, 1969), p.75} The dialogical aspect of civil disobedience reinforces civil disobedients’ commitment to underlying democratic principles in which the force of the better argument is meant to guide democratic politics. This dialogical work provides another reason (that I will develop below) why deliberative democratic theorists ought to account for protest.

\textbf{3.4 Protest: a challenge to deliberative democracy}

\textbf{3.4.1 The deliberative argument against protestors}

Deliberative democrats go to considerable lengths to effectively include all people in deliberations. The recent work that theorists have done to make sure that deliberative processes take social pluralism seriously is meant to ensure that all people can participate as equals while simultaneously making sure that self-interested claims do not factor into deliberative decisions. The criteria that are in place to make sure that deliberants reach decisions on the basis of public reasons have clear implications for the scope of the deliberative debate – people either participate within the deliberative group according to a set of criteria meant to keep undue influences of power in check, or they forgo the opportunity to affect the deliberative decision. Effective inclusion turns upon the willingness (and ability) of deliberants to keep their dialogue within this boundary of public reason, a
requirement that is necessary to ensure that deliberative democracy maintains its standard of legitimacy by treating all people as moral and political equals.

Because deliberative theorists do a lot of work to set out criteria for deliberations they do not consider arguments that arise outside the deliberative group to be legitimate. The reason for rejecting external arguments is not necessarily based on the content of the argument itself (which may or may not, upon further deliberation, convince the deliberative group of its merits) but turns on the fact that external arguments are not subject to this deliberative evaluation. Public reason demands that people demonstrate the legitimacy of their claims. Because deliberative democrats go to so much trouble to make sure that deliberative criteria are inclusive, they are suspicious of any refusal to exchange arguments within the deliberative group. The deliberative assumption is that if people reject the terms of the debate then they reject the standard of fair and equal inclusion. This carefully monitored exchange is necessary if deliberants are, as we ought, to put arguments to the test of public reason and if deliberants are to guard against people who want to manipulate deliberations.

Whether it is because protestors do not have public reasons or because they want to “fast-track” issues that they, unlike the rest of the deliberative group, think are pressing, deliberants reject protest on principle; if the people who offer arguments do not exchange reasons with other deliberants in a setting where people can critique the claims and make sure that they meet criteria of mutual respect then the deliberative group will not accept them. Deliberative democrats argue that if protestors believe that the deliberative group undermines the principles of democratic legitimacy – by either refusing to acknowledge their claims or to take them seriously – then they ought to push to address these concerns from within the deliberative group and according to deliberative criteria.182

Protestors are unreasonable, according to deliberative criteria, whenever they speak outside of and in opposition to the deliberative group. The objection of unreasonableness will stand regardless of the content of protestors’ messages. The specific claims that protestors make when
they situate themselves outside the deliberative group may encounter fewer objections than the fact that they reject the procedural rules of deliberative democracy. Deliberative democrats, however, cannot separate the content of protestors’ arguments from their external location; deliberative criteria of the exchange of reasons makes the process inseparable from the content of the reason when it comes to the argument’s legitimacy. Without a strong set of normative criteria deliberations cannot claim legitimacy. Because protestors, in leaving the deliberative group, reject these criteria their exclusion, from a deliberative standpoint, is both legitimate and necessary.

3.4.2 The problem with the deliberative argument against protest

The deliberative insistence that protestors ought to pursue their claims within the deliberative group loses force when we consider that deliberative processes and decision-making mechanisms sometimes effectively exclude marginalized people and make it difficult for them to have any efficacy in deliberations. Disputes over whether or not arguments meet the criteria of public reason and are weighted appropriately in deliberations pose a direct problem to the legitimacy of deliberative institutions. If there is a conflict over the deliberative process or outcome that people cannot resolve within the deliberative group then there is no recourse for the marginalized deliberant. If the deliberative group continually rejects or devalues a minority’s arguments, and if the minority, although overridden, has a valid claim on the deliberative group, then their resulting lack of efficacy is especially problematic because it means that deliberative democrats do not meet their own criteria of inclusiveness. Although the deliberative group is right to exclude arguments that violate deliberative criteria (for the reasons that I mention in the section above), this same justification does not validate the effective exclusion of arguments where the claim to offer (important) public reasons is reasonably contested, nor does it justify the lack of efficacy. Despite the ways that deliberative

---

democrats seek to accommodate social pluralism, deliberative processes do not have a way to deal with people who cannot, despite the deliberative group’s protections, effectively participate as equals.

Work in deliberative theory, in response to problems of effective exclusion, tends to focus on what deliberative democrats can do to establish a richer type of inclusion so that we are less likely to encounter this problem. Supplementing this approach, and in addition to a (welcome) focus on making deliberative groups more effectively inclusive, are safeguards such as Gutmann and Thompson’s discussion of provisionality. In addition to offering a normative argument as to why deliberants ought to remain open to the possibility that procedural constraints may need to undergo revision, provisionality requires institutional changes that allow deliberants to engage in this re-evaluation. Gutmann and Thompson’s discussion of provisionality is, as I discussed in Chapter 2, an important contribution to deliberative theory. The recognition that re-evaluation may be necessary goes a considerable way to empower effectively excluded people and to improve the extent to which deliberative democracy can effectively include all deliberants. Their discussion of provisionality, however, does not include a discussion of protest. The examples of institutional changes that Gutmann and Thompson propose are open forums (an unconstrained forum for deliberation in which people can address/revisit particular issues) and sunset provisions (a clause in a piece of legislation that ensures that the issue will be revisited at a later date).183 While these may help deliberants to meet the goal that Gutmann and Thompson set out – to “encourage reconsideration of laws and their justifications”184 – there is no question that people are to do so from within the sphere of decidedly deliberative institutions. The reconsideration that effectively excluded (or potentially excluded) deliberants ask for may challenge the legitimacy of particular policies, but this challenge comes from within deliberative democracy’s institutional framework. While Gutmann and Thompson’s examples are not exhaustive, there is no indication that the kinds of institutional

184 Gutmann and Thompson, *Why Deliberative Democracy?*, p 111.
changes that they call for are ones that even consider taking extra-institutional (civilly disobedient) action into account. Provisionality could, on a radical reading, offer a justification for this kind of extra-institutional application (given the normative basis for the argument to revisit deliberative decisions), but Gutmann and Thompson do not show any signs of extending its scope in this way. Provisionality has its place and this place is squarely with the realm of the deliberative group and the attempts to offer a richer kind of inclusion therein.

Expanding the inclusive capacity of the deliberative group is an important part of a richer theory of deliberative democracy. Even so, it is not sufficient to address the effective exclusion and problems of efficacy that marginalized deliberants encounter in the deliberative group. If deliberative groups were to develop in such a way so as to guarantee that deliberative processes and decisions will never lead to effective exclusions and so that deliberants were always able to affect the outcomes then the problem that protest poses to deliberative democracy would not exist: all people would be able to pursue their claims inside the deliberative group, all claims would receive a fair evaluation, everyone would have efficacy, and all deliberants would be able to accept deliberative decisions.

While Gutmann and Thompson (briefly) discuss dissent in Democracy and Disagreement (“Citizens may find it necessary to take extreme and even offensive stands. They may find it necessary to refuse to cooperate with opponents, and even threaten retaliation. These strategies may be justified when, for example, they are required to gain attention for a legitimate position that would otherwise be ignored, and thereby to promote mutual respect in the long term” p.90) there is no indication that these objections are external to the process (and thus acts of protest) or, if they are, how – and even if – the deliberative group ought to respond. More likely, this discussion refers to the kind of dissent that occurs within governmental institutions (instances such as Carol Moseley Braun’s “unconventional” way of objecting to the decision and framing of the debate on the Senate’s discussion of the renewal of a patent on the Confederate flag insignia; indeed, when Gutmann and Thompson address her role here they use her actions as a way to argue that “even extreme nondeliberative methods may be justified as necessary steps to deliberation” p.135: this is so despite the fact that Moseley Braun’s use of persuasion and rhetoric is, arguably, neither extreme nor nondeliberative). Amy Gutmann argues for the importance of accommodating dissent in Identity in Democracy (Princeton: Princeton University Press, 2003) on the grounds that this recognition “recognizes a reciprocal relationship – of mutual respect – between conscientious citizens” (34) but, again, there is no discussion of the relationship between deliberative groups and conscientious objectors insofar as legitimacy and democratic dialogue are concerned.

If provisionality were to offer this kind of justification it would, however, still need to offer a conceptual account of the way that these external challenges would happen. This would not exclude the existence of illegitimate protest, but it would not pose a problem to deliberative theory because the unjust goals and actions of illegitimate protest groups do not conflict with deliberative democracy’s normative criteria. This is not to say that deliberative democracy does not need to take a stand about the way it ought to respond to illegitimate protest, but that its response (or lack thereof) does not threaten the foundation of deliberative democracy’s theory.
perfect application of an ideal theory, however, is not something that deliberative theorists can promise. We cannot rely on assertions that deliberants will always be able to agree on deliberative framings, fairly evaluate public reasons, and to justify decisions to all deliberants as a way for the theory to justifiably reject all protest as illegitimate. As long as we try to argue that this is possible then deliberative democracy is vulnerable to significant procedural problems. There are no procedures internal to the deliberative group that can reliably address the problems of effective exclusion and a lack of efficacy, and this alone should be a good reason to make sure that the theory offers a normative justification of protest.

The problem goes deeper than one of application, however, because deliberative democracy’s problem is not purely procedural. Two problems arise from the assumption that it is. First, the assumption that a “perfect” application of deliberative democracy is possible is mistaken and reveals a weakness in the theory. It is a mistake to assume that we can consistently implement a perfectly inclusive version of deliberative democracy and it is dangerous to use this assumption to dismiss the need to build precautions against potential effective exclusions and marginalization into the theory. This approach makes it difficult for deliberants to recognize new injustices, let alone address them. The refusal to accept that legitimate protest might occur, along with deliberative democracy’s refusal to address arguments that arise outside the deliberative group, builds a weakness into deliberative theory itself.

Second, there is nothing to guarantee that people will deliberate from the best starting point or that deliberative decisions will be fair. As I mentioned earlier, identifying a reason as a public reason does not mean that deliberants will decide on the basis of the best one, it does not mean that all deliberants will be able to affect the deliberative decision, and it does not mean that they will be able to avoid producing unjust policies. Deliberative democrats ought to recognize the limitations of deliberative procedures and should deal with this in a way that minimizes the sort of effective exclusions and lack of efficacy that, because there is no real recourse, have a clear – and avoidable –
basis in deliberative theory. That deliberative theorists currently fail to do so is surprising in the context of a theory that otherwise goes to such great lengths to prevent unjust exclusions.

When the deliberative group sets out terms of inclusion that do not allow all people to participate as equals, marginalized deliberants can justifiably reject the terms of participation. When there are charges of effective exclusion and a lack of efficacy the deliberative group ought to respond to the critique and re-examine the deliberative processes and decision. The deliberative group will, of course, quite often do just this. The intent of the provisionality principle is, after all, to encourage just this kind of re-examination. The deliberative group, however, might continually refuse to acknowledge that a problem exists or, if they do acknowledge a problem, deem it insufficient to warrant further deliberative attention. When this is the case then provisionality (which, after all, depends upon a certain amount of pressure to revisit the issue, both from internal dissenters and the rest of the deliberative group who already concede a certain amount of legitimacy to these bracketed arguments) is an insufficient resource. If the deliberative response lacks the minimum amount of interest to invoke provisionality then marginalized people currently have three choices: to try to convince the deliberative group that they do, in fact, have public reasons that deserve to carry more weight; to deliberate using a different set of arguments; or to forgo debate on the topic altogether. The first option may prove fruitless, the second may co-opt deliberants, allowing only formal, not effective, inclusion, and the third is (obviously) exclusionary. The only other recourse is protest, but since the deliberative group does not recognize protest, it does not offer a deliberative solution to the problem of effective exclusion.

While marginalized deliberants face either formal or effective exclusion, the rest of the deliberants continue to exchange reasons. It is possible that protestors’ arguments are misguided. If this is the case – if protestors cannot ground their arguments in public reasons or make a strong case on the basis of them – then they ought, if their aim is inclusion in the deliberative group, to alter their claims. It is also possible, however, that the problem is not due to a weakness in marginalized
people’s arguments, but is due to the inability (or refusal) of the deliberative group to really hear marginalized deliberants’ arguments. There is, after all, a significant normative difference between people’s ability to make a strong case (one that has significant merit to it) and their ability to make their argument persuasive enough to affect deliberations. In the latter case the argument may be a normatively strong one, but practically speaking the effect of the argument upon the rest of the deliberative group may be quite weak because they do not have the efficacy to persuade other deliberants of the merit of their claim. If the failure is on the part of the deliberative group then their request that protestors change their arguments would be co-optive and would effectively remove their ability to participate as equals. In this scenario deliberative democracy would, once again, fail to account for social pluralism.

The deliberative group’s assumption that protestors reject reasoned discussion with deliberants is unfair. Protestors act to invite a response from their audience. The purpose is to communicate messages to people in legislative bodies and civil society in the hopes that, once they persuade deliberants to pay more attention to these claims, a better deliberative dialogue and social change will occur. Protest actions, which are themselves rebuttles (and therefore dialogical) to the conditions that marginalized deliberants encountered in the deliberative group, are a necessary first step in a fair exchange of reasons. The intent is to spark a dialogue. This exchange of new reasons takes place on what protestors argue to be more effectively inclusive and equal grounds. As far as protestors are concerned, this (given that their arguments were consistently under-valued by the deliberative group) is the only way that they can enter into a fair dialogue in which they have a chance to impact the deliberative decision.

Of course, protestors’ goal to start a new dialogue has no guarantee of success. The chance of protestors successfully engaging the deliberative group in this area is, arguably, less likely than it is in aggregative democracy. This is the case because the extra pains that deliberative democracy takes to be effectively inclusive mean that deliberative processes are less likely to contain and therefore to
acknowledge unjust exclusions. Protestors argue that deliberations that take place without paying sufficient attention to their arguments do not involve a reciprocal exchange of public reasons and as such argue that deliberations are not properly dialogical; at the same time, without a way to ensure that protestors meet the requirement of reciprocity the deliberative group will not count this exchange as legitimate deliberative dialogue. The extent to which protestors reject or engage in (any) dialogue can vary quite significantly and the fact that any exchange with the deliberative group would be unmonitored is problematic from a normative (and practical) standpoint. All things considered, it is unlikely that protestors would be able to persuade the deliberative group to listen to them to the extent that protestors are able to pressure institutions in aggregative democracy. The construction of legitimacy in the deliberative group works against protestors and renders the success of protest actions unlikely.

Although the motivation that leads people to protest is (often) a desire to enter into a dialogue, on its own this cannot offer a convincing reason as to why deliberative democrats ought to offer a normative account of protest. As long as participation in the deliberative group is necessarily part of the normative criteria of deliberative democracy, the tension between the two appears irreconcilable.

When protestors sincerely argue that deliberants effectively exclude them from the deliberative group, and when deliberative democrats cannot guarantee the effective inclusion of deliberative processes, then there is the potential for a serious problem of deliberative (il)legitimacy. It is unreasonable to expect that deliberative democrats will always be able to know what weight people’s arguments ought to carry, and it is unfair to expect this. However, once we acknowledge this potential for effective exclusion and for deliberants’ lack of efficacy it is clear that what is most unreasonable is that deliberative democracy does not have a mechanism to rectify these problems. Deliberative theorists know that effectively excluding or undervaluing public reasons is unjust, and it is reasonable to expect that marginalized people, when their claims are under- or unrecognized, might
engage in a form of protest to contest their effective exclusion or lack of efficacy. This protest is necessary for democratic legitimacy whenever people’s claims do not receive adequate attention and where social justice is undermined as a result. The deliberative group’s potential for these injustices should serve as a warning sign to deliberative theory, and deliberative theorists should respond to this with a normative justification of protest and by developing a normative response to the challenge that protest poses to deliberative democracy.

3.4.3 Gap in the deliberative literature

The intersection of deliberative democracy and political protest is an area of normative democratic theory that is significantly undertheorized. Very few deliberative democrats mention protest, let alone address it in a comprehensive way. When deliberative theorists do discuss protest the response is to emphasize the tension between the two, even though they recognize the normative importance of each.188

A few people, however, do address the issue directly. Francis Dupuis-Déri and William Smith make important contributions to the literature with their normative appeals for deliberative theorists to recognize the valuable contributions of protest, particularly Smith with his theory of “deliberative contestation.”189 The primary focus for both, however, is protest and not deliberation, and so discussion of their contribution to deliberative theory is (understandably) limited. Iris Marion Young also addresses the relation between deliberative democracy and protest, and approaches the

188 Young, as I will discuss shortly, takes this approach. Archon Fung argues that “there is less opposition between deliberation and activism than Young suggests” (399), and his discussion of protest is one of the few that takes the relationship between deliberative democracy and protest seriously. Even so, his normative argument for deliberative activism does not carve out the same space for protest as do Dupuis-Déri and Smith. The circumstances that give rise to deliberative activism in Fung’s account are similar to the circumstances that Dupuis-Déri and Smith discuss: Fung notes that “widespread inequality and failures of reciprocity can justify nonpersuasive, even coercive, methods for the sake of deliberative ends” (399) but his discussion of deliberative ends both 1) shows that there is less conceptual difference between his approach and Young’s, and 2) shows that his focus is on a normative justification for activism and is not, much like the critiques that I will make of Dupuis-Déri and Smith, on developing a conceptual account of the way that protest itself functions in a larger deliberative framework. “Deliberation Before the Revolution: Toward an Ethics of Deliberative Democracy in an Unjust World.” In Political Theory 33:2 (2005).
intersection as a deliberative democrat. While Young aims to highlight some of the virtues of protest, her main focus is upon the limitations of deliberative democratic norms and what we can do to address this.\footnote{Young “Activist Challenges to Deliberative Democracy”, p.670.} I will leave my discussion of Dupuis-Déri and Smith, whose primary concerns are with protest, not deliberative democracy, until the next chapter. Here I will focus upon Young’s discussion in \textit{Activist Challenges to Deliberative Democracy} in order to demonstrate that, despite the sustained discussion of protest by a deliberative democrat sympathetic to the benefits of protest, deliberative theory still does not have a satisfactory normative response to protest.

At the end of \textit{Activist Challenges}, Young asserts that a full account of democratic theory needs both deliberative democracy and activism. The problem with this, as Young points out, is that “the two kinds of activities cannot usually occur together”; given this, she argues that our best response is to “affirm them both while recognizing the tension between them.”\footnote{Young, “Activist Challenges to Deliberative Democracy”, p.689} With this statement, Young draws attention to a serious gap in deliberative democratic literature. \textit{Activist Challenges} addresses new ground in deliberative theory and the work that Young does to illustrate the tension between deliberative democracy and activism is very important.

Young makes two conceptual moves to address activism in a deliberative democratic context. The first is to expand the scope of reasonableness to include (some) arguments that activists make, and the second is to recommend that deliberants address activist challenges by creating “inclusive deliberative settings.”\footnote{Young, “Activist Challenges to Deliberative Democracy”, p.684.}

In the first part of \textit{Activist Challenges}, Young establishes that protestors are worth talking to. This part of her argument is a response to the public reason problem. In order to make her argument, Young offers a slightly different conception of what it means to be reasonable. In this new interpretation, a reasonable person has to be willing to have “a sense of a range of alternatives in belief and action and engaging in considered judgement in deciding among them” and “to justify his
or her claims and actions to others.” This understanding is a response to the deliberative democrats’ definition of reasonableness as a process where deliberants exchange public reasons with one another within the deliberative group in order to justify policy decisions. The activist’s definition is certainly broader than this. In addition to removing the criterion that people must be in the deliberative group to apply the definition of reasonableness, an important step that Young makes is her refusal to limit the “range of alternatives” to a more restrictive set of criteria. Adding to her already expansive conception of inclusive political communication (that she develops in earlier works), Young opens the normative door to include alternate forms of political communication, and here she lists the use of slogans, humour, and irony. Because she does not limit her conception of reasonableness to criteria that presuppose the deliberative group, her definition does not address the specific concerns that deliberants have regarding the inability of the deliberative group to monitor people’s claims. However, the definition that she offers, apart from the fact that she does not require the exchange to take place in the deliberative group, is not objectionable from a deliberative standpoint. Deliberative theorists already agree with the benefits that “a range of alternatives” bring to debates; what Young does here is to reframe “reasonable” in light of justifications for activism, and to establish that the communicative aspect of protest is deliberative insofar as protestors pursue an exchange of ideas through these activist means.

Young’s definition of reasonableness challenges the connection that deliberative democrats make between the location of people who make claims and the legitimacy of their arguments. With her focus on communication, broadly conceived, instead of upon “orderly reason-giving” Young makes it easier for deliberants to concede that activists might have reasonable claims. If Young can (successfully) make the argument that activists are reasonable then deliberants can no longer

193 Young, “Activist Challenges to Deliberative Democracy”, p. 676.
195 Young, “Activist Challenges to Deliberative Democracy”, p.676.
automatically dismiss protest. Making the normative case for protest is not enough to address the larger problem of the specific role that the monitored exchange of public reason plays in deliberative democracy, but it is important and it gives deliberative democrats a reason to acknowledge that protestors may merit at least some type of inclusion in deliberative theory and practice.

In the second part of *Activist Challenges* Young looks at four different kinds of disagreements between a (female) deliberative democrat and a (male) activist. For each example, Young sets out the activist’s reason for refusing to participate in deliberations, offers the deliberative response, and recommends what deliberative theorists ought to do to respond to the activist’s justice claim while simultaneously respecting the normative criteria of deliberative democracy.

The first activist challenge concerns the level of publicity in deliberations. Here, Young discusses the exclusive nature of the 1999 WTO meetings in Seattle. Despite the far-reaching impacts of the talks, activists protested because both the agenda and the proceedings were closed to the public. In this case, the activist challenge does not pose a problem to deliberative democrats. A lack of publicity is clearly problematic in terms of deliberative democracy’s own criteria and, as such, the WTO meetings are not instances of (legitimate) deliberative democratic practice. As a result Young argues that the deliberative democrat would agree with the activist’s concerns and ought to respond to the challenge by joining him in protest.

The second activist challenge is one of inclusivity and here the deliberative democrat also agrees with the activist’s concerns. The dispute is over effective inclusion. Young cites the NGO deliberations that, because of advance criticism about the exclusionary nature of the WTO meetings, were organized at the last minute to take place before the scheduled talks. The problem is that the agenda was predetermined and participants had very little power. In this case, although the deliberant agrees with the activist’s criticisms of deliberations, her prescription differs. The deliberant thinks that the activist would be more effective if he were to argue for more inclusive

---

196 Young, “Activist Challenges to Deliberative Democracy”, p.676.
procedures from inside the deliberative group, whereas the activist, afraid of both co-optation and conferring unwarranted legitimacy upon the process, disputes this approach.\textsuperscript{197}

The agreement between the deliberative democrat and the activist over the effective exclusion of deliberations in this second example is somewhat problematic. The disagreement that remains between the activist and the deliberant concerns whether it is more effective to demand these changes from inside or outside the deliberative group. Young does not directly address this problem here\textsuperscript{198}; she sides with the deliberative democrat and argues that activists ought to try to push for change from within deliberative proceedings\textsuperscript{199}, but the way that she addresses it does not address the activists’ concerns. We can find a more concrete (but still problematic) response, I argue, in her recommendation as to how deliberative democrats ought to respond to the third activist challenge. For now it is important to note that the consensus between deliberants and activists about the problem that arises in the second activist challenge occurs because the problem does not challenge deliberative democracy on a theoretical level; both parties agree that deliberations are not currently effectively inclusive and that they ought to be.

Young waits until the third activist challenge to suggest what deliberants and activists should do when they clash over where their disagreement ought to play out. Young looks at the problem of structural inequality through an analysis of an advisory council on welfare policy. The concerns that Young notes here are along the same lines as the problems of effective exclusion that exist because of disagreement on the starting point in the NWMO deliberations. In Young’s example, the activist refuses to participate in this council because he objects to the context in which deliberations take place. Constraints exist because of social and economic structures that (severely, in his view) limit the agenda and terms of deliberation. Specifically, the structural constraints allow participants to

\textsuperscript{197} Young, “Activist Challenges to Deliberative Democracy”, pp.680-81
\textsuperscript{198} Young does address this elsewhere (“Communication and the Other: Beyond Deliberative Democracy”; Inclusion and Democracy). In these works, Young’s recommendations for institutional changes within deliberative democracy suggest that change ought to come about from inside the deliberative group, albeit in a way that draws heavily from protestors’ own methods of communication).
make decisions about administration but not about eligibility. This, the activist argues, is the wrong
dialogue and makes outcomes “inevitably unjust.”\textsuperscript{200}

The deliberant, however, takes a different approach. In this case, she is less sympathetic to
the activist and argues that his refusal to work within deliberations to find the best administrative
solution is “uncooperative and counterproductive.”\textsuperscript{201} This response stands in contrast to the NGO
talks in the second activist challenge where the deliberant agrees with the activist’s objections to the
type of effective exclusion that is at work; although she disagrees with his method of address, the
deliberant does not contest the way that the activist frames the problem. The welfare policy case,
however, is different. In the third activist challenge the deliberant still recognizes that the activist has
public reasons for his objection, but unlike the second activist challenge she disagrees with his
starting point. Working within deliberations is even more problematic for the activist in this case
because, in addition to the structural conditions not being open for debate, the framing of the debate
itself is objectionable, and limits the deliberative group to talking only about solutions that the activist
disagrees with on the grounds that they are insufficient to address the problem. Like the NWMO
case in which the merits and dangers of nuclear power itself were off the agenda – which effectively
excluded opponents of nuclear energy – the activist argues that cooperation will only perpetuate
unjust institutions and that any outcome will be undesirable given the constraints. Because of this,
the activist argues that the best response is to work to change the structure – to contest the framing
and push for a wider deliberative scope. The deliberant, on the other hand, argues that it is better to
pursue the most just policy that is possible within the limitations of the structure than it is to
abandon or distrust these efforts and risk not being able to effect any positive change\textsuperscript{202} – particularly
given that these deliberations are actually happening and other, larger scope deliberations may never
occur due to a lack of political will.

\textsuperscript{199} Young, “Activist Challenges to Deliberative Democracy”, p.681 and Footnote 6.
\textsuperscript{200} Young, “Activist Challenges to Deliberative Democracy”, p.683.
\textsuperscript{201} Young, “Activist Challenges to Deliberative Democracy”, p.683.
If we recognize that structural injustice exists, then Young argues that deliberative democrats do not have a satisfactory response to this activist challenge. As a result, Young asserts that deliberants ought to modify their response in order to take the activist’s concerns into account. To this end, Young proposes that deliberants create “inclusive deliberative settings”: a space apart from the deliberative group that allows activists to examine social and economic structures whenever they argue that structural injustice works to effectively exclude them from deliberations. The idea is that, by deliberating separately, people will be more likely to articulate what is wrong with the starting premise and will then be able to convey the seriousness of this to the deliberative group (an approach that is similar to the work that consciousness-raising groups do).

Although Young does not explicitly call for this, inclusive deliberative settings could also help deliberants to address the second activist challenge. The need for these groups may not be as strong for this level of objection, but if the activist cannot effectively push for changes from inside the deliberative group because he is in a position of structural inequality, then, if Young’s approach is right, inclusive deliberative settings might offer a solution and deliberants and activists might be able to address the lingering disagreement about the appropriate venue to address problems of exclusion.

I do not, however, think that Young’s approach can deal with the problem. Apart from indicating that inclusive deliberative settings are separate from the deliberative group, it is unclear as to what, exactly, inclusive deliberative settings will consist of and how they will function. Young notes that the inclusive deliberative settings exist “for the most part . . . outside of and opposed to ongoing settings of official policy discussion.”203 At the same time, they appear to be part of the larger deliberative structure. Given Young’s account, it makes the most sense to think of them as ad-hoc deliberative groups. Calling for these groups to be “outside of and opposed to” the ongoing discussions of the “official” deliberative group suggests two things. First, that activists are still institutionally connected to the deliberative group and, as such, must still meet deliberative criteria in

---

inclusive deliberative settings. Second, it suggests that people in the deliberative group will continue to conduct their own deliberations on the basis of the starting point that activists contest.

Establishing these inclusive deliberative settings does give activists more power within a deliberative framework, and so Young’s approach is beneficial in one respect, but the problem remains that the people in the (main) deliberative group still have the balance of power. This power manifests itself in (at least) two ways. First, because deliberative criteria will still govern the inclusive deliberative settings activists risk co-optation. The kind of activists who are likely to move to inclusive deliberative settings would most likely be those who find their premises marginalized because the rest of the deliberative group (who hold the balance of power) choose to frame deliberations from a starting point that dismisses (or severely undervalues) the weight of these arguments. Activists are free in inclusive deliberative settings to frame deliberations around their own arguments. These ad hoc groups can go on to deliberate on the terms that they choose – although with the obvious thought that they will give to convince people within the (larger) deliberative group to reconsider the way that they frame deliberations. Deliberants who question their efficacy in the deliberative group could also enter into inclusive deliberative settings where their focus would be upon how to make their arguments more persuasive. In both cases the deliberations that take place in inclusive deliberative settings are ones where all deliberants (in the larger deliberative group and in the inclusive deliberative settings) accept that dissenters’ arguments meet normative deliberative criteria. Young does not directly argue for this extension of deliberative criteria, but it is implicit in the way that she discusses inclusive deliberative settings as a solution. Nothing about the activist’s approach is incompatible with deliberative criteria. The problems are ones of framing and efficacy and Young’s assertion that the deliberative group has to help to create these inclusive deliberative settings suggests that they will (and can) do so only if people in them meet deliberative criteria.

Second, when people in inclusive deliberative settings finish their own deliberations and return to the deliberative group they all still have to engage with the same framing of deliberative criteria that they originally objected to and they will still need to convince the same people who previously rejected their starting point of the need to reframe deliberations. Now, after deliberating in the inclusive deliberative settings people should have better developed and more persuasive reasons that they can use to try to convince the rest of the deliberants that their agenda and arguments are important and that the deliberative group ought to reframe deliberations accordingly. Given this advantage there is a good chance that creating inclusive deliberative settings will greatly improve deliberative democracy’s ability to effectively include marginalized groups. However, there are no guarantees that the deliberative group will listen, and if they do not then we are left with the original problem.

Young’s push to develop a conceptual response to protest is an important move in deliberative democratic theory. The changes that Young proposes with an expansive conception of reasonableness and inclusive deliberative settings show that she takes this significant problem seriously. The structure of the inclusive deliberative settings as ad-hoc deliberative groups that deal with protest, however, is different from a conceptual move that addresses activist groups as they exist outside of and in opposition to the deliberative group. In Young’s proposal the role of marginalized groups who would, without inclusive deliberative settings, mobilize as protest groups is one of critical deliberants – people who, but for the chance to critique the framing of deliberations, would otherwise leave the deliberative group to protest their effective exclusion and lack of efficacy. Importantly, critical deliberants are not activists. Young’s proposal addresses marginalized deliberants before they become (or after they agree to stop being) activists. The ties between inclusive deliberative settings and the deliberative group work to keep would-be activists from

---

204 Creating inclusive deliberative settings also gives us another way to think about taking further advantage of the principle of provisionality; institutionalizing this space within deliberative groups would better enable deliberants to revisit issues when there is disagreement and has an immediacy that sunset clauses lack.
leaving the deliberative group altogether – or, if they have already left, make sure that activists re-enter as deliberants. The ability of Young’s conception of deliberative democracy to prevent this exclusion is significant, as are the additional tools that marginalized deliberants have in order to try to combat effective exclusion and their lack of efficacy. The problem, however, is that this otherwise commendable response does not account for activism; that is, it does not address the question of whether the deliberative group ought to recognize activists while they are outside of, and opposed to, the deliberative group. Young’s account concedes that activists do make valid points about effective exclusion – ones that deliberants recognize for their reasonableness and ones that ought to carry more weight in the deliberative group. The fact that she accounts for this in her theory is a big step for deliberative democracy. However, the fact that it is deliberative democrats who, through a closely connected ad-hoc part of the deliberative group, address the valid points that activists raise means that Young’s discussion of activism ends up becoming about the arguments that deliberative democrats are aware of because of the efforts of activists but is not a discussion of activism itself.

As she goes through the second and third activist challenges, Young is right to point out that deliberants do not have a strong enough objection to activists that allow them to legitimately exclude them from deliberations; indeed, it would undermine the legitimacy of deliberative proceedings if they were to ignore these activist challenges. However, the way that Young, as a deliberative democrat, addresses these challenges is problematic. It is clear from Young’s critiques that protestors must be the ones to make their own arguments. Protestors’ objections, after all, come from the fact of their effective exclusion. Despite this call for substantive formal inclusion that is implicit in the reasons that Young gives as to why we ought to listen to protestors (and is explicit in her other work205), Young gives no indication that protestors ought to be able to speak for

205 In Justice and the Politics of Difference (Princeton: Princeton University Press, 1990) Young begins her discussion of structural injustices by looking at social movements and indeed takes their claims about social domination and oppression as her starting point (p.3); in Inclusion and Democracy Young cites actions typically associated with social movements and activists (“other forms of making a point” that include “visual media,
themselves as anything other than deliberants (even if it is as ad-hoc deliberants who are at a distance from the deliberative group and therefore deliberants who have some level of independence). Young draws from the critiques that protestors make so that the deliberative group can expand its inclusive potential and, with more information and new approaches, deal with activist claims. On the one hand, this is important because full and effective inclusion and greater efficacy within the deliberative group is the end goal if protestors want to address their marginalization via processes and policies that work to overcome this. At the same time, however, this response allows Young to avoid the question as to whether or not deliberative democracy accounts for protest itself. Young sidesteps this question in Activist Challenges. Instead, she has the deliberant and the activist agree that activists do make valid points about effective exclusion; the “consensus” that arises, however, is that it is ultimately deliberative democrats who should address the points that protestors raise.

The last activist challenge, that of hegemonic discourse, poses the biggest problem to deliberative democracy. The solutions that Young offers both highlight the need for deliberative democracy to offer a normative response to protest and, again, fail to offer this account. Hegemonic discourse – constraints on the terms and contents of deliberative dialogue that exist in the widely-accepted framing of the debate and which, in doing so, “mask the reproduction of power and injustice”206 – is difficult to address because deliberants and activists do not disagree. This problem is particularly significant because “the idea of false or distorted agreement seems outside the theory.”207 The lack of disagreement however does not prevent this from being problematic.

Young offers a twofold response to the challenge of hegemonic discourse. One thing that deliberants can do, she argues, is to look to James Bohman’s suggestion that we measure the inclusiveness of deliberations by the ability of all people to initiate dialogue. This appeal comes from Bohman’s larger argument in response to the exclusionary effects that the requirement of impartiality

signs, demonstration, guerrilla theatre and symbols”p.65) as forms of rhetoric that will enrich deliberative democracy by making political communication more inclusive.

206 Young, “Activist Challenges to Deliberative Democracy”, p.685.
has upon deliberations. As part of an argument for a plural account of public reason, Bohman argues that if deliberative theorists are to take substantive inclusion seriously then we need to pay more attention to the capacity that deliberants have to effectively engage in deliberations. One strong measure of this capacity is the ability to initiate deliberation, which is, he argues, “the basic threshold for political equality.”\textsuperscript{208} Paying normative attention to people’s ability to initiate dialogue draws attention to the assumptions that underlie deliberative processes of reason-giving – assumptions that deliberative theorists critique for the silencing effects that requirements to “fit into” deliberations, be it a particular way of speaking or adhering to a predetermined agenda, have upon differently-situated people.

In addition to initiating dialogue, it is important that we continue to pay attention to the way that this new dialogue unfolds. A good indicator of deliberative legitimacy and people’s efficacy is the ability of deliberants to continue to cooperate after their issue gains entry into the deliberative group.\textsuperscript{209} Initiating dialogue is relevant to the hegemony challenge in terms of its role as a test for deliberative legitimacy. If less-powerful deliberants can initiate dialogue then it is a good indicator of the deliberative groups’ openness to trying to identify (and address) hegemonic discourse. It is not, however (and nor does Young present it as), a solution to the challenge because it does not address the fact that deliberants might be unaware of structural constraints and, in lacking disagreement, think that the deliberative processes that they engage in are fine.

The second thing that Young argues that deliberants can do is to make “ideology critiques.” This entails questioning the prevailing modes of discourse and the ways that we frame problems. This work includes an analysis of the media’s role in naturalizing assumptions, and a push to generally make people “wonder about what we are doing, to rupture a stream of thought, rather than

\textsuperscript{207} Young, “Activist Challenges to Deliberative Democracy”, p.686.
to weave an argument.” Presumably deliberants could initiate dialogue and engage in an ideology critique, at least to some extent, in either the deliberative group or in an inclusive deliberative setting. If deliberants and activists were to do so they would still, however, be vulnerable to problems of effective exclusion and a lack of efficacy. As to Young’s other recommendations, there is nothing to suggest that deliberants will not be willing to look at the role that the media plays (or that they might be able to push for positive reform), but the media itself is necessarily separate from the deliberative group. The problem here is not that deliberative democracy will not be able to impact the media (because it may very well succeed to an extent), but that the deliberative group has little control over the real power that the media exerts, and a push to raise awareness about the media’s influence, while important, seems unlikely to change very much. The larger concern for Young’s argument is that her suggestion that activists ought to push for effective inclusion and greater efficacy by interrupting particular streams of thought does not fit with deliberative democratic theory. The emphasis that deliberative democrats place upon the exchange of reasons does not sit comfortably with the activist refrain that it is sometimes more important “to rupture a stream of thought . . . than to weave an argument.” Weaving arguments – ones that conform to the criteria of public reason – is a crucial part of deliberative democracy. Young is aware of this disconnect, which leads her to finish Activist Challenges with the acknowledgement that deliberative democracy and activism “cannot usually occur together.” Young then steps back from deliberative democratic theory to – more broadly – democratic theory, and leaves us with the final recommendation that “the best democratic theory and practice will affirm them both while recognizing the tension between them.”

210 Young, “Activist Challenges to Deliberative Democracy”, p.687.
212 Young, “Activist Challenges to Deliberative Democracy”, p.687.
213 Young, “Activist Challenges to Deliberative Democracy”, p.689.
214 Young, “Activist Challenges to Deliberative Democracy”, p.689.
Young’s recommendations do make headway in deliberative democracy’s ability to address some of the concerns that protestors raise. However, the successful and effective inclusion of activists can only happen if they agree to try to work with deliberants as they try to address the marginalization that they encounter in the deliberative group. Whether these efforts are to take place within the deliberative group after protestors reclaim their places there, or whether they are to take place within an ad-hoc deliberative group, activists will only agree to a form of cooperation with the deliberative group if they do not fear co-option. Young has not done enough to argue that co-option does not remain a significant concern for activists despite the important ways that her recommendations strengthen the overall level of inclusiveness in deliberations. As Bohman argues, effective deliberation in which deliberants do not succumb to inequalities requires that people “avoid both exclusion and inclusion” which means that “they are neither excluded from deliberation or included in the constraints of plans devised by others.”215 Young’s discussion of protest fails on this second count.

Young draws two conclusions from her discussion of deliberative democracy and protest. First, she argues that we need to identify deliberative democracy as a critical theory, and in doing this we must apply deliberative principles in a way that accounts for the less-than-ideal situation in which deliberations occur. Second, and relatedly, Young argues that we need to pay more attention to the context in which people exchange reasons, and to pay more attention to the ways that people generate and influence public opinion.216 The problem, as Young identifies it, is one of implementation. In her response, Young concedes that protest is important for deliberative theory and practice, but she does not offer a discussion of protest as protest. Instead of setting out what the normative deliberative democratic response to protest ought to be, Young looks to protest to sharpen the normative foundation of deliberative democracy. Young’s revisions to deliberative democracy strengthen the theory by drawing attention to ways that we can expand our conception of

effective deliberative inclusion. I agree with Young that the deliberative group can, and ought to, include more people and that it should do so in a way that makes this inclusion more substantive. However, the problem is not straightforwardly one of inclusion in the deliberative group (and therefore a problem of implementation); because Young treats it as this, her discussion of protest ends up becoming about what we can do to make the deliberative group more effectively inclusive. While important, this approach misses the point of protest. The discussion, on Young’s account, becomes about the arguments that deliberative democrats are aware of because of the efforts of protestors, and not a discussion of protest itself. Consequently, the work that Young does on the foundation of deliberative democracy is ultimately separate from the work that needs to be done on protest so that if instances of effective exclusion do happen and if deliberants suffer from a lack of efficacy marginalized deliberants will have recourse that does not depend so heavily upon the deliberative group itself. The arguments that she focuses on ultimately play out within the deliberative group and Young omits the fundamental question about what deliberative democrats ought to do about protest. It is not clear if this categorical exclusion of protest is intentional or if Young underestimates the significance of the challenge of protest. Either way, her approach is problematic. Missing from her account is a discussion of protest that sees protestors interact with deliberants from outside, and in opposition to, the deliberative group. Young’s response does not tell deliberative democrats what they ought to do with protestors who either do not want to enter into deliberations, or who, because of the way deliberants evaluate their reasons, still face effective exclusion and lack of efficacy in the deliberative group.

Protest poses a serious problem to deliberative democracy. Deliberative democrats’ claims that the theory does not need to offer a normative justification of protest because the deliberative group can accommodate all reasonable arguments overlooks the possibility that the deliberative group might

---

216 Young, “Activist Challenges to Deliberative Democracy”, p.688
not frame deliberations in a substantively inclusive way, ignores the fact that effective exclusions are, as the history of civil disobedience illustrates, not at all uncommon, and neglects that power differentials that make it difficult for marginalized deliberants to overcome structural constraints and persuade other deliberants that they ought to take their arguments more seriously. Despite what deliberative theorists imply, the ability to decide when an argument is legitimate and when it is not is not as simple as drawing a line between inside and outside the deliberative group. It is important for deliberative legitimacy that deliberants recognize that whether or not people’s arguments are recognized as legitimate is only a part of what deliberants need; if the deliberative group is to be legitimate, then people’s arguments need to carry significant weight within the deliberative group. Marginalized people must have efficacy in deliberations if they are to participate as equals. At this point, power and persuasion play important roles in effective and just deliberative inclusion and deliberative theorists need to shift the focus to the ways that deliberative processes can fail to take these kinds of deliberative disagreements into account.

If people’s arguments do not carry sufficient weight in deliberations then they cannot participate as equals. When this occurs, they may decide to leave the group and mobilize as protestors. This move is an active objection to the marginalized status that people face in the deliberative group. The move outside a deliberative group does not in itself change the nature of the protestor’s argument. If the deliberative group is wrong to overlook or undervalue the public reason, then the same unjust deprivation of rights, freedoms, recognition, and resources still defines the protestor. The move does, however, change the way that protestors can interact with the deliberative group. The criteria that constrain deliberants no longer apply to protestors, and deliberants are under no obligation to listen to them. Without a normative deliberative account of protest, marginalized deliberants have no recourse to their effective exclusion and lack of efficacy.

Deliberative democrats do not have a way to address the problem that protest poses when protestors (try to) persuade people of the significance of their arguments from outside the
deliberative group. Although Young – as the only deliberative theorist to offer a sustained discussion of protest – attempts to reconcile the concerns of deliberative democrats and activists, her approach falls short. Young recognizes the need to talk to protestors, but her recommendations do not address protestors as protestors; inclusive deliberative settings are part of the deliberative group and the activist challenge to deliberative democracy still remains unanswered. This leaves deliberative theory with a serious problem: a failure to account for protest that undermines the theory’s claim to legitimacy and a rich account of inclusion.
Chapter 4

A DELIBERATIVE RESPONSE: PROTEST-AS-DELIBERATION

Given the non-ideal circumstances that deliberants encounter, protest is a significant resource if deliberative theory is to address effective exclusions and to take questions of efficacy seriously. Some deliberative theorists recognize the important contributions that protest can make to deliberative democracy. As I discussed in Chapter 3, Young addresses protest’s contribution to deliberative democracy from the perspective of a committed deliberative democrat who wants to strengthen the theory. Her account of the critical role that protestors play when they highlight deliberative democracy’s weaknesses, however, does not address the larger role of protest itself. From Young’s account we know what the value of protest is for the deliberative group, but we do not know the value of protest that is outside of and in opposition to the deliberative group, nor do we know the way that deliberative democrats ought to deal with protestors (and not just some of the suggestions that they make). I will take up these questions in this chapter.

Deliberative democracy’s response needs to balance protest, as something distinct from the deliberative group, with normative deliberative criteria and to do so while avoiding the problems that I identify in Chapter 3. I agree with Young that protest has value insofar as external critiques help deliberative democrats to strengthen the deliberative process. This, however, is only one democratic contribution of protest and it is insufficient to address the larger normative problem. In this chapter I will argue for the deliberative benefits of a normative account of protest that seeks to explain the contribution of protest when protestors, and their actions, do not lend themselves to incorporation in the deliberative group as we see with Young’s inclusive deliberative settings. Unlike Young’s narrative of the relationship between the deliberative group and protestors, I will argue that protest performs an important function in deliberative democracy even when protestors’ critiques are not ones that deliberants want to take up immediately (or at all). That is, in order for protest to
strengthen deliberative legitimacy, it need not fit into the deliberative group (or into an inclusive deliberative setting). Protest can remain outside the deliberative group: it can be disruptive, protracted, its advocates can refuse to accept the terms of debate set out by the deliberative group, and yet it can still play an essential role in strengthening deliberative legitimacy. Importantly, protest can do this without deliberants merely “learning” what is wrong with their arguments from protestors and then taking this information back to the deliberative group where they use it to engage in stronger deliberations. Instead, the real deliberative value of protest emerges when deliberative democrats value the activity of protest. Deliberative legitimacy lies in the participation of all affected people on terms that they can accept—not in a proxy discussion that deliberative democrats take from an external critique. Deliberative theorists need to account for the activity of protest because it is the only way that they can avoid being over- and under-inclusive without running into charges of effective exclusion, marginalization, or co-optation.

In this chapter I look to balance deliberative democracy and protest in a way that simultaneously allows deliberative democrats to evaluate people’s arguments and to avoid co-opting protestors. As I do this I argue that we need to reframe the way that we look at deliberative interactions. This reframing is similar to, and builds upon, the expansive conception of deliberative democracy that theorists (such as Dryzek and Young) offer as they reframe the theory to better reflect a socially pluralistic society. As I show in Chapter 2, the changes that communicative democracy makes to deliberative democracy go a long way to strengthen effective inclusion and to increase people’s efficacy in deliberations. The two amendments that Young makes enable marginalized deliberants to participate more effectively and in doing so strengthen the democratic content of deliberations as well as minimize the structural inequalities that lead marginalized deliberants to question the fairness of deliberative decisions. These revisions are important, but I argue that deliberative theorists fail to take full advantage of these new conceptual resources. I argue that the new methods of communication that deliberative democrats set out can, with a bit more
work, help deliberative democrats to offer a normative justification for protest. Treating difference as a resource helped marginalized people to communicate the significance of arguments that had previously been overlooked by the deliberative group. Just as the institutional changes that let deliberants use difference (to strengthen effective inclusion and efficacy within the deliberative group) improved deliberative democracy, I argue that making changes to the way that we treat protest, following this example, can help deliberative democrats to offer a normative account of protest that strengthens effective inclusion and efficacy without co-opting protestors.

Before I introduce my theory of protest-as-deliberation I look at the deliberative democratic literature on protest – this time from the perspective of theorists whose primary focus is protest, not deliberative democracy. Here I set out the moral pleas for protest that Francis Dupuis-Déri and William Smith make and I look at the additional contribution that Smith makes with his theory of deliberative contestation. While I note the valuable contributions that these theorists make, the moral plea is not, on its own, sufficient and Smith’s call for protest as a form of deliberative dialogue is not sufficiently dialogical and their appeals leave us wanting more in the way of conceptual changes that affect the structure of deliberative theory in a more fundamental way. This, I argue, is where the normative work needs to occur. Before I address this conceptual gap I add to the moral pleas that Smith and Dupuis-Déri make, and I discuss three things that we need to work on if we want to pave the way for the kinds of normative changes that are necessary to satisfy the critiques of protestors and deliberative democrats. One of the things that deliberative theorists can do in order to facilitate the dialogue that needs to occur between deliberants and protestors is to look at the resources that deliberative theory already has. Difference as a resource and inclusive political communication provide us with a good place to start and I detail the ways that we can look to these amendments in order to develop the conceptual ties between protestors, who critique the deliberative group on the grounds of effective exclusion and efficacy, and deliberants. I look to difference as a resource in particular and I draw an analogy between the way that the deliberative group benefits from treating
difference as a resource and by treating protest as if it were a resource (instead of a problem). I build my theory of protest-as-deliberation out of this discussion and I discuss the kind of alternative political communication that protestors can use to engage in extra-institutional deliberative dialogue. Finally, I revisit the normative criteria of deliberative democracy that I set out at the end of Chapter 2. This time, I go through it in order to demonstrate the ways that protestors meet these criteria. My purpose in doing this is both to strengthen the moral case for protest-as-deliberation, and to draw from this in order to develop a discussion of alternative political communication as part of a conceptual deliberative response to protest that will support the theory.

4.1 Protest and deliberative literature, revisited

Francis Dupuis-Déri and William Smith discuss the role of protest in deliberative democracy and, significantly, they do so as theorists whose primary concern is protest (and not deliberative democracy). Neither theorist collapses protest into a larger discussion of deliberative democracy (as with Young), and both make the normative case for an account of deliberative democracy that takes protest seriously. The deliberative potential that Dupuis-Déri and Smith attribute to protest is significant because it falls under a larger democratic justification for protest – one that is not specific to deliberative democracy and as such one that is more open to the idea that deliberative democracy ought to take the (larger) democratic justification of protest seriously and adjust its normative response accordingly. Importantly, their support for protest does not exist solely to enrich a deliberative conception of democracy. Dupuis-Déri and Smith’s discussions of protest make it clear that, as two important components of democratic theory, we ought to pay more normative attention to the connections between deliberative democracy and protest. In doing so they make significant contributions to a deliberative justification of protest.

While Dupuis-Déri and Smith’s contributions are important in framing the problem, they still fall short in terms of reconciling the tension between deliberative democracy and protest. In this section I will offer an overview of Dupuis-Déri’s moral appeal as to why deliberative democracy
ought to offer a normative defence of protest. As I discuss his and Smith’s moral appeals I focus on the specific role that Smith attributes to dialogue and I argue that these critiques, while important, still leave us with important normative questions. In order to reconcile the tension between deliberative democracy and protest I argue that we need a larger framework and to focus on the ways that deliberative theory can set out a conceptual account of the way that we ought to approach these two components of democratic theory when they (appear to) conflict.

Dupuis-Déri’s discussion of the relationship between protest and deliberative democracy grows out of his background in the transnational movement for social justice. As he brings this to bear upon deliberative democratic theory, Dupuis-Déri takes as his starting point the assumption that the deliberative processes of the groups that transnational protestors target\(^1\) are illegitimate from a democratic standpoint; because of this he argues that if we want to take deliberations seriously then we need to find a way to satisfactorily address these critiques. Dupuis-Déri’s response to deliberative theory’s neglect of protest is to argue for the deliberative benefits of protest when institutions fail to meet democratic standards. To do this he makes the case that direct action “may be legitimate within the theoretical framework of deliberative politics, especially when it is directed against institutions falling well short of the ideal of deliberative politics.”\(^2\)

This starting point is different from mine. On Dupuis-Déri’s account it is easy for deliberative democrats to accept that whenever deliberations are not inclusive they ought to adjust to meet normative deliberative criteria (as we see in Young’s discussion in *Activist Challenges*). The reasoning that Dupuis-Déri employs to make the case for the democratic benefits that protest can bring to deliberative groups, however, adds something that is missing in Young’s discussion. The motivation that leads him to critique organizations such as the World Trade Organization and the World Bank is similar, but Dupuis-Déri’s discussion of legitimacy has implications that are

\(^1\) Here he focuses primarily upon the World Trade Organization and the World Bank.

significantly more radical than those found in Young’s discussion. Unlike Young, Dupuis-Déri focuses upon protest as it exists outside of and in opposition to the deliberative group. Dupuis-Déri looks at protest action – not just protestors’ arguments – and he argues that people’s external protest actions are legitimate if: 1) the decision to resort to force – or not – is made through deliberation, 2) such deliberation takes place among free and equal individuals, and 3) said non-violence or the use of force is seen as a better means to defend or promote equality, liberty and justice and/or to correct flaws in the general deliberative process.  

These criteria are by no means meant to form a decisive checklist that, if protestors meet all three, automatically make their contestatory actions legitimate from a deliberative standpoint. They are, however, meant to urge deliberative democrats to rethink the measure by which we currently evaluate protestors and, importantly, to make the argument that people who protest can remain outside of and opposed to the deliberative group as they make these critiques. Unlike Young, Dupuis-Déri does not frame his discussion in terms of protestors either needing to express their support for deliberative democratic processes (as with Young’s first activist challenge) or in terms of resolving problems of effective exclusion by looking for a way to make protestors an (internal) part of deliberation (as with Young’s third activist challenge).

The three criteria that Dupuis-Déri sets out all focus upon the (deliberative) processes that protestors use to make their decisions to engage in protest. In this way Dupuis-Déri’s discussion of protest is significantly influenced by deliberative democratic literature. Because these criteria have their limitations, however, Dupuis-Déri expands his discussion of legitimate protest and addresses this contestation as it is likely to occur in practice. Here he offers a list of seven effects that protestors and direct action may have, all of which draw from deliberative democratic criteria and

push to make deliberation “freer, more equal, and just.”

He argues that if we examine direct action through the lens of deliberative politics (applying deliberative criteria to protestors’ actions) then we can view confrontational action “as a means to improve the quality of deliberation and to move from an elitist deliberative regime toward a more participatory regime.”

Here the scope of deliberative inclusion and legitimacy extends beyond the deliberative group and involves taking protestors seriously as they are (and not as they “should be” in inclusive deliberative settings). The reasons that Dupuis-Déri offers draw from the normative criteria of deliberative democracy and they are all meant as moral pleas in support of the deliberative value of protest.

4.1.1 Dupuis-Déri: direct action and effects on deliberative democracy

*Agenda-setting:* Dupuis-Déri begins his list by arguing that protest is sometimes necessary to start deliberation on a new issue when people protest the limitations of the agenda. He notes that sometimes it is difficult for people, even if they are included in the deliberative group, to deliberate on specific topics. He gives the example of Svend Robinson, who protested against the Free Trade Areas of the Americas (FTAA) in Quebec City even though he was part of the minority government in Parliament at the time. It is difficult to change the agenda from within a deliberative group, especially given particular hegemonic framings. Just as in the NWMO example, people engage in protest in order to push for issues that deliberative institutions may foreclose or explicitly reject.

---


222 Dupuis-Déri notes that the minority government “generally has no control over the negotiation and signature of treaties such as the FTAA” “Global Protesters Versus Global Elites: Are Direct Action and Deliberative Politics Compatible?”, p.179. This being said, however, Robinson’s status as a Member of Parliament does give him an effective platform to critique the FTAA. Protest is necessary because, despite Robinson’s formal inclusion and effective inclusion, the starting point of deliberations on the FTAA exclude serious discussion on the kinds of critiques that Robinson wanted them to address. Robinson’s participation in Parliament, while important in terms of registering dissent, did not have the efficacy that was necessary to change the tone of deliberations. As a result, this external protest, which challenges the government’s support of the issue, is necessary to reflect the significant division within the ranks of the government itself.
When opposition to issues is so entrenched then protest is often the only way to reframe the issue so as to capture institutional attention.

**Participation:** Dupuis-Déri argues that confrontation can push the deliberative group to include new deliberants who would, without this pressure, otherwise face exclusion.\(^{223}\)

**Representation:** Questions of inclusion and exclusion are not always as straightforward as deliberative theorists would like. Deliberants may disagree on who deliberations affect (and therefore who ought to be present in deliberations). When this is the case then activists can push the deliberative group to be more inclusive and achieve this by standing in for voiceless groups such as children working in sweatshops and endangered species.\(^{224}\)

**Information:** Protestors increase the quality of deliberations because they draw attention to ideas and arguments. The tactics that protestors use to do this may be a more effective way, Dupuis-Déri argues, to promote particular information and arguments.\(^{225}\) There is a reason why some claims rank higher than others (minority protections versus a community’s desire to build a new arena, for example), but since one of the ways that the deliberative group can fail to treat people as equals is by not giving sufficient attention to people’s reasons, then drawing attention to particular arguments in this way may be necessary on a rich account of deliberative legitimacy.

**Imagination:** Dupuis-Déri’s argument that “protests may involve a transgression of normality and the legal order, allowing people to see social reality in a new way and to reconsider what is reasonable and possible, hence providing new problem-solving options with regard to the topic of deliberation”\(^{226}\) is in the same kind of vein as Young’s claim that activists are important because they

---


disrupt our thought processes and make us wonder, thus opening up the possibility for new and
better solutions to problems, problems that we both are and are not aware of.

**Decisions:** Protest is necessary if important issues are continuously (and unreasonably) postponed
or if the issue is especially timely. Dupuis-Déri offers the Live8 campaign’s pressure upon the G8 to
“stop talking endlessly about reducing global poverty and to take action by cancelling the debt of the
poorest countries” as an example of the kinds of exclusions that tend to occur in deliberations.227
The sense of urgency in this example is also the case with ACT UP, which I discuss later in the
chapter.

**Outcomes:** People can engage in protest to criticize or block the effects of deliberative decisions and
to push for the re-opening of a debate. As Dupuis-Déri notes, this function overlaps with agenda-
setting.228

Although the majority of the reasons in support of deliberative confrontation correspond with
deliberative democratic criteria, Dupuis-Déri does more than explain how protestors meet
deliberative criteria and goes on to explain how protestors adapt the criteria and reframe it to fit their
position outside the deliberative group. On this view, protestors not only meet the normative
requirements of deliberative democracy (thus challenging the deliberative democratic view that
deliberative legitimacy will be threatened if the deliberative group engages with protestors), but they
go on to interpret them in a way that places normative pressure on deliberants to respond to their
claims. This normative justification of protest is significant because it takes a distinctively
deliberative position. Dupuis-Déri does not see the same tension between deliberative democracy
and protest that Young does and the criteria that he develops makes a significant contribution to a
normative justification of protest.

227 Dupuis-Déri, “Global Protesters Versus Global Elites: Are Direct Action and Deliberative Politics
228 Dupuis-Déri, “Global Protesters Versus Global Elites: Are Direct Action and Deliberative Politics
In “Democracy, Deliberation and Disobedience” (2004), William Smith develops a theory of civil disobedience that is informed by deliberative democracy. Like Young and Dupuis-Déri, Smith offers a normative justification of protest. Smith argues that civil disobedience is justifiable in deliberative theory and practice when the deliberative group fails to meet three fundamental principles of deliberative democracy. He argues that marginalized people are justified to engage in acts of civil disobedience whenever deliberations are insufficiently inclusive, manipulated by more powerful participants, or when the debate is insufficiently informed. His justification, insofar as all three principles deal with effective exclusions in a deliberative group that prevents deliberants from participating as equals, is a democratic one, and complements the justice-based accounts of civil disobedience put forth by Rawls and Dworkin (and others). After Smith sets out the three deliberative principles, the violation of any of which form the moral basis of his democratic justification for civil disobedience, he develops a theory of “deliberative contestation.” Deliberative contestation combines the normative justification for protest in a deliberative context with a more expansive discussion of the way that protestors engage the deliberative group in dialogue about the procedural violations of the three principles in question. Protestors engage in deliberative contestation to challenge exclusion on normative grounds and to appeal that deliberative democrats reconsider their actions. In practical terms, Smith supports deliberative contestation for the way that it contributes to ongoing deliberation by either engaging vertically with the state as protestors try to enter a (more effectively inclusive) dialogue and use deliberative contestation because they want a response from the deliberative group, or engage horizontally with others in civil society in order to

229 Smith’s focus is on civil disobedience (a form of protest that, as I discuss it in Chapter 2, poses a stronger challenge to democratic institutions than do acts of protest that do not break laws). His focus on civil disobedience specifically (and not protest in general) takes the stronger challenge to deliberative democracy as a starting point. The arguments that Smith makes, although he discusses deliberative contestation specifically in relation to civil disobedience, are applicable to discussions of protest more generally. Smith’s focus on civil disobedience is also necessary for the third section of his paper in which he looks at the moral dimension of deliberative contestation in non-violent civil disobedience and where he distinguishes between coercion, harm, and persuasion. William Smith, “Democracy, Deliberation and Disobedience.” In Res Publica 10: pp.375-376.

raise awareness and gather support. Because deliberative contestation emphasizes communication, the theory places a burden on protestors in terms of explaining why protest is justified and making sure that people offer arguments in support of this protest, and upon the deliberative group to “respect, listen to and respond to arguments.” Smith’s theory is, as he explains, “deliberative in that it is geared towards contributing to ongoing deliberation in the public realm, and it is contestation in that it constitutes a challenge to perceived failings on the part of actual deliberation.” The two parts of this theory are important because they emphasize the need to balance deliberative democracy and protest without subsuming one to the other – a response that fits in well with the challenge of effective inclusion, efficacy, and co-optation that I argue that a normative deliberative account of protest must be able to meet.

The deliberative contribution of Smith’s theory is very closely connected to his justificatory argument for protest. Like Young’s discussion of activist challenges to deliberative democracy, deliberative contestation has as its goal the redress of violated deliberative principles. Smith, however, looks at deliberative democracy in order to develop a justification for a theory of civil disobedience, whereas Young looks at protest in order to strengthen a theory of deliberative democracy. Smith’s perspective is different, and the moral justification that he offers for civil disobedience draws attention to the significance of civil disobedience as a process and not merely an analytical tool (albeit one that can improve the quality of inclusion in the deliberative group). As Smith sets out his argument, the moral plea is difficult for deliberants to ignore. Smith uses the language of deliberation and emphasizes the communicative act of deliberative contestation in a way that appeals to the same normative base as does deliberative democratic theory. This appeal upsets deliberative democrats’ critique of protest as unreasonable. Deliberative contestation is, primarily, a

---

way to establish communication. The intent is to “open up channels of communication and influence between civil society and the state” and in doing so “to persuade the state to enter into a dialogue.” It is important that the justification for this communication has a normative foundation and that it is constrained by normative criteria. When civil disobedients address deliberants using deliberative contestation they have to use public justifications to appeal to the deliberative group’s “sense of justice or their capacity to reason and deliberate.” Similarly, they have to draw upon evidence to support their assertions. The reliance upon communication and normative criteria combine to enable deliberative contestation to contribute to the gap in the literature. While the normative foundation of Smith’s theory is sound and the normative argument for protest is important, his discussion of the communicative aspect of deliberative contestation is not sufficient to address the specific role that protest has in a larger theory of deliberative democracy. Smith emphasizes the way that deliberative contestation can initiate dialogue, and the desire that Smith has to see civil disobedients enter into a dialogue as they stand outside the deliberative group (instead of merely enriching someone else’s dialogue) is, in itself, important. However, the normative appeals for the value of protest and the corresponding requirement for the deliberative group to engage with protestors (in order to benefit from this additional deliberation) are, by themselves, not enough to support the dialogical element that his theory requires. Deliberative contestation is a good normative justification as to why deliberants ought to engage in dialogue with protestors, but it is unclear as to how this dialogue – as a sustained back-and-forth between the deliberative group and protestors – will occur and what, beyond this initial moral plea, will sustain it.

Smith, it seems, overestimates the extent to which dialogical contestation can actively engage the deliberative group in civil disobedients’ arguments. While he outlines an important first step in a dialogical process, his theory of deliberative contestation does not offer a strong conceptual account.

238 Smith, “Democracy, Deliberation and Disobedience”, p. 375
of how an actual dialogue would unfold between deliberants and protestors. Presumably, the deliberative group would pay attention to protestors’ claims because of the normative justifications that Smith sets out for their behaviour. This moral plea is bound to carry some weight given that the deliberative group has to justify their procedure and decisions, but Smith does not elaborate upon the effect that shaming the deliberative group into effectively including protestors could have upon actual deliberations (most likely because he is not writing as a deliberative democrat and his focus is on civil disobedience) and how this effect would manifest itself. Practically speaking there is little in Smith’s theory to give us an idea of what a rich conceptual account of a normative deliberative democratic response to protest would look like. The closest that Smith gets to sketching out this kind of conceptual response lies in his explanation of what the second step in a dialogue would consist of. Here, however, although Smith asserts that communicative effort on the part of civil disobedients “should be matched by a commitment on the part of other citizens (and ideally the state) to respect, listen to and respond to” their arguments240 he does not develop this argument and it is unclear how deliberative democracy can sustain the kind of dialogue that he hopes for and that is necessary to ground this account.

A conceptual account of the dialogical process between deliberants and protestors is necessary in order to make sure that both parties know what is expected of them, to carve out fora for this dialogue, and so that protestors have the means to engage in deliberations with people in the deliberative group. On the one hand, there may be resistance to the idea of a conceptual response to protest that offers normative guidelines as to how protest ought to occur if it is to meet the criteria of protest-as-deliberation. The main risk here is co-optation the point of protest is to be outside of and in opposition to the deliberative group and so the worry is that any developed conceptual account of protest (such as Young’s inclusive deliberative settings) might undermine this objective by extending the power of the deliberative group, via these new requirements, to protestors and unduly

239 Smith, “Democracy, Deliberation and Disobedience”, p. 375
limiting the kind of protest actions that are acceptable within the scope of deliberative democracy.\footnote{Smith, “Democracy, Deliberation and Disobedience”, p. 374} It is important that a conceptual account is not just an extension of the deliberative group. The measures that are necessary to ground a theory of deliberative contestation need to regulate the exchange between the deliberative group and protestors without themselves being regulated by the deliberative group. While we do need to separate the criteria within the deliberative group from criteria in protest-as-deliberation, the regulatory criteria themselves are necessary. In order for the deliberative group to take protestors’ claims seriously, these criteria need to address how protestors will be able to make their arguments in a way that better equips them to persuade the deliberative group that they have not lived up to these three deliberative principles. Because protestors leave (or refuse to enter deliberations) on account of their effective exclusion and lack of efficacy, the conceptual response that deliberative theory needs to develop is important because of the ways that it will equip protestors to speak to power imbalances. While normative justifications for protest are important in terms of getting deliberants to listen to people outside the deliberative group, on their own they are not enough to change the larger context so that protestors can persuade deliberants. This is why it is important to establish a full conceptual account that deals with the kind of discourse that deliberants ought to listen to (which kind of protest actions meet the criteria of deliberative contestation, what forms of communication count as engaging the deliberative group) as well as the laws and regulation that deal with the availability of public space, and the economic issues that surround access to this space. Without an account of the ways that protestors can actually engage in dialogue with the deliberative group, the normative arguments for protest will have little practical impact upon deliberations given the already non-ideal circumstances that marginalized deliberants and protestors encounter.

\footnote{Some limitations – specifically where protest actions involve violence or the threat of violence – are necessary. Apart from instances in which protest actions violate normative democratic criteria, deliberative democrats should be cautious of limiting the kinds of protest actions that they deem acceptable within a theory of protest-as-deliberation.}
Dupuis-Déri and Smith, to different extents, offer normative justifications for the dialogue that needs to take place between protestors and the deliberative group if we want to take deliberative legitimacy seriously. Importantly, they offer normative justifications as to why protestors need to be the ones who communicate their public reasons, as opposed to Young, who ends up (unintentionally) co-opting protestors. Smith’s normative justification for a dialogue between protestors and the deliberative group is an important rebuttal of this co-optation. The problem here, however, is that while Smith offers a strong moral plea for the inclusion of protestors, and argues for the need to start a dialogue, he does not ground his argument for sustained deliberation between protestors and the deliberative group in terms of a full conceptual account of the changes that are necessary to enable protestors to successfully engage in this kind of dialogue.

The structural constraints that marginalized deliberants and protestors face make this kind of conceptual account of the relationship between the deliberative group and protest necessary. Even moral pleas as specific as the ones that Dupuis-Déri and Smith set out do not, despite their strong justifications for protestors’ effective inclusion, give protestors the tools that are necessary if they are to take proper advantage of the normative case for protest. A conceptual account is necessary so that the deliberative group (or the state more generally, depending upon the specific context) does not undermine this dialogue by closing down democratic spaces of external contestation and deliberation. A conceptual account of support for protestors is also necessary to make sure that the deliberative group does not co-opt this dialogue. There is, as Young’s discussion shows us, the danger that the deliberative group will respond to moral appeals for inclusion but do so in what are effectively the deliberative group’s terms and thus undermine the normative justification for protest. Developing a full conceptual account of the appropriate relationship between the deliberative group and protestors can prevent this co-optation by inserting space between the deliberative group and protestors so that critiques really do come from outside the deliberative group and are, therefore, capable of standing in opposition to it when necessary.
While I wait until Chapter 7 to set out what this conceptual account ought to look like, it is worth setting out the criteria that such an account ought to meet. In order for a theory of protest-as-deliberation to succeed, a conceptual account of protest needs to clearly set out the necessary tools. Normative criteria will need to address the motivation that the deliberative group and protestors have for engaging in protest-as-deliberation. Without a clear account of this deliberative democracy will not have the support that is necessary to set out the practical tools that we need to put the theory into practice. These practical measures ought to address ways of speaking and need to balance the way that protestors will try to persuade the deliberative group with mechanisms that guard against their co-optation. We need to offer an account of how these ways of speaking should impact deliberative criteria of reason-giving and inclusion. Practically speaking, more work has to be done on the fora that protestors will use to make their arguments. An institutional account ought to address both the physical space (the access that protestors have) and the legal room that protestors have to engage the deliberative group without suffering undue penalties. Both these normative and practical measures are necessary if a sustained dialogue is to occur. In the section below I will begin the groundwork for this conceptual account of protest in deliberative theory as I ask a series of questions that concern the normative case for protest in deliberative democracy.

4.2 Why should deliberants talk to protestors?
The moral appeals that Smith and Dupuis-Déri set out make an important contribution to deliberative democratic theory’s capacity to offer a normative justification of protest. While I support their appeals, my intent in this section is to add to them and flesh out this normative justification. Because my critique of Smith and Dupuis-Déri centres largely upon the need for a stronger conceptual account of the way that protest-as-deliberation can occur – which, I argue, limits the strength of their appeals – I look at three issues that we need to address and at requirements that protestors should meet if they are to engage in legitimate dialogue with the deliberative group. First, we need to take a closer look at protestors’ capacity for legitimate arguments and this requires that
we take a closer look at the way that protestors form arguments and present them to the deliberative group; additionally, we need to take a closer look at the way that the deliberative group reacts given their own specific criteria of reason-giving. Second, we need to identify the specific problems that arise whenever people try to engage in an exchange of reasons while they are outside the deliberative group. This picks up on the first criterion. When protestors appeal to the deliberative group they are outside the deliberative group’s authority to regulate normative criteria, and consequently a strong normative justification for establishing a link with protestors must address the deliberative group’s concerns about their ability to monitor the exchanges of reason-giving that they argue are necessary to protect deliberative legitimacy. Finally, we need to be more specific when we set out the benefits that engagement between protestors and the deliberants will bring to the deliberative group, and when we discuss the normative problems that will exist if this dialogue cannot occur.

As I flesh out the normative reasons that deliberants have to engage with protestors I point to some of the resources that deliberative theory already has and can use to support this dialogical interaction. Specifically, I will revisit deliberative theory’s response to the challenges that social pluralism presents and look at some of the ways that deliberative theorists can use difference as a resource to support a stronger normative response and offer an account of the way that such a dialogue might unfold.

As I discussed earlier, Young, Smith, and Dupuis-Déri offer good normative arguments for protestors’ capacity to put forth arguments that meet deliberative democracy’s standard of legitimacy, so I will say little about this here. For now I will assume that the justifications that these theorists set out are sufficient to allow me to move on to the second step. I will return to the reasonableness of protestors’ arguments when I set out the conceptual account of the way that a dialogue between protestors and deliberants might take place in Chapter 7.

Deliberants might accept that protestors sometimes have legitimate arguments, but may nonetheless refuse to enter into a dialogue with them. When this is the case, their concern is that
protestors will not adhere to deliberative criteria because they present their claims from outside the deliberative group. Without some assurance that protestors must meet these criteria (that mediators, etc, can ensure in the deliberative group), deliberants are suspicious of protestors’ claims to legitimacy. Ultimately, given the deliberative group’s requirements, the fact that protestors may have reasonable arguments is outweighed by the lack of a conceptual response that is capable of addressing this reservation. Deliberants might be willing to engage with the claims that protestors put forth if they were to make the same claims inside the deliberative group where they could be sure that deliberative criteria would govern the exchange of reasons. This is Young’s approach; she sees the value of protestors’ contributions, but does not extend her endorsement of their deliberative value to deliberative democracy’s acceptance of protestors as external deliberative partners. In order to avoid co-opting protestors, and to prevent the deliberative group from automatically rejecting protestors’ arguments, deliberative theory needs something that will help both parties to mediate this grey zone.

Deliberative legitimacy would improve if deliberants were to remain open to the possibility that the deliberative group is not always fully and effectively inclusive and that deliberants do not always have the efficacy that they need in order to participate as equals. This appeal to legitimacy – although it carries normative weight – is not, on its own, enough to outweigh the potential challenge to legitimacy that could arise if the deliberative group were to deliberate with protestors without reassurance that they respect deliberative criteria. Establishing that protestors have legitimate arguments is not enough to convince deliberants that they ought to enter into a dialogue with protestors. Protestors’ refusal to debate these arguments from within the deliberative group, where everyone can exchange reasons with the assurance that deliberative criteria will ensure fairness, poses a further challenge. Because protestors’ decision to engage deliberants from outside the deliberative group is in direct response to their effective exclusion from deliberative framings and decisions and
their lack of efficacy, they are not going to cede to the deliberative group’s requirement that deliberative criteria serve as a normative check on the reasonableness of their claims.

This scepticism that deliberative democrats display toward protestors prevents them from taking advantage of the potential contributions that protestors could make to the deliberative group. The normative justifications that protestors have for (some of) their claims and the implications that the exclusion of claims has upon deliberative legitimacy leave deliberative theorists with a different version of a familiar problem. The problem that the deliberative group’s exclusion of protest poses is a problem that is similar to pluralist objections to a narrow conception of deliberative criteria of reason-giving. In both cases, marginalized people object to a particular exclusionary construction of deliberative criteria. The main difference between protest and social pluralist challenges is that deliberative theorists (at least try to) meet the pluralist challenge within the deliberative group. Here, marginalized people have formal inclusion, and the deliberative group takes institutional measures to (try to) ensure that this inclusion is effective and that differently-situated people can participate effectively and as equals. While the deliberative group is not always successful in doing this, the recognition that this is something that deliberants need to do is of considerable significance and has led to an expansive conception of deliberative (communicative) democracy that is now much better equipped to deal with social pluralism. Protestors share many of the same objections about their effective exclusion and lack of efficacy within the deliberative group. Despite the changes that deliberative democrats make to accommodate social pluralism, however, the fact that protestors are outside the deliberative group when they level their opposition makes their problem significantly different. The concession that protestors want the deliberative group to make (to allow that their claims may be reasonable and, as such, ones that warrant deliberative attention) is fundamentally at odds with the deliberative group’s institutional requirement that claims must be held to a standard of public reason and that the only way to ensure that this is the case is to subject them to evaluation in the deliberative group. The incompossibility between deliberative criteria and protestors’ concerns
of co-optation leads deliberants to reject protestors’ claims outright on the grounds that their approach violates deliberative legitimacy. Protestors, despite the legitimacy-based concerns that they may share with differently-situated people who remain in the deliberative group, are at an impasse when it comes to the question of whether or not they have a legitimate claim upon the deliberative group.

4.2.1 Difference as a Resource

When deliberative theorists respond to the challenge of social pluralism, the institutional amendments to deliberative democracy are able to address charges of effective exclusion and a lack of efficacy without sacrificing the deliberative group’s ability to monitor the deliberative criteria that ensure a fair discourse. In this section, I challenge the grounds on which deliberative theorists argue that deliberative democracy is unable to offer a normative justification of protest. The deliberative group’s response to social pluralism is to expand the scope of democratic communication and to utilize difference as a resource – to expand the deliberative criteria of reason-giving so that deliberative democracy’s own criteria do not lead deliberants to preemptively reject arguments that might, in spirit if not in the letter, speak to their normative requirements. I argue that there is no reason why deliberative theorists do not take a similar approach to the challenge of protest. Specifically, what I propose is that deliberative theorists treat protest similarly to the way that we now treat difference. The “bracketing” that protestors have to contend with when they leave the deliberative group is, of course, of a different kind than the bracketing that differently-situated people encounter within the deliberative group before deliberative theory expanded the criteria of public reason. In protestors’ case there are additional obstacles to overcome because they are outside the deliberative group where their claims are not subject to the monitoring that occurs within deliberative groups. The assumptions that deliberants then make about the reasonableness of protestors’ unevaluated claims make it especially difficult for protestors to rebut charges that they need to reframe their reasons in “acceptable” ways. In addition, we ought to expand the conception
of democratic communication even further. In this way, the institutional amendments that Young makes to deliberative democracy can, with a little rethinking, help deliberative theorists to offer a stronger normative account of protest.

Difference as a resource, as I outline in Chapter 2, asks that when differently-situated people level charges of effective exclusion at the deliberative group or contest their lack of efficacy on the grounds that the deliberative criteria of reason-giving are too narrow, deliberants ought to rethink what counts as inclusive deliberative communication and expand the criteria to include different ways of presenting reasonable claims. Specifically, deliberative democracy ought to unfold in a way that allows deliberants to try to convince others that their reasons – ones that the prevailing criteria of reason-giving do not recognize – are in fact public reasons and merit recognition as such. The deliberative group accomplishes this by changing the procedural requirements of deliberative democracy to enable people to deliberate across their differences instead of otherwise limiting their arguments and trying to fit their claims into unsuitable “impartial” moulds. Viewing difference as a resource allows people to use new and previously inadmissible information and modes of communication in order to clarify discussion and to make the case that their arguments ought to have more consideration in deliberations.

Communicative democracy, because it revisits the criteria of reason-giving in this way, makes a significant difference to the effective inclusion and efficacy of marginalized people. The exchange of reasons itself, however, takes place – and can only take place – within a deliberative setting. It is possible to expand deliberative criteria to make deliberative democracy more effectively inclusive toward differently-situated people within the deliberative group because one of the main ideas behind deliberative democracy is that even civil and political rights are not off the deliberative agenda.242 The significant reworking of deliberative criteria is compossible with the criteria of public reason

because deliberants can debate about what the criteria of public reason ought to look like while still treating each other as free and equal participants in deliberations.243

Protestors cannot question the criteria of reason-giving in the same way that people in the deliberative group can. This is true for at least two reasons. First, protestors, unlike other marginalized people, are by definition not part of the deliberative group; consequently protestors have a different, weaker claim upon the deliberative group. Marginalized people have a legitimate claim when they ask other deliberants to revisit these criteria because they are (at least on the face of it) equal participants in deliberations and are equally bound to the deliberative group; the same normative criteria that constrain marginalized groups when they question deliberative criteria of reason-giving apply to everyone, and so this revisiting happens without danger to other deliberants.244 This push to question the kinds of reasons that ought to carry weight in deliberations comes from a call to legitimacy that deliberants cannot refuse if their actions are to be consistent with their claim to deliberative legitimacy. This normative basis for differently-situated people’s challenge within the deliberative group is consistent with deliberative processes, whereas the claim from protestors does not have the same normative force because although it is a moral claim it is one without sufficient conceptual ties to or with any protections from the deliberative group.

Second, protestors have a good reason not to try to make the same claim upon the deliberative group that marginalized people do. If protestors were to adhere to the same evaluative criteria as marginalized people then they would risk co-optation. Protestors cannot remain protestors

243 Although the ability to contest basic rights and our interpretation of these rights is an important component of deliberative democracy this is not unproblematic. There is a concern when a set of deliberative rights rests upon the degree to which basic rights are themselves contestable: safeguards must be in place prior to deliberations if they are to protect the deliberative process; at the same time, if we form a set of rights prior to deliberations then we risk those who already possess the most power having undue influence in terms of determining the values that guide deliberative democracy – and without the guaranteed and effective input of marginalized people. Carol Gould addresses these issues in “Diversity and Democracy: Representing Differences” In Seyla Benhabib, ed. Democracy and Difference: Contesting the Boundaries of the Political. (Princeton: Princeton University Press, 1996). Joshua Cohen also speaks to this issue in “Deliberation and Democratic Legitimacy.” In Deliberative Democracy: Essays on Reason and Politics, eds. James Bohman and William Rehg. (Cambridge, MA: MIT Press, 1997), pp.82-84
if, in every respect but for their continual physical presence in the deliberative group, they receive the same treatment as other marginalized people. While entering the deliberative group and – finally – being able to speak as equals may be protestors’ goal in protest-as-deliberation protestors do not have the same relation to the deliberative group that marginalized people do; to assume otherwise is to fail to treat protest as protest (that is, as something that is necessarily external to the deliberative group) and, once again, to see deliberative democracy fail to offer a normative account of protest.

Protestors, then, because they have a significantly different relationship to the deliberative group than do marginalized deliberants, cannot follow marginalized people and use difference as a resource in the same way. The difference between marginalized people and protestors, however, does not mean that protestors cannot take advantage of difference as a resource. To do so, protestors need to use it differently and must overcome additional obstacles as they make their case for having a legitimate claim upon the deliberative group. In what follows, I will propose a way that protestors can draw from the amendments that communicative democracy makes to deliberative democracy. I will outline the specific changes that must occur if protestors and deliberants are to avoid the problem of illegitimacy that arises when deliberants ignore protestors, and the problem of co-optation that would occur if the deliberative group were to demand that protestors were to try to exchange their reasons in the deliberative group.

4.2.2 Protest-as-deliberation

Both protestors and deliberants can benefit if we think of protest similarly to the way that we think of difference. That is, if we look at protest not as a problem to deliberative theory, but as a resource that, if we approach it in the right way, can help to increase deliberative legitimacy. Instead of either excluding protest outright, or drawing from protestors’ arguments in order to bring (some of) protestors’ claims into the deliberative group (but leaving protest itself unaccounted for), I argue that

---

244 Other than the “danger” that privileged deliberants might have to give up part of their oppressive power, which is clearly not a legitimate concern and therefore does not count.
we need to rethink our normative response to protest and expand deliberative democratic theory to establish communicative links between deliberants and protestors.

Treating protest as a resource – similarly to the way that deliberants treat difference as a resource – will strengthen the reasons that protestors offer. This is the case because the justification rests on a moral plea and conceptualizing protest as a form of deliberation depends on the appeal to (but not compliance with) deliberative criteria. If protestors appeal to the deliberative group because they argue that their effective exclusion and lack of efficacy are the result of the deliberative group undervaluing their reasons, then protestors appeal to deliberative democracy’s normative criteria. If protestors are committed to deliberative principles as the best (moral) way to deal with disagreement, then there should be something in deliberative theory that enables the deliberative group to re-evaluate claims that purport to adhere to deliberative democracy’s criteria despite their (self-imposed) formal exclusion from the deliberative group. This normative argument, however, must be able to counter deliberative objections to the illegitimacy of external, unmonitored deliberation.

Given the differences between protest and difference, however, and in order to profit from the democratic benefits of protest, deliberants need to do more than to think of protest as a resource in a way that is analogous to difference as a resource. Finding a way to utilize protest without co-opting it poses a serious problem to deliberative democrats who want to establish a dialogue between protestors and deliberants. The immediate response to using protest as a resource is for deliberative democrats to treat protest in a way that (primarily, if not solely) benefits deliberative democracy. This is the approach that Young takes, and it results in co-optation (however unintentional). When co-optation is the result, then deliberative democracy does not deal with protest and the approach does not end up benefiting deliberative democracy. Instead of thinking of protest as if it is a resource, I argue that we ought to think of protest as a form of deliberation. This particular form of deliberation is, however, distinct because it does not fold into the deliberative group and therefore resists co-optation.
4.2.3 The Deliberative Polity

The improvement that treating difference as a resource brought to deliberative democratic theory ought to influence this conception of protest as a form of deliberation. In addition to drawing from the positive contributions of difference as a resource, deliberative democrats need to look further than the changes that this inspired. Approaching protest as a form of deliberation forces us to think about both protest and deliberation differently; instead of viewing protest as something that contributes to deliberative discourse (in terms of deliberants taking protestors’ concerns and incorporating these arguments into the deliberative group) we ought to think of protest as something that has the capacity to constitute its own distinct part of the deliberative dialogue. In order to avoid co-optation (and to prevent falling prey to the problems that Young does with her inclusive deliberative settings) we need to reframe what we mean by deliberative dialogue. The accounts of protest that I look at in the previous chapter conceive of a deliberative group (or a series of connected deliberative groups) that dominate all deliberation (a hub that ad-hoc deliberative groups will all return to because the deliberative group is where decision-making occurs). Because this is the case, even when people who challenge deliberative criteria or particular framings of deliberations have their own space (as in Young’s inclusive deliberative spaces), these contestatory ad-hoc groups still fall under the ambit of the main deliberative group. What I propose is that when deliberative democrats think of protest as a form of deliberation, this protest ought to occupy a separate space. Importantly, this space must be outside the deliberative group – external to (and in opposition to) the deliberative hub. This clear separation allows us to avoid charges of co-optation. In order to establish a dialogue, however, there needs to be a connection between the deliberative group and protest within this larger deliberative space. I call this space the deliberative polity. The space is both physical (the deliberative polity encompasses both the public space where protest occurs and contains a deliberative group) and conceptual (it requires that we think of the relationship between protestors and the deliberative group in a specific way, which I will set out shortly). In creating this larger deliberative space, the relationship between deliberative democrats and protestors necessarily
changes and we can better conceive of a non-co-optative dialogue – in the form of protest-as-deliberation – between the two.

Protest-as-deliberation must take place within this larger, more expansive, deliberative polity that encompasses both protestors and the deliberative group. The deliberative group still plays the central role in this reconceptualization. The legitimacy of the deliberative group depends upon its relationship with the deliberative polity and the dialogue that it can sustain with protestors. Protest-as-deliberation has several important institutional implications for deliberative democracy. In what follows I will explain what the deliberative polity consists of and set out the relationship between the deliberative group, the deliberative polity, and protest. I will also explain why – and how – protest as a form of deliberation within a deliberative polity can successfully deal with the challenges of illegitimacy and co-optation.

Because the fundamental disagreement between protestors and deliberative democrats turns upon the weight that the deliberative group gives to particular issues and the deliberative decision, the justification for protest-as-deliberation – from the perspective of both the deliberative democrat who needs convincing that dialogue with protestors is legitimate, and from the perspective of protestors who fear co-optation and think that protesting will be more effective in terms of communicating the significance of their arguments – has to avoid giving either protestors or deliberants the final say in which arguments are legitimate and how much weight these arguments ought to carry when it comes time to evaluate them. When the problem between protestors and the deliberative group is a dispute over the framing of an issue and the weight that people’s arguments should carry, protestors should still share the deliberative group’s commitment to deliberative democracy’s normative criteria. The difference in protestors’ interpretation of these criteria as they object to their effective exclusion from the exchange of reasons ought not to negate their demonstrable commitment to deliberative principles. We see the deliberative group acknowledge marginalized deliberants’ commitment to deliberative principles in the move to recognize difference
as a resource. If protestors are to convince deliberants of their commitment to normative deliberative principles, then they need to take deliberative democracy’s criteria into account when they engage in protest. If we think of protestors as people with potentially legitimate objections to the deliberative group’s agenda and decisions, then they ought to be able to engage in a dialogue with people in the deliberative group over the deliberative processes that lead to their effective exclusion. If protestors appeal to normative deliberative democratic criteria and if they frame their (external) arguments as ones that will improve deliberative legitimacy then it does not make sense to exclude protestors from all means of deliberative exchange and evaluation. This, and the recognition that the deliberative group’s interpretation of deliberative criteria does not always result in the best (most legitimate) process or outcomes, is why deliberative theorists ought to look at deliberative space in terms of both a deliberative group and a deliberative polity.

4.2.4 Impact on the Deliberative Group

On this understanding of deliberative space, the deliberative group will have to change in terms of demonstrating a willingness to accept that protestors might have reasons that merit inclusion. Apart from conceding this possibility and engaging in dialogue with protestors, the deliberative group remains the same and retains its position as the decision-making body. The main change in an account of protest-as-deliberation occurs in the way that deliberative theorists situate the deliberative group within the polity. Instead of the hard and fast separation between deliberative/non-deliberative and legitimate/illegitimate arguments, the deliberative polity replaces the “regular” polity and the deliberative group assumes a new relationship with protestors. Situating the deliberative group within a larger deliberative polity changes the ability of the deliberative group to respond to protest. The relationship between the deliberative group, protestors, and the deliberative polity is different from both Gutmann and Thompson’s institutionally-centred account of deliberative democracy and from Habermas’s discussion of the relationship between social and administrative power. Unlike Gutmann and Thompson's discussion of deliberative democracy, people outside
deliberative groups that are responsible for decision-making play a much greater role. On my account, the role of protestors extends beyond the impact that they make in terms of highlighting an issue that the deliberative decision-making group then (if protestors are, on the deliberative group’s account, successful) take up. Unlike in Gutmann and Thompson’s account, the space outside deliberative groups is important independently of the response that the deliberative group has to marginalized deliberants and protestors. On Habermas’s account of deliberative democracy, which does a great deal more in terms of the active role that civil society plays, people in the public sphere still only have ties to the decision-making power of the deliberative group insofar as they can indirectly influence the agenda via their ability to persuade a large number of people in the public sphere, whose influence then reaches the administrative sphere via the transformation of social power. This process, as I discussed in Chapter 2, does not have the institutional checks that are necessary to ensure that marginalized deliberants will be able to play an effective role in this process. As a result, protestors have a tenuous position in deliberative democracy and his theory cannot offer a sufficient normative account of protest. In the deliberative polity people outside the deliberative group have a greater chance to persuade deliberants to engage with them and to do so on their terms. In a conception of protest-as-deliberation that requires the deliberative polity to play an important role, deliberation no longer fits entirely within the deliberative group. The reconceptualization of the polity as deliberative – and not just a larger space that contains a deliberative group – expands people’s involvement in deliberative politics, broadly conceived. People who cannot participate effectively in the deliberative group can still work from outside to influence deliberative outcomes by engaging with the people who are responsible for deliberative decisions. In a deliberative polity, civil society assumes a stronger role in terms of both who can contribute to deliberations and how they can do so. I look at the role of civil society in Chapter 6.
4.2.5 How Protest-as-Deliberation Works

A theory of protest-as-deliberation enables protestors to interrupt hegemonic discourse in the deliberative group using their own language. The basic idea is that protestors can frame their arguments on their own terms (arguments that were undervalued by the deliberative group) and still have a moral claim on the deliberative group insofar as the deliberative group has an obligation to respond to protestors’ reasons. Instead of rejecting protestors’ reasons, deliberants remain open to the possibility that they might have public reasons that warrant further consideration. The deliberative polity is a forum for this kind of deliberation. Protestors start this deliberative engagement in two ways: when they engage in protest actions that appeal to the arguments that they wish to see influence the deliberative group, and when protestors make a conscious effort to ensure that these arguments appeal to normative deliberative criteria. The deliberative group has an obligation to respond to protestors’ claims whenever they appeal to these criteria, even if the deliberative group’s response is to systematically offer reasons as to why the protestors’ reasons do not merit the further consideration – in the deliberative group – that they call for. Protestors then respond to the deliberative group, and in this way protest-as-deliberation assumes its dialogical form.

Because protest-as-deliberation offers protestors a voice in a larger deliberative polity while it simultaneously allows them to remain protestors, the particular construction of this exchange sets the nature of the dialogue apart from the exchange that previously occurred in the deliberative group. Sceptics might object that attempts to establish a dialogue between protestors and deliberants stand little chance of success; after all, deliberants can continue to systematically reject the arguments that protestors put forth, and hopes of a dialogue may well end up as a continual loop of arguments and rejection with no dialogical progress in sight. Deliberants, after all, have already rejected protestors’ reasons in the deliberative group, and protestors, by their decision to remain outside the deliberative group and to use the same reasons, want effective inclusion and greater efficacy on the basis of the same (already-rejected) arguments. Why then should deliberation in this larger deliberative polity be any more convincing?
Part of what makes protest-as-deliberation a reconceptualization of – and not just an extension of – deliberative space, and what makes it able to offer a normative justification of protest, is because of the difference that appealing to (instead of adhering to) deliberative criteria makes. The exchange of reasons in the deliberative polity does not duplicate the criteria that deliberative groups set out because to do so would co-opt protestors – drawing them back into the deliberative group only to make them deliberate using ineffective public reasons. Since the aim of creating a deliberative polity is to remove the obstacles that prevent protestors from changing their effective exclusion and lack of efficacy, the criteria that protestors appeal to when they want the deliberative group to enter into a dialogue with them (outside the deliberative group and as protestors) must not prevent them from speaking as differently-situated people. Protest-as-deliberation allows protestors access to space and resources that were unavailable to them in the deliberative group. In order to communicate with the deliberative group, protestors must be able to occupy public space in a way that enables them to capture the attention of the deliberative group and to communicate their arguments. Keeping with the array of tactics that protestors use, protest-as-deliberation needs to secure significant conceptual changes to deliberative theory that enable protestors to use space in ways that they currently cannot (or have considerable difficulty doing). Typically, protestors communicate with the state via the physical occupation of public space (rallies, sit-ins, etc), visual installations (billboards, graffiti, posters, etc). In order to remove obstacles to deliberation between protestors and the deliberative group, deliberative theory needs to rethink the availability of this space (and the sanctions that protestors currently face if they use space that they do not have (legal) rights to. When the state changes the availability of these spaces for public (protestors’) use in this deliberative exchange, the deliberative polity becomes more than an expansion of deliberative space and it changes the nature of the space itself. In protest-as-deliberation, protestors have dialogical tools that are unavailable to people who exchange reasons in the deliberative group. These tools serve a similar function as greeting, rhetoric, and narrative do in the deliberative group; they let
people – in this case protestors – speak from their differently-situated positions and allow them to communicate their reasons in different, more effective ways. Because protestors have fewer constraints and greater access to deliberative resources, the context of protestors’ arguments changes. This gives protestors the opportunity to reframe their reasons in ways that are more likely to challenge the critical reaction that people in the deliberative group had to them.

The focus in protest-as-deliberation is to create a larger deliberative environment in which protestors will, hopefully, be able to persuade deliberants that their reasons merit reconsideration. The goal of protestors who engage in protest-as-deliberation is to be able to participate effectively and as equals within the deliberative group. If protestors choose to do so, they ought to be able to re-enter the deliberative group and influence the deliberative group’s framing and decisions in a much more effective way. In this sense, protest-as-deliberation aims at a form of incorporation (or at least at the option of incorporation). This incorporation, however, ought only to occur when protestors can participate as equals within the deliberative group. Re-entry should not be the better-of-two-evils approach to exclusion dealing only with a change in the extent of their effective exclusion and efficacy, but an active choice that protestors make because they will be equal deliberative partners. The decision to re-enter or not is one that protestors themselves must make. A deliberative polity in which people use protest as a form of deliberation provides the context that is necessary for protestors to make this decision free of co-optation. Because the deliberative polity is always there (and because people can return to their position as protestors if they doubt their subsequent effective inclusion and efficacy in the deliberative group) it offers a continual safeguard against problems of effective exclusion and a lack of efficacy.

4.3 Protest and deliberative criteria

The set of deliberative criteria that Young outlines in *Activist Challenges* are meant to ensure the legitimacy of deliberative democratic processes and require that deliberants do the following four things: propose solutions to collective problems and offer reasons for them; criticize other proposals
and remain open to criticism; bracket the influence of unequal power; and bring all potentially affected people together to make decisions. There is, I argue, nothing inherent in deliberative democracy’s criteria that prevent us from applying the criteria to protestors. This is true despite the obvious inability for protestors to exchange reasons in the deliberative group. The ability of protestors to meet these criteria forms much of the moral plea in support of a conception of deliberative democracy that offers a normative justification of protest. In this section, I will look at the normative criteria that undergird deliberative democracy. I will address each criterion in turn and detail the ways that protestors have met the criteria in the past. If protestors can meet deliberative criteria from outside the deliberative group, and if deliberative theorists can reframe deliberative theory to reflect this, then we ought to do so. As I argue that protestors meet the criteria (thus strengthening previous arguments that protestors do have legitimate claims), I will pay particular attention to the ways that protestors make their claims in a deliberative polity and in accordance with a theory of protest-as-deliberation. I will look at several protest actions that, while it is not their specific intent, meet the deliberative criteria that Young sets out. As I do so I will focus upon the content of protestors’ claims and the methods that they use in order to communicate them. My aim in taking this approach is to see what deliberative theorists can learn from actual protest actions that embody the qualities that deliberative theorists look for in protest-as-deliberation. The dialogical element of protest actions and protestors’ willingness to engage with people underlies the arguments that I make here. The goal is to see what we can take from these examples that will allow us to offer a conceptual account of the dialogical exchanges that need to occur in protest-as-deliberation.

i) Deliberants should propose solutions to collective problems and offer reasons for them

---

246 This is true not only of the dialogue that occurs between protestors and the state, but also of the dialogue that occurs between protest groups as protest movements encounter and respond to counter movements. For a good discussion of this latter kind of dialogue see David S. Meyer and Suzanne Staggenborg. "Movements,
This criterion is meant to ensure that deliberants are constructive. Part of what it means to engage in deliberations with others is to engage with a problem in a productive way. Deliberants show a lack of good faith if their participation consists of one stubbornly-held argument and critique and if they refuse to consider other people’s arguments and the implications that these arguments may have for their own. The criterion that deliberants should offer reasoned solutions (or suggestions for improvement) suggests that people who challenge policies without proposing realistic alternatives not only do not enter into deliberation with good faith, but that they are unhelpful and disruptive. This counterproductivity undermines deliberations. If protestors are to meet this criterion while they challenge the deliberative group’s policies then they must demonstrate that they can contribute to deliberations instead of halting them by (only) rejecting policy proposals. This shows both a desire to engage in deliberation and a willingness to exchange reasons. Additionally, when protestors register their critiques they must, if they do not want to be charged with making self-interested or inaccessible claims, ground their objections in public reasons and their recommendations must appeal to justice.  

AIDS Coalition to Unleash Power (ACT UP) meets this criterion. Although it is a direct action group that, like the acronym suggests, is intentionally disruptive, ACT UP is responsible for prompting many policy changes. ACT UP directs their protest actions at both governmental bodies (including the Food and Drug Administration (FDA), the National Institute of Health (NIH), and the New York City government) that have a responsibility to all citizens (and as such are analogous to the deliberative group in terms of the effective exclusions that I discuss here), and to corporate bodies (Burroughs Wellcome) who do not have the same kind of obligations to people but who do respond to external pressure and who are increasingly the target of protest actions. In addition to ACT UP’s needle exchange program, which led to the first government-sponsored needle-exchange


247 Young, “Activist Challenges to Deliberative Democracy”, p.672.
program in the US, and their development (and subsequent defence) of a condom distribution plan for use in New York City schools (which I will discuss in Chapter 6), ACT UP’s protest actions have consistently impacted governmental and corporate policy. Sometimes ACT UP makes very direct demands on institutions whenever they use time and money as justifications for inaction. The FDA was the target of ACT UP’s first protest where over 250 people assembled to protest delays in releasing AIDS medication. The problem is clear (“this is taking too long”) and the solution equally evident (“speed up the process”). ACT UP’s protest, in which ACT UP-ers distributed “why we are angry” fact sheets, brought these concerns to the nation’s attention and their success challenges the party line that such a solution may sound simple but in reality the proposed steps are not easy to put into motion. At this particular protest ACT UP brought attention to the political willpower that, in the end, had a significant effect upon the FDA’s process. After 17 people were arrested and the action made national news, ACT UP’s appeal had a direct impact on the FDA. Weeks after the protest action the drug approval process sped up significantly and newscaster Dan Rather cited ACT UP’s pressure as a key influence.\textsuperscript{248} ACT UP continued to pressure the FDA, and their “Seize Control of the FDA” protest in October 1988 marked a turning point in their institutional recognition. From the first protest to this key one, ACT UP’s Treatment and Data Committee (TDC) members learned a great deal about the scientific and technical aspects of drug administration. TDC’s work included studying treatment issues for over a year, gathering knowledge from activists in other cities, preparing a 40+ page AIDS Action Handbook, and running teach-ins for other ACT UP members.\textsuperscript{249} The combination of their demonstrated knowledge and the effectiveness of their campaigns led to TDC’s inclusion in decision-making. In future meetings both the FDA and the NIH sought out TDC’s input.\textsuperscript{250}

\textsuperscript{248} Douglas Crimp and Adam Rolston, \textit{AIDS Demographics}. (Seattle: Bay Press, 1990), pp.28-29.
\textsuperscript{249} Crimp and Rolston, \textit{AIDS Demographics}, p.78.
\textsuperscript{250} Crimp and Rolston, \textit{AIDS Demographics}, pp., 76, 83.
ACT UP’s success has a lot to do with their ability to identify problems, propose solutions to them, and offer public reasons (in addition, of course, to the persuasiveness of their protest strategies). Their ability to do this benefited from connections that they had inside the government – connections that provided members with documents that they could analyze and use to offer these constructive critiques.\footnote{Lei Chou. Interviewed by Sarah Schulman. \textit{ACT UP Oral History Project}. Interview 025, May 2003, p.4.} The problems, solutions, and reasons are all (especially 20 years after the fact) quite obvious, but ACT UP pursued them when, despite the clearly public nature of their reasons and the underlying appeals to justice, institutions ignored them, effectively excluded marginalized people advocating for policies that “promoted” drugs and homosexuality. ACT UP’s strategies show that direct – and sometimes drastic – action may be necessary. As part of an appeal to make AIDS drugs accessible to the people who need them, ACT UP protested against the large profits that drug companies were making from the sale of AIDS medications. In September 1989 ACT UP achieved an historic first and shut down the New York Stock Exchange (NYSE) for 5 minutes. Protestors threw large amounts of (fake) money (printed with protest slogans) in the middle of the NYSE. The results were (almost) immediate: the next day shares of Burroughs Wellcome (the corporation with the patent on AZT, the first drug approved to treat HIV/AIDS) fell substantially and four days later the price of AZT went down by 20\%.\footnote{Crimp and Rolston, \textit{AIDS Demographics}, p.119.}

\textit{ii) Deliberants should criticize other proposals and remain open to criticism}

The obligation to engage in a dialogue implicit in this criterion exists only insofar as the interests in question are compatible with justice.\footnote{Young, “Activist Challenges to Deliberative Democracy”, p.672.} The critical exchange that this criterion requires is a call to accountability. Protestors need to convince deliberants of two things. First, they need to communicate that their contribution to the deliberative dialogue is normatively compatible with deliberative democratic criteria and that, despite the fact that they are situated outside the deliberative group where deliberants are not predisposed to listen to them, protestors must, from a practical
standpoint, be able to engage the group in a dialogue. Second, protestors need to persuade deliberants that their claims ought to carry more weight in deliberative processes and decisions so that their inclusion in the deliberative group is of a kind that does not undermine their efficacy.

The accountability in this criterion benefits protestors in two ways. This is so despite the way that deliberants use the criteria of public reason (and protestors’ alleged automatic failure to meet it because they leave the deliberative group) to justifiably – in their opinion – exclude protestors. Protestors can counter deliberants’ resistance to engage with them in the way that they construct their arguments. If protestors claim that the deliberative group has a democratically-grounded obligation to listen to their arguments, and if they make this claim in a way that indicates to deliberants that they are, in their mind, adhering to deliberative criteria, then this has two potential effects. First, appealing to deliberative principles and citing effective exclusion and a lack of efficacy has a direct bearing on deliberative legitimacy. Protestors place normative pressure on the deliberative group. The deliberative group, while it might want to ignore protestors’ claims, will find it increasingly difficult to do so if protestors make direct and well-supported challenges to the group’s ability to be substantively inclusive. If deliberants continually ignore these appeals, then their ability to answer challenges to the fairness of their processes and their decisions might become difficult (and embarrassing). Second, if protestors engage in protest-as-deliberation, then, in anticipation of a deliberative response, they will have a greater incentive to “anticipate some of the weaknesses and pitfalls” in their arguments and to frame their protest actions accordingly. If protestors anticipate this requirement of accountability and structure their protest actions to respond to the deliberative group’s policy or critiques of their arguments then there is a greater likelihood that, with this direct engagement with normative deliberative criteria and with challenge to deliberants’ interpretation of it, protestors will be more effective in terms of evoking a response and initiating a dialogue. If

---

protestors present and represent their actions in direct response to the deliberative group then it will become increasingly difficult for a deliberative group to ignore protestors and for them to refuse to enter into a dialogue (however reluctant this exchange may be).255

One case of protest sparking and sustaining a dialogue with political institutions is the (US) nation-wide public art installation *Kissing Doesn't Kill* (1989). The installation is a piece of activist art that, unlike acts of civil disobedience, did not break any laws. The *Kissing Doesn't Kill* installation approximates the conditions that protest will encounter in protest-as-deliberation. Whether or not protest breaks laws does not have to bear upon the legitimacy of protest (since laws can be unfair). However, a deliberative conception of democracy that accepts protest-as-deliberation ought to respond differently to acts of civil disobedience. Instead of responding to them with arrests and convictions, protest-as-deliberation should take institutional measures to make sure that the deliberative group’s response to protest does not, because of legal repercussions, make protest prohibitively difficult for marginalized people to engage in.256 Additionally, the *Kissing Doesn't Kill* installation is a good example because its purpose is to challenge public policy decisions and to make institutions rethink their approach towards particular groups, and because it succeeded in both sparking and sustaining a dialogue with political institutions.

As part of a larger exhibit, *On the Road*, that the American Foundation for AIDS Research (AmFAR) sponsored, *Kissing Doesn't Kill* drew significant media coverage. The installation consisted of photographs of three couples: one heterosexual, one gay, one lesbian, and all interracial, and carried the tag “kissing doesn’t kill: greed and indifference do.” Additional text ran with the

255 Part of what this involves is taking stock of past and current protest actions: something that ACT UP documented in the notes from a strategy weekend. Here ACT UP lists three main questions (“What are our goals for 1993; what does ACT UP need to do to accomplish them; and what resources do we need to get them done?”), as well as a series of other questions, including whether or not other people are engaging in similar actions, how past attempts have been more or less successful, and how best to engage the media to assist them in their goals. ACT UP/NY Records. Reel 24. Box 32; Folder 21. “Strategy Weekend: January 9 & 10, 1993).
256 There are many legal repercussions that make engaging in protest actions prohibitively difficult: for people in and pursuing particular professions criminal records may be incompatible with employments and illegal immigrants or people in the country on visas may risk deportation. For a discussion of the effects of
installation in New York City. With the extra appeal that “corporate greed, government inaction, and public indifference make AIDS a political crisis” Gran Fury (the art branch of ACT UP) intended the artwork “as a comment on prejudice and government inaction in New York City.”

As On the Road/Kissing Doesn't Kill travelled to different cities in the US, the exhibit raised awareness on two levels. First, the public nature of the posters and billboards spoke directly to citizens and served as a way to encourage people to change attitudes and practices – an appeal that was particularly important in the face of the government’s reluctance to address “controversial” issues of sex and homophobia in a direct and effective way. Simultaneously, the public presence of the artwork intentionally provoked a response from those in power. Working within this context, Gran Fury – in addition to the site-specific critique aimed at municipal politicians with the additional text in New York – criticized homophobia in implicit calls for (safe) sexual freedom, non-homophobic safe sex education, and the acknowledgement, and redress, of the lack of rights and protections for gays and lesbians. The deliberate inclusion of three different types of couples – in terms of both sexual orientation and race – is an appeal to treat all people as equals. The public medium of this activist art coupled with its specific challenges illustrates a first step in the attempt to initiate a dialogue. Significantly, Kissing Doesn't Kill engaged in this while upholding – and calling attention to – principles of inclusion and equality.

The Kissing Doesn't Kill installation is helpful in terms of evaluating the potential for an ongoing dialogue between the deliberative polity and in the deliberative group because there were several exchanges in response to the poster. The different critiques that inform Kissing Doesn't Kill did not always come through in the installation’s reception. While this is a danger that protestors encounter, the response to these misunderstandings demonstrates the potential of protest-as-deliberation. In Chicago, where the artwork appeared without the additional New York text (which

was removed at the request of corporate sponsors), some people read it as being “chiefly about the right of lesbians and gay men to kiss in public.” Arguing on the basis of this (limited) interpretation, local officials protested that the poster “has nothing to do with the cure for AIDS” and, as such, is not something that the Chicago Transit Authority (CTA) – where the posters were to appear – should “promote.” In addition to this negative response, and shortly before the arrival of the installation, the Illinois State Senate passed a bill that prohibited the public display of “any poster showing or simulating physical contact or embrace within a homosexual or lesbian context where persons under 21 can view it.”

The CTA’s and the State Senate’s responses both aim to silence the public activism that the Kissing Doesn’t Kill project wants to promote. In response to the Bill and efforts to ban the poster from the CTA, however, the local lesbian and gay community and the American Civil Liberties Association (ACLU) organized around the Kissing Doesn’t Kill installation to protest intolerance and censorship. The mobilization of activist groups in Chicago show that attempts to stop dialogue can actually work to advance it. This lends support to protest-as-deliberation and illustrates how protestors can continue a dialogue even if the deliberative group is reluctant to do so. The attention over the impending arrival of the posters provoked a debate in the Illinois State Senate over the representation of gays and lesbians, thus successfully raising the profile of AIDS-related issues.

---

259 Meyer, “This is to Enrage You: Gran Fury and the Graphics of AIDS Activism”, p. 57. The mayor continued to explain that the poster “has something to do with a particular lifestyle, and I don’t think that is what the CTA should be about the business of promoting.” Gran Fury Collection. Box 1; Folder 3. Chicago Tribune. August 15, 1990.
260 Meyer, “This is to Enrage You: Gran Fury and the Graphics of AIDS Activism”, pp. 57-59.
261 It is relevant to note here that the deliberative group has an incentive to deliberate with protestors that the CTA and State Senate do not share. While the deliberative group ought to offer a better response than attempts to silence protest groups, this example illustrates that even in harder cases (i.e. when the deliberative group either does not support accounting for protest with dissent as deliberation, or when there is deep disagreement over protest groups’ claims to have (potentially) public reasons in the deliberative polity), protestors can still engage in a form of protest-as-deliberation.
262 www.actupny.org/indexfolder/granfury.html
(and helping Gran Fury to achieve one of its goals). As a result of the debate over the installation, the State House of Representatives ultimately defeated the Bill.\textsuperscript{263} After the House’s decision, the posters went up in the CTA locations. Almost all of them, however, were defaced; the defacements received national press coverage, and, significantly, public debate, including a radio appearance by the mayor, continued.\textsuperscript{264}

Deliberants may concede that protestors can initiate dialogue, but they will likely counter that while protestors are very good at offering criticism, they are unable to take it themselves. As a result, protestors, although they claim to engage democracy by providing critical opposition to a state’s practices, cannot legitimately claim to be part of a dialogue. Instead, protestors become “participants in a somewhat one-sided conversation.”\textsuperscript{265} If this criticism is true, then protestors are ultimately guilty of what they charge the state – with not listening to the opposition, and of an unwillingness to significantly rework their policies. In order for protest to meet deliberative criteria, protestors must meet the second part of this criterion and remain open to criticism from others.

In order to remain open to criticism, protestors need only to address the criticisms that others direct at them – they do not need to convince others that opposing arguments are invalid, nor do they need to cede the merit of their public reasons in the face of this criticism. Protestors only need to explain to their critics why they reject particular arguments, and to frame their counter arguments as public reasons. A lot of the criticism that protestors respond to comes from other protestors. Protestors do amend their actions in response to criticism. Sometimes in planning actions protest groups put together arguments and propose strategies that – usually inadvertently – misrepresent or overlook fellow protestors. In one instance of this, female members of ACT UP objected to the gender representation in one of the group’s campaigns. The objections concerned one of the designs for the upcoming Read My Lips campaign (a kiss-in which was part of the anti-

\textsuperscript{263} Meyer, “This is to Enrage You: Gran Fury and the Graphics of AIDS Activism”, p.59.
homophobia contribution to the larger 9 Days of Protest action). Gran Fury designed two posters to advertise the upcoming demonstration: one contained two men “aggressively kissing”, and the other two women “staring longingly into each other’s eyes.” The critique over the gendered representations in these posters was that the female version “reinforced the stereotype of desexualized lesbian desire compared with sexy gay male desire.” In response, Gran Fury made another poster with two women kissing in an attempt to address the imbalance.\(^{266}\) ACT UP’s internal deliberation allowed the group to address gender representation before they distributed the posters throughout the city. Gran Fury did not intend to represent male and female sexuality in a way that reinforced gender assumptions and they were quick to remedy the situation once the implications became clear. In addressing the problem within the protest group, ACT UP managed to avoid the kind of negative response that might lead non-members to critique the group.

In addition to offering critiques, protestors can respond to criticisms that others level at them, whether these come from other protestors (women in ACT UP), or from those in positions of power whom they protest against (offering counter arguments for equal rights and against censorship in the Kissing Doesn’t Kill poster controversy, and their part in the debates in the media and the House in terms of the State Senate’s Bill). That protest groups can (and do) engage in deliberations that take a variety of claims into account is important in terms of the chance that protestors can engage in deliberations that take a variety of claims into account is important in terms of the chance that protestors can engage in deliberations that take a variety of claims into account is important in terms of the chance that protestors can re-enter the deliberative group if they choose to do so. Practically speaking, their ability to engage in a dialogue with those whom they protest against is of great importance.

---

\(^{iiii)}\) **Deliberants should bracket the influence of unequal power**

If protestors are to meet this criterion then they need to show that their status as protestors, free from the (particular) constraints of the deliberative group’s criteria of reason-giving, does not prevent


\(^{266}\) Crimp and Rolston, *AIDS Demographics*, p. 53.
them from taking into account the impact that their claims might have upon others. The moral case for protest-as-deliberation, after all, requires that protestors do not reject the normative criteria that underlie deliberative democracy. In addition, protestors ought to make sure that, in coming up with their arguments and strategies, they do not marginalize people within their own group. A failure to address the power relations that might arise within the protest group and between them and the deliberative group will undermine the legitimacy of protestors’ claims.

Protest-as-deliberation requires that protestors meet deliberative criteria, but the fact that they must do so outside the deliberative group means that they are not necessarily exposed to the range of arguments that people within a deliberative group ideally are. This is potentially problematic because protestors might be unwilling or unable to look beyond their own claims, fail to take the claims of others into account, and ultimately fail to take into account the ways that their claims might impact other people, thus jeopardizing their ability to offer compelling reasons. Protestors are at risk of the potential dangers of what Cass Sunstein terms group polarization: a phenomenon that occurs when like-minded people group together and “predictably move toward a more extreme point” in their views as a result of intra-group deliberation.\footnote{Cass R. Sunstein. “The Law of Group Polarization.” \textit{The Journal of Political Philosophy.} 10/ 2 (2002), p..176.} Sunstein looks at the implications of group polarization in order to ask larger questions about the role of deliberation in the public sphere.\footnote{Sunstein, “The Law of Group Polarization”, p. 176.} The specific danger that Sunstein examines is the concern that when people are isolated from different viewpoints – as often tends to be the case in the public sphere when people pursue freedom of association – the argument pool will be so limited as to compromise the group’s deliberations. Sunstein’s concern is that this may occur to the point where enclave dialogue ought not to count as deliberation at all.\footnote{Sunstein, “The Law of Group Polarization”, p. 186.} The theory of protest-as-deliberation that I develop depends upon the ability of protestors to engage in dialogue that counts as deliberation. Because of this, and


\footnote{Sunstein, “The Law of Group Polarization”, p. 176.}

\footnote{Sunstein, “The Law of Group Polarization”, p. 186.}
because protestors think that their dialogue can and ought to count as deliberation, it is important that protest-as-deliberation does not fall into the enclave trap.

Sunstein’s account of group polarization is especially problematic for protestors. Even if we assume that protest groups can be (and often are) deliberative, Sunstein makes it clear that the quality of intra-group deliberation is connected to people’s exposure to different viewpoints. This poses a potential problem for protest groups, who might fail to take other protestors’ claims – which bear upon their own – into account. If protest groups are unable to engage with other groups and if they experience group polarization then protest-as-deliberation could run into serious problems. If protestors try to engage in protest-as-deliberation without developing their arguments in ways that take the claims of other groups into account, then they are less likely to produce strong reasons or to be effective.

Sunstein’s discussion of group polarization, despite the dangers, does not lead him to automatically reject enclave deliberation. Enclave deliberation, he argues, has important benefits and can help people to develop arguments that might otherwise be silenced. Marginalized groups often benefit from this: enclaves can present marginalized groups with an opportunity to clarify their objections to the dominant discourse and to discuss how they can address them. This enables marginalized groups to impact larger debates. Groups are able to develop their own position from the safety of enclave groups and can then go on to use the group as a base from which they can amplify their voices in larger (general) deliberative exchanges. Sunstein’s findings are consistent with the beneficial effects of protest. He argues that enclaves can function as resources for marginalized groups and that group polarization does not have to occur. This has clear benefits for

---

270 For example, Dupuis-Déri views activist groups as “alternative deliberative arenas” (23), and points to their deliberative capacity in his justification for the types of acceptable protest actions (which I will discuss in greater detail in chapter 6). Dupuis-Déri, “Global Protesters Versus Global Elites: Are Direct Action and Deliberative Politics Compatible?”

protest-as-deliberation because enclaves can offer a space for protestors to strategize how they can re-present their arguments to the deliberative group in a more persuasive way.272

Ultimately, Sunstein concludes that the democratic value of enclave deliberation depends greatly upon social context. People can avoid the potentially dangerous effects of group polarization with alterations in institutional arrangements. Importantly, these institutional arrangements do not have to be major overhauls in order to make a significant difference273 (which means that the implication for deliberative democracy is beneficial yet not unduly onerous). To illustrate his point, Sunstein looks at one of James Fishkin’s Deliberative Opinion Polls. Here, he argues that “the existence of monitors, an absence of a group decision, the great heterogeneity of the people involved in Fishkin’s studies, together with the external arguments, makes the deliberative opinion poll quite different from the group polarization studies.”274 Attention to selecting deliberative facilitators, drawing from a diverse group of people, making sure that deliberants have access to a representative sample of information, and paying attention to the technical aspects of collecting deliberative decisions are all amendments that deliberative theory can recommend without running into scepticism about the viability of the project.275 These measures can have significant effects upon deliberations. Deliberative processes benefit considerably not only from the input of mediators, but from the ability of mediators to keep people talking when people’s values and interests conflict.276

272 Enclave deliberation “is, simultaneously, a potential danger to social stability, a source of social fragmentation or even violence, and a safeguard against social injustice and unreasonableness.” See Sunstein, “The Law of Group Polarization,” 177. See also Nancy Fraser Justice Interruptus: critical reflections of the “postsocialist” condition (NY Routledge, 1997), especially Chapter 3.
275 Sunstein, “The Law of Group Polarization”, 194-95. Bruce Ackerman and James S. Fishkin, in addition to these institutional supplements to deliberation, describe the process of their “deliberation day”; this four-phase process consists of a live television debate in which participants are exposed to the issues and where journalists raise relevant questions, the selection of a foreman from the smaller groups who will participate in a large group meeting and ask questions on the presentation, a large group meeting with questions and answers, and time to discuss the reactions from this larger group back at the smaller roundtables. “Deliberation Day,” in Debating Deliberative Democracy (Malden, MA: Blackwell, 2003) pp. 13-16.
276 As John Forester discusses these benefits that mediators can bring to deliberative groups he notes the different (specific) roles that mediators play. Depending upon the type and extent of conflict, whether mediators try to foster dialogue, moderate the debate, or mediate negotiations can have a significant impact on
Protest-as-deliberation takes important steps to counter the potential danger from group polarization. These include: i) the way that we conceptualize the deliberative polity in terms of the physical access that protestors have to public space and the way that the deliberative group views protestors’ reasons as ones that warrant deliberative attention; ii) the new ways that protestors can engage with the deliberative group (using persuasion and alternative political communication) – ways that are unavailable to them then they are in the deliberative group; and iii) the ways that the deliberative democracy mediates the space between the deliberative group and the deliberative polity, as with the two stages of deliberation that protestors’ arguments are subject to before they can affect deliberative decisions. While it is true that protest-as-deliberation does not require that protest groups engage with each other until (and unless) they both re-enter the deliberative group, they do have the opportunity to do so in the deliberative polity. The chance to do this arises because of the public way in which protest groups engage with the deliberative group. Although the appeals that protest groups level at the deliberative group are not intended for an audience of other protest groups, protest-as-deliberation’s requirement of publicity (and the public nature of protest actions in general) leaves protest groups’ claims open to scrutiny from both the deliberative group and other people in the deliberative polity. In addition, the fact that protest-as-deliberation requires that protest groups use public reasons, and subjects protestors’ claims to public scrutiny in an ongoing dialogue, means that protest groups cannot avoid exposure to other claims. Of course, what they choose to do with this information is another question, but the institutional structure of protest-as-deliberation does include a publicity requirement and does, through dialogue, monitor the types of claims that protestors make. As such, it offers protection against the isolation that produces the willingness of people to participate and upon the outcome of the talks themselves. “Making Participation Work When Interests Conflict: From facilitating dialogue and moderating debate to mediating negotiations.” In *Journal of the American Planning Association* 72:4 (2006), p.454.

277 See Chapter 5.

278 These two stages are protest-as-deliberation where protestors have additional resources and fewer institutional constraints, and deliberations in the deliberative group where the exchange of reasons is monitored. I will discuss these two stages in greater detail in Chapter 5.
negative effects of group polarization, which means that deliberants will have access to information that they might need to strengthen their arguments even before (if they choose to do so) they re-enter the deliberative group.

Although group polarization is a serious problem, it is not uncommon for protest groups to follow democratic principles in their internal organization. ACT UP uses radical democratic processes, and its composition and priorities show a conscious move to stress inclusion and diversity within the group. Although it has been called a “gay white male group,” ACT UP includes women and people of colour and has done so since its inception. ACT UP holds weekly meetings that are open to anyone who wishes to attend. Meeting facilitators and other positions are elected and rotating, all financial decisions involving more than $100 must be authorized by a majority vote, and activist art is often planned and created in ACT UP committees and presented at the Monday meetings for discussion and approval. ACT UP's decisions are legitimate only if, in the process, “no one felt that his/her position was misunderstood or that it wasn’t given a proper hearing.”

Protest actions deal with a wide range of issues that affect the diversity of the group. For example, the 1998 9 Days of Protest action devoted a day each to homophobia; people living with AIDS (PLWA); people of colour; substance abuse; prisons; women; the worldwide crisis; and testing and treatment.

ACT UP also works with people outside the organization to coordinate some of their actions and to measure the impact of their efforts on the rest of society. This was the case with the A25

279 www.actupny.org/documents/earlytactics.html
280 www.actupny.org/documents/start_chapter.html
282 www.actupny.org/documents/Cddocuments/Consensus.html Although ACT UP did operate according to these democratic processes and did require consensus, there are internal critiques of the organization itself, particularly when the size of the meetings grew. Emily Nahmanson. Interviewed by Sarah Schulman. ACT UP Oral History Project. Interview 023 (April 2003), pp. 15-17.
283 Crimp and Rolston, AIDS Demographics, p.53.
action, in which ACT UP worked in conjunction with other protest and advocacy groups in NYC in order to bring attention to five specific areas that were directly affected by the proposed social cuts in Mayor Rudy Giuliani’s upcoming budget. Because the motivation for the protest was the limited pool of resources available to advocacy groups, the expectation might be that protest groups would each try to make the strongest case in the hopes that they would receive a higher share of the budget – as is typically the case with the kind of interest group pluralism lobbying that occurs in aggregative democracy. However, the aim of the A25 action (in addition to the need to secure funding) was to draw attention to the negative impact of this zero-sum approach. The basic premise of the action was to balance each group’s autonomy with a united front between the groups. This unity turned out to be not only advantageous to individual protest groups, but necessary in order to question the system of social support (or lack thereof). In a move that was both symbolic and literal, the coalition shut down the city by occupying two bridges and two tunnels in Manhattan during rush hour. After securing media attention, people from the five main groups who comprised the A25 action only spoke with the press if they agreed to cover the other groups. This strategy was successful and all groups received press coverage despite the initial media interest in only the higher profile groups.

iv) Deliberants should bring all potentially affected people together to make decisions

Sceptics might use this last criterion that insists that people deliberate together – which I take to mean both a physical presence at deliberations and adherence to the same deliberative rules – to dismiss protestors’ claims, arguing that because protestors are not in the deliberative group they cannot, by definition, meet this criterion. I argue, however, that this criterion does not automatically mean that protest is illegitimate from a deliberative standpoint. While the “together” in Young’s last criterion does (for her) mean that people ought to gather in the deliberative group, it does not have

---

284 Named for April 25th, the date of the action.
to mean that deliberative exchanges that occur outside the deliberative group are illegitimate. In terms of meeting requirements of inclusion and equality, what is necessary is that all people's public reasons factor into the deliberative decision. This does mean that all affected people must be present in the deliberative group. However, since decision-making occurs only at the end of deliberations there is room to see how this criterion implicates dialogue outside the deliberative group. I argue that as long as there is an exchange of reasons between deliberants and protestors, and as long as protestors demonstrate that they meet the deliberative criteria that ensure that people deliberate fairly and on the basis of public reasons, then there is no reason why we cannot rethink our application of this criterion to legitimize the additional deliberative forum of the deliberative polity. Instead of a narrow reading of what inclusion and publicity require in terms of all people gathering together in the deliberative group, the better approach – one that can accommodate the spirit of this criterion and one that can account for protest – is to look at inclusion in the larger context of the deliberative polity. Like the other three criteria, this one is important not because it structures democratic processes in a particular way (i.e. because it establishes a deliberative group), but because the normative ideals that give rise to deliberative criteria are valuable in and of themselves. Protest-as-deliberation appeals to this normative criteria, and the deliberation between protestors and the deliberative group is another way of bringing potentially affected people together. This argument for inclusion turns on a context where deliberative legitimacy is in question and where protest-as-deliberation’s role is to function as a safeguard. This normative justification, along with the fact that deliberative decisions can only occur in the deliberative group (ideally after protestors gain re-entry), means that protest-as-deliberation not only does not prevent deliberants from meeting this criteria, but aims to bring even more potentially affected people together. Moreover, on this reading protest-as-deliberation takes effective exclusion and a lack of efficacy seriously and therefore works to strengthen the kind of substantive inclusion that we ought to find in the deliberative group.
Deliberative democrats ought to listen to protestors and to engage with them, even though there is considerable tension surrounding claims to legitimacy on the part of both protestors (who want their claims to carry significant weight in the deliberative group and to impact deliberative decisions), and deliberants (who fear that protestors might circumvent legitimacy by trying to offer reasons in a space where they are not subject to the scrutiny of deliberative criteria). After setting out the moral case for protest in deliberative democracy, I argue that justifications for the deliberative democratic benefits that protest brings (such as those put forth by Smith and Dupuis-Déri) make it clear that deliberative theorists need to pay serious normative attention to this conflict.

After developing the moral justification for a conception of deliberative theory that offers a normative justification of protest, I argue that, in order to address this problem in a way that helps us to implement the kind of sustained dialogue that is necessary for a conception of protest as a form of deliberation to work, deliberative theorists can take advantage of the revisions that communicative democracy makes to deliberative democracy. I advocate that we treat protest similarly to the way that deliberative democrats treat difference as a resource in order to take full advantage of the benefits that contestatory dialogue can bring to a theory of deliberative democracy. In order to develop a theory of protest-as-deliberation I argue that we need to expand the conception of deliberation to encompass the dialogue between the deliberative group and protestors. This dialogue ought to take place in a larger deliberative polity – an overarching space of deliberation (a space that is both physical and conceptual) that changes the way that we structure deliberative politics and allows us to offer a normative account of protest without co-opting protestors.

The next theoretical challenge to a theory of protest-as-deliberation lies in the deliberative criteria of reason-giving. While protestors are capable of meeting the deliberative group’s criteria, and while they are capable of offering public reasons, they cannot, by virtue of their position as protestors, adhere to the same set of criteria of as people in the deliberative group do; something
must be different or protestors would face the co-option that the theory takes pains to avoid. In the
next chapter I will explain this challenge to the deliberative criteria of reason-giving and look at the
ways that protestors can satisfy this normative requirement while they are still able to offer this
normative account of protest.
Chapter 5

THE CHALLENGE TO DELIBERATIVE CRITERIA OF REASON-GIVING

Having made the justificatory argument for protest in Chapter 3, and the argument that deliberative dialogue is possible between protestors and deliberants in Chapter 4, I now turn my attention to the deliberative account of reason-giving. This focus on reason-giving is necessary because deliberants object to protestors on the grounds that they try to cheat the monitored exchange of reasons (and therefore try to manipulate deliberative processes and decisions) while protestors object to deliberative groups that claim legitimacy despite effectively excluding people from deliberative framings and in deliberative decisions. When protestors object to this and leave the deliberative group they appeal to the normative criteria of deliberative democracy as a moral justification as to why the deliberative group ought to take protest seriously; at the same time, the deliberative group’s insistence that all people must deliberate where they can monitor the kinds of reasons that people offer are what lead them to justify the exclusion of protest. This simultaneous disagreement over and appeal to an exchange of reasons that respect normative deliberative criteria puts deliberative responses to people’s reasons (particularly the way they weigh them and go on to make deliberative decisions that are informed by this framing) in an interesting theoretical spot. Protestors want effective inclusion and efficacy in deliberations but they are susceptible to co-optation (which negates this kind of inclusion). This puzzle forms the basis of the chapter.

Before I address this main problem I build upon my earlier discussion of the role of public reason. Although deliberative theorists typically agree upon the general guidelines for public reason, they disagree quite widely when it comes to the constraints that deliberants ought to insist upon and the way that the deliberative group should structure processes and justify decisions. If public reason is going to play a central normative role in deliberative democracy then we need to be more specific
about the way that deliberative legitimacy follows from an exchange of reasons, particularly when it comes to making decisions and giving deliberative democrats the tools to deal with conflict. Additionally, we need to be more specific about the relationship between inclusion in the deliberative group and the exchange of public reasons. Monique Deveaux, Jonathan Quong, and Daniel Weinstock take different positions on the ways that deliberants ought to exchange reasons and on the kind of approach that best allows us to deal with conflict. As I look at these theorists’ approaches I am particularly interested in three things: the constraints upon deliberants and the implications that these have for people’s effective inclusion; the appropriate response to the “public reason problem” and, relatedly, the extent to which it is appropriate to evaluate people’s arguments; and, finally, the best ways to effectively include people, promote deliberants’ efficacy, and reach deliberative decisions in cases of conflict. The problem that arises here between effective inclusion and the criterion of mutual justification requires that deliberative theorists separate criteria of inclusion from those of decision-making. I argue that the best deliberative account of inclusion and reason-giving is one that expands the deliberative group’s scope of reason-giving to allow deliberants to evaluate their arguments – arguments that do not have to be public reasons. Normative criteria of public reason should not work to exclude people from participating in the deliberative group but rather should only be employed when deliberants begin the process of decision-making.

After I look at the normative role that the exchange of reasons plays in conflict resolution (and, relatedly, the extent to which deliberative democracy’s approach to conflict benefits a socially-pluralistic society) I look at the difficulties that deliberative democrats face when they exchange reasons in non-ideal circumstances and where there is a significant risk of effective exclusion and marginalization. In order to do this I focus upon Coloradans Working Together (CWT), a case of deliberation in which participants were asked to reach consensus despite their deep value differences. CWT’s deliberants are concerned not only with finding reasons that all people can accept but also with seeing how people deal with deeply conflicting public reasons when they have to evaluate them
in order to make policy decisions. The particular framing of these deliberations in terms of issues and interests illustrates the benefits of the approach to a deliberative exchange of reasons that I argue deliberative theorists ought to take.

After I look at this, I turn my attention to an additional challenge that arises when we introduce protestors as legitimate deliberative participants in the deliberative polity. As I argue in Chapter 4, deliberants need to monitor the exchange of reasons using deliberative criteria in order to make sure that they treat all people as equals; however, the criteria become complicated when we have both the deliberative group and protestors in the deliberative polity. After all, the purpose of the deliberative polity is to allow protestors another chance to engage deliberants on the basis of the reasons that were unsuccessful in the deliberative group. In order to ensure legitimacy, deliberants need to include all public reasons, including those that protestors advocate from outside the deliberative group. In order to make sure that protestors’ reasons merit this inclusion, deliberants need to evaluate – at least in a preliminary way – the reasons that protestors offer to make sure that they are not self-interested. The problem, however, is that protestors are unlikely to be able to use the deliberative polity in the way that they need to (i.e. in a way that lets them successfully reframe their arguments so as to persuade the reluctant deliberative group that they are worth talking with) if a condition of their re-entry is for the deliberative group to re-evaluate protestors’ reasons on the basis of the criteria that led protestors to leave the deliberative group in the first place.

This challenge, I argue, is one that protest-as-deliberation can meet. In the final section I argue that if deliberative theorists are to successfully respond to this dilemma, then we need to reconceptualize the deliberative legitimacy that arises from an exchange of reasons. This new approach involves rethinking deliberative criteria of reason-giving in terms of both an overarching normative criteria – the requirements of fair and open exchanges of reasons – and two sets of institutional criteria that we apply to the deliberative group and the deliberative polity in order to offer a normative justification of protest without co-opting protestors.
5.1 Public reason in deliberative democracy

As one of the main criterions of deliberative legitimacy, public reason plays a very important role in deliberative democracy. Conflicts over the way that the deliberative group frames issues and over deliberative decisions both concern the particular way that deliberants exchange reasons and lead to charges of effective exclusion and a lack of efficacy. These exclusions are problematic for deliberative theory and provide a normative justification for people to engage in protest-as-deliberation. One of the problems that arise here concerns the specific role that public reason ought to play and disagreement over the way that we ought to understand constraints upon public reason – problems that are often at the source of charges of effective exclusions and a lack of efficacy.

So far I have only set out a general overview of the role that public reason ought to play as a requirement of deliberative legitimacy (Chapter 3), as well as a discussion of what ought to happen when there are conflicts over decisions that the deliberative group makes (Chapter 4). In this section I will look at public reason in greater detail. My aim here is to set out a normative account of the ways that deliberants and protestors ought to exchange reasons. This account addresses the issues that a theory of protest-as-deliberation raises and speaks specifically to the larger scope of deliberative engagement that is necessary to address (some of) deliberative theory’s problems regarding effective exclusion and efficacy. In order to do this I will look at some of the debates over the appropriate scope of public reason as well as at the procedural constraints that different deliberative theorists suggest. In doing so I will look at the reservations and justifications that these theorists put forth and I will evaluate how well these different approaches do and do not deal with social pluralism. I will then extend this account to my expanded conception of deliberative democracy. Expanding our analysis of deliberative democracy to the larger deliberative space of the deliberative polity gives us a new perspective on deliberative criteria of reason-giving. Negotiating the space between the deliberative group and the deliberative polity exposes additional problems with
the exchange of reasons; at the same time it also helps us to address some of the recurring complaints that deliberants and deliberative theorists have with deliberative criteria.

As I note in Chapter 2, members of a political community can only make legitimate claims upon other citizens when they can reasonably justify them in terms of reasons that they can expect all people to access. This requirement of public accessibility rules out reasons based (only) upon what people believe. In order to make sure that the reasons are accessible, people can only make (legitimate) claims upon others when the reasons that they give “rest on the plain truths now widely accepted, or available, to citizens generally.”287 This empirical requirement is important because it helps people to avoid the kinds of unresolvable conflicts that we find in metaphysical conceptions of justice and it gives people something that they can actually deliberate about.288

While this empirical requirement is, for the most part, widely accepted by deliberative theorists, it is not unproblematic. Some deliberative theorists express reservations about deliberative democracy’s ability to include (and take seriously) people’s religious beliefs. Alan Wertheimer has reservations about deliberative democracy’s ability to accommodate pro-life positions. As he addresses Gutmann and Thompson’s discussion of abortion and fundamental disagreement his concern is with the moral costs if the pro-choice position is wrong. Given these moral costs, Wertheimer questions whether people who have fundamental disagreement over abortion will, as Gutmann and Thompson argue, be able to accept the deliberative decision.289 Stanley Fish makes a similar critique and challenges Gutmann and Thompson on their definition of reasonable. He argues that Gutmann and Thompson’s commitment is not to the process of deliberation but rather to particular outcomes and that ultimately they claim “the high ground of neutrality while performing

---

288 As we see in Gutmann and Thompson’s discussion of the areas of social policy where those who both support and oppose abortion ought to be able to deliberate upon and find mutually acceptable policies that work to minimize unplanned pregnancies and also offer potential mothers the resources that are necessary to support children. Amy Gutmann and Dennis Thompson. *Democracy and Disagreement* (Cambridge, MA: Belknap Press, 1996), p. 89.
exclusionary work.” While Wertheimer notes the way that Gutmann and Thompson’s deliberative process is biased toward particular (pro-choice) outcomes, Fish makes the stronger argument that the fundamentalist objection to reciprocity is not that it is biased but that it is wrong. When challenges to mutual respect and reciprocity come from outside a particular belief system (i.e. from fundamentalist Christians and not from adherents to deliberative principles) it is unclear why fundamentalists would commit to deliberative principles and, therefore, why they would accept the legitimacy of deliberative outcomes. Fish raises additional questions of exclusion as he argues that deliberative framings that exclude fundamentalist beliefs are “an act of power, of peremptory exclusion and dismissal” and ultimately a way of keeping particular beliefs and arguments off the deliberative agenda. These are questions that deliberative theorists need to take seriously. The larger problem for deliberative theory is not the normative challenge that fundamentalist critiques make to deliberative democracy (as I will explain in a moment) but rather the reactions that fundamentalists, and others who share this objection, have to deliberative democracy as a result of this particular kind of exclusion – reactions that may lead them to protest the illegitimacy of deliberations. The ability to accommodate fundamentalist perspectives is another reason why deliberative democracy needs to offer a normative response to protest.

The fundamentalist objection that Fish sets out rests upon the argument that “the distinction between what is procedural and what is substantive is itself a substantive one.” Substantive requirements are at the root of the exclusions (justifiable or not) that fundamentalists encounter. Substantive principles, however, are necessary to ensure that deliberative groups treat all people as equals. As Joshua Cohen argues, it is “the background conception of citizens as equals that sets

291 Fish, “Mutual Respect as a Device of Exclusion,” p.97.
292 Fish, “Mutual Respect as a Device of Exclusion,” p.94.
293 Fish, “Mutual Respect as a Device of Exclusion,” pp.95-96.
limits on permissible reasons that can figure in the deliberative process.”295 Although constraints on the kind of reasons that deliberants can offer (public reasons versus fundamentalist beliefs) will limit the substantive outcomes of the process,296 these limitations are warranted. Jonathan Quong speaks to the issues that the fundamentalist objection raises when he discusses objections to policies that people may find deeply objectionable due to their religious beliefs. The benchmark for legitimacy (deliberative and otherwise) rests upon the extent to which people’s beliefs impose upon others. It is one thing, Quong argues, to fundamentally object to a particular practice, and another to prevent other people from engaging in it. As Quong argues that “there is nothing about a cultural practice being important to my identity that could act as a justification for wanting to impose that practice upon others”297 he makes the important normative distinction between recognizing people’s beliefs (acknowledging that a particular religious position is important to people) and treating all people as equals. The latter negates imposition because making these (unjustified) claims upon others undermines the normative principle of treating all people as equals. This question of imposition offers a normative response to fundamentalist objections. While people who hold fundamentalist beliefs are justified in having their particular conception of the good, they are not justified in trying to impose this belief upon others, nor are they justified in rejecting the legitimacy of a (deliberative) process that requires empirical verification as a condition of people being able to access people’s arguments. The fundamentalist objection should alert us to the practical problems that deliberative groups are likely to encounter when we make the accommodation of reasonable pluralism the criteria of inclusion for deliberative democracy.298 The objection should emphasize deliberative democracy’s need to account for protest, but the charges that Fish brings against deliberation as a result are not

298 For a guideline as to how we ought to determine the scope of reasonable pluralism see Jonathan Quong’s discussion of a “cost-based” approach to assessing disputed practices “Disputed Practices and Reasonable
problematic from a normative standpoint. Fundamentalists may believe that reciprocity is wrong, but since there is no legitimate alternative to a process that aims to treat all people as equals (and uses the mutual respect that underlies a principle of reciprocity in order to do this) then any exclusions that occur are necessary if we are to treat all people as equals. While deliberative theorists may be able to do more to take the claims that fundamentalists put forth seriously (through extending the deliberative framework to offer a normative justification of protest), there is no way to accept the fundamentalist rejection of deliberative democracy while simultaneously accepting the need to have a political process that treats all people as moral and political equals.

Beyond the requirement that the reasons that deliberants make must be accessible and verifiable, the scope of public reason can be quite broad (although not all deliberative theorists choose to keep it so, with some imposing further constraints). Whatever the scope, the deliberative group has to evaluate people’s claims. Some reasons will clearly be stronger than others. Claims that appeal to principles of equality and freedom, for example, will have a stronger influence on deliberants than those that appeal to preferences. Other claims, however, will be harder to weigh against each other, and deliberations will be more complicated; this, of course, is where many of the problems regarding effective exclusion and a lack of efficacy arise. Deliberants will object to the quality of their participation and will challenge the inclusiveness of the deliberative group. While disagreements here are difficult and unavoidable (we must expect that people will disagree, sometimes fundamentally, about the weight that their public reasons ought to have in deliberations and upon the deliberative decision), this question of evaluation is at the root of disagreement at a more foundational level. It is not the kind of fundamental disagreement (of the kind that Gutmann and Thompson set out, for example with the case of abortion) that poses the biggest problem for


Monique Deveaux acknowledges this in her discussion of deliberative democracy where her political approach that incorporates negotiation, bargaining, and compromise is subject to requirements of democratic
deliberative theory; although these disagreements are significant, there are ways for deliberative democrats to address problems of moral disagreement and reasons why deliberation is a particularly useful tool when it comes to members of a polity dealing with these conflicts. The more serious problem is the disagreement over the different ways of structuring deliberative processes (via discursive requirements, etc) that lead to charges of effective exclusion and a lack of efficacy. In particular, deliberative theorists disagree upon the requirements for effective inclusion in the deliberative group and over the constraints that we ought to place upon the exchange of reasons, and this has a significant impact upon the decisions that the deliberative group will make. Since deliberative legitimacy requires that all people can participate as equals in a process that allows us to make decisions collectively and without engaging in effective exclusion or domination, it is crucial that the criteria that govern the exchange of reasons are neither over- nor under-inclusive.

In “Saving Democracy from Deliberation”, Daniel Weinstock takes issue with the role that deliberative theorists expect public reason to play in deliberations. He looks at the different constraints that deliberative democrats place on the exchange of reason-giving and he critiques deliberative democracy on (moral) pluralist and democratic grounds. Although Weinstock notes that the exchange of reasons is a normatively more robust way for a political community to deal with conflicts than bargaining and aggregation, he questions the extent to which deliberative democracy, as informed by public reason, is a properly democratic process. As he develops the argument that public reason is bad for democracy, Weinstock makes the arguments that 1) public reason is unfair because of the demands that it makes upon people to translate their actual reasons into the language of public reason, and that 2) public reason, because it (and not people’s deliberations) does the work in attempting to address disagreement, undermines the mutual understanding that deliberants try to reach, hinders their ability to compromise, and in doing so undermines their autonomy. Weinstock

---


See Chapter 2.
builds his critique around two general interpretations of the particular conception of public reason that can guide deliberations. Deliberative theorists, Weinstock argues, can set out either weak or strong substantive constraints. Neither of the approaches, however, is satisfactory, and both are unable to account for moral pluralism.

The minimal requirement of weak substantive constraints only asks that the claims that people make must be reasons (that is, they must be logical, have generality, be relevant, and allow us to draw inferences). These constraints do not make reference to the permissible content of those reasons and, as a result, Weinstock argues that they are insufficient to ensure that deliberants will be able to arrive at mutually justifiable resolutions. This expansive approach does not give deliberants any guidance as to how they ought to deal with the fact of their moral pluralism and this leads Weinstock to critique weak substantive constraints on the grounds that they do not make this problem any more tractable. Weinstock argues that in order to meet the justification requirement of mutually-justifiable reasons, “[d]eliberations must be structured so as to allow the strongest argument to prevail.” The problem, when we structure deliberations to deal with moral pluralism – that is, when we think that the best (most democratic) way to account for people’s first order views is to let people decide as a collective what the best political response is – is that deliberants are left with a series of conflicting public reasons and without substantive constraints (other than those that require that deliberants use reasons). When this happens there is little guidance in terms of what people ought to do to resolve disagreement – disagreement that could be fundamental – and deliberation will have to do a great deal of difficult work, perhaps more than is reasonable for us to expect. Given these minimal substantive constraints, Weinstock’s concern is that “there is no reason

303 Weinstock, “Saving Democracy From Deliberation”, p.82.
to think that the moral pluralism that threatens the traditional justificatory project will be made any more tractable by being placed in the democratic arena.”

Stronger substantive constraints limit the content of reasons by requiring that deliberants use reasons that could, in principle, be shared/accepted by others, an approach that applies a principle of reciprocity. This, Weinstock points out, is initially appealing. The intent behind asking that deliberants not only give reasons, but that these reasons must be ones that “others who do not share one’s broader moral and philosophical beliefs” could accept is that the process of justification, because it must be accessible to all deliberants, will make it more likely that deliberants will be able to arrive at mutually-justifiable results (since this excludes reasons that, because people cannot accept them, negate mutually justifiable outcomes). Weinstock, however, rejects these stronger substantive constraints. Instead, he argues that the limits that these stronger substantive constraints place upon permissible types of reasons will have an adverse effect upon deliberants’ abilities to deal with disagreement. His concern is that deliberants will have to refrain from making the claims that they really want to make and that this will unfairly impact some deliberants more than others.

When deliberants try to adhere to these stronger substantive constraints, translating their claims into the language of public reason “will involve some distortion of their views and will put them at a disadvantage in deliberation with others, as the arguments that the requirement of publicity would have them make will seem somewhat foreign and distant to them, as if they had been made to take up a character not their own in a play.” Stronger substantive constraints put additional obstacles in the way of clear and effective deliberations, Weinstock argues, and ultimately have a negative

---

305 Weinstock, “Saving Democracy From Deliberation”: Weinstock begins his discussion of this on page 83. He uses “shared” and “accepted” interchangeably.
308 Weinstock, “Saving Democracy From Deliberation”, p. 84.
impact upon equality and fairness. Instead of helping deliberative democracy to account for moral pluralism, substantive constraints lead deliberants to circumvent it.\textsuperscript{309}

Given the choice between a set of weak substantive constraints and a stronger set of substantive constraints, Weinstock opts for the former. While he rejects the latter on the grounds that they violate democratic principles and fail to address moral pluralism because the resolution does not really come from the deliberants themselves (it “is not deliberation among citizens, but rather the theorists’ external imposition of norms of public reason, that is doing the work in closing the gap between citizens’ diverse moral conceptions”\textsuperscript{310}), his assertion that the weak substantive constraints are “entirely appropriate”\textsuperscript{311} is, I think, problematic given his earlier argument that moral disagreement is likely to be intractable when people deliberate with only these weak substantive constraints.

Neither the weak nor the stronger substantive constraints, on Weinstock’s account, can satisfactorily address the fact of moral pluralism. Weak substantive constraints rely upon deliberation among citizens to do the work, but this is insufficient to address moral pluralism because people might not be able to produce mutually justifiable results; strong substantive constraints rely upon the external imposition of norms of public reason to do this decision-making work, and this approach fails to address moral pluralism because deliberants (and some deliberants more so than others) have to distort their views in order to meet these criteria, therefore making the decisions unfair. Given Weinstock’s own arguments against weak substantive constraints, the conclusion that we are left to draw is that deliberative democracy, while it is normatively more appealing than the aggregative alternative, cannot use public reason in a way that satisfies people who take moral pluralism seriously and so we should give up on deliberative democracy.

\textsuperscript{309} Weinstock., “Saving Democracy From Deliberation”, pp.83-84.
\textsuperscript{310} Weinstock., “Saving Democracy From Deliberation”, p.85.
\textsuperscript{311} Weinstock., “Saving Democracy From Deliberation”, p.88.
Weinstock’s account of these two general approaches to public reason is useful in terms of illustrating some of the problems that arise with the ways that deliberative theorists use public reason to determine the scope of deliberative democracy. I take issue, however, with the way that Weinstock frames the choices that are available to deliberative theorists. When Weinstock rejects strong substantive constraints he argues that it is due to people’s ability (or the lack thereof) to translate their actual reasons into the language of public reasons that employ these stronger substantive constraints. I think that this problem is overstated, and the arguments that Jonathan Quong makes help to show why this is the case.

Quong addresses objections about the nature and scope of public reason that are similar to the ones that Weinstock puts forth. In “Are Identity Claims Bad for Deliberative Democracy?” (2002) Quong asks if the claim “because it is important to my identity” is, or can be, a legitimate reason in deliberative democracy. By asking this question, Quong offers a response to what he calls “the public reason problem” – a problem that exists because of a perceived tension between identity claims and public reason. On the surface the two claims appear incompatible. Making similar claims to Weinstock, Quong addresses issues of accessibility and he argues that public reason relies upon deliberants having widely-shared values as a necessary precondition for deliberating. This requirement appears to be incompatible with identity claims. The specific (not generally shared) connections that people who make identity claims draw between why their identity is important to them appear to be only tenuously (if at all) related to the reasons that they give as to why other deliberants ought to count these claims as public reasons. When we try to combine identity claims and public reason in deliberative democracy a problem emerges. Public reason requires widely-shared values, but identity claims appeal to values that are only shared by some deliberants. Following this, the assumption is that because there is no way to ensure that identity claims are not self-interested preferences, they ought not to have a place in public deliberations.312

312 Quong, “Are Identity Claims Bad for Deliberative Democracy?”, p. 309.
The public reason problem that Quong tackles is similar to the problems that Weinstock discusses. Although he does not frame it using the language of identity claims, Weinstock’s concern is with substantive constraints that prevent deliberants from presenting the reasons that they are required to offer in the direct language (of the kind that they can use on an account of weak substantive constraints) that best allows them to communicate their actual arguments. If we bring Weinstock’s discussion of reason-giving and constraints to Quong’s discussion of the public reason problem, then when it comes to identity claims that ask that deliberants to reframe their arguments in the language of public reason, it would, in Weinstock’s language, force deliberants with identity claims into the objectionable role of “character[s] not their own in a play.”

Quong is not unsympathetic to Weinstock’s concerns about the potential of public reason’s constraints obscuring the nature of the issues and preventing proper deliberation. However, whereas Weinstock constructs an argument as to why deliberative democracy ought to only insist upon weak substantive constraints, Quong does something else. Quong argues for an approach to public reason that employs comparatively stronger substantive constraints (the conception of deliberative democracy that he looks to draws from Gutmann and Thompson and he accepts the principle of reciprocity and that the arguments that deliberants make must be “justifiable to the other members of the deliberative community”). Whereas Weinstock, out of concern that strong substantive constraints might exclude deliberants, ends up going back to weak substantive constraints that make it difficult for deliberants to resolve their disagreements [at least the disagreement that is necessary if they are to reach collective (political) decisions], Quong, via his discussion of identity claims, works different vantage points into deliberative democracy’s evaluative framework. This approach enables Quong to support stronger substantive constraints in a way that, unlike Weinstock’s approach, avoids charges of distortion.

313 Weinstock, “Saving Democracy From Deliberation”, p.84.
When Quong sets out his justification as to why identity-based claims can be legitimate reasons in deliberative democracy, he makes a clear link between the claim “because it is important to my identity” and the stronger substantive requirements of public reason. Unlike Weinstock, Quong does not step back from stronger deliberative constraints in order to prevent a distortion between the deliberant’s actual reason and her public reason. Instead, Quong argues that the appeal to identity is necessary if deliberants are to offer consistent public reasons. Quong sets out the steps that deliberants take to get from their actual reason to their public reasons and in doing so he (implicitly) refutes Weinstock’s claims of distortion. In Quong’s deliberative process the deliberant first makes her claim and supports it with the assertion that its importance lies in the fact that “it accommodates a cultural practice which is central to [her] identity.”315 This claim, as Quong points out, “is an accurate representation of the reasoning of the speaker” because “it is an honest explanation of the speaker’s position.”316 Her claim is consistent with the “actual reason” that Weinstock argues that deliberants must be able to present if the deliberative group is to avoid treating people unfairly. It is also, as Quong points out, consistent with the idea of public reason. This is the case because “most people can at least understand what it means for something to be important or central to someone else’s identity”, and as such “the appeal to identity does not rely on any values or reasons that are not widely shared or controversial.”317

Importantly, we can also make sure that the claims that people present are, as they say, important to their identities. To do this, we need to evaluate the practice in question which we can do if we look “at the structure and reasoning of [the] culture and then assess how central the practice in question [is] to the culture as a whole.”318 Addressing concerns that Weinstock raises, Quong asserts that “determining how central or peripheral a practice is to a culture does not involve any evaluation of the culture, nor does it require us to accept or reject any of the culture’s comprehensive

315 Quong, “Are Identity Claims Bad for Deliberative Democracy?”, p. 313.
317 Quong, “Are Identity Claims Bad for Deliberative Democracy?”, p. 313.
reasons or values.” The evaluation deals with the practice – not the culture itself – and is therefore consistent with social and moral pluralism; at the same time it is also able to address concerns of self-interested (non-public) reasons unfairly influencing deliberations. This, however, only takes us so far. In addition to his concern about deliberants’ ability to translate their actual reasons into public reasons, Weinstock is also concerned that deliberants will not be able to weigh people’s claims fairly. While the identity claim, as Quong sets it out, does not ask deliberants to translate their claim (thus avoiding the risk of misrepresentation), it does not tell us much about the value of that claim, and without this it is harder to make disagreement tractable (since deliberants may doubt the truth and significance of people’s arguments and suspect that people make things up or exaggerate them in order to gain a political advantage). Although identity-based public reason claims are representative of people’s actual reasons and are fair in this respect, deliberants still do not know anything other than that a claim is important to some deliberants, meets criteria of public reason and, as such, belongs in deliberations. It is unclear what deliberants can and ought to do with this information. At this point, the position that deliberants are in appears to be similar to that of deliberants who only adopt weak substantive constraints. Deliberants still lack guidance as to what they ought to do next: how ought they to rank claims and on what basis ought they to make collective decisions? Without answers to these questions – without, that is, further guidance as to how deliberants are to try to reach agreement on the basis of these identity claims – the substantive constraints that Quong advocates are unable to fully address the pluralist challenge because the potential for intractability is still significant.

Weinstock’s concerns over the constraints on public reason lead him to question the extent to which deliberative democracy, as it is informed by public reason, is sufficiently democratic. Quong offers a partial answer to Weinstock’s concerns with the work that he does to show that deliberants’ arguments are not distorted when they present their actual concerns as public reasons.

Quong satisfies the question of deliberants’ ability to translate their actual reasons into public reasons, and in doing so he addresses Weinstock’s democratic concern about questions of equality that surround people’s entry into deliberations. Despite Quong’s work here, Weinstock’s concern about the extent to which decisions are democratic still needs further attention when we consider that deliberants need to make decisions on the basis of these public reasons, that they need to do so as equals, and that the decision they make must be mutually justifiable. An additional challenge to the democratic capacity of deliberative democracy concerns fairness-based objections that come from people who argue that their arguments – their real reasons – cannot easily be defended in public terms. Weinstock wants deliberants to compromise politically so that they are able to reach mutually-justifiable decisions. At the same time, this critique against strong substantive constraints – in which Weinstock argues that we need to accept deliberants as they are – is an important one and one that deliberative theorists need to take seriously if we wish to prevent deliberants from compromising themselves in order to participate in the deliberative group. These questions of compromise arise because of the ways that deliberants engage with each other. One of the fears that underlie discussions of the intractability of conflict and problems of distortion is, in large part, due to an emphasis upon moral pluralism as the most appropriate way to deal with issues of fundamental disagreement. A shift away from this, and a focus upon social pluralism offers a better response to these questions. Deliberants can step out of this intractability/distortion trap if we focus upon ways to draw attention to the potential for compromise in a more transparent process of deliberation. Monique Deveaux offers an account of deliberative democracy that emphasizes the political nature of conflict resolution by drawing attention to the power relations that influence deliberations.  

320 Deveaux’s emphasis on the political nature of conflict (and her deliberative account of this) offers an important response to some earlier critiques of deliberative democracy. Ian Shapiro argues that Gutmann and Thompson’s discussion of deliberative democracy falls short in terms of “the degree to which moral disagreements in politics are shaped by differences of interest and power” (29) and argues that they have not done enough to establish the political value of deliberation (36). “Enough of Deliberation: Politics is about Interests and Power.” In Stephen Macedo, (ed.), *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford: Oxford University Press, 1999). Similarly, Michael Walzer offers a list of 14 “non-deliberative activities” in
Making deliberants acknowledge their strategic interests exposes unjust motives (therefore helping with the intractability problem) while the transparency and shift from moral argumentation to a political interest approach helps to address problems of distortion. Deveaux’s democratic approach is, as a result, better equipped to deal with the democratic problems that Weinstock addresses and is more likely to enable deliberants to reach a compromise without compromising themselves.

Deveaux looks at democratic challenges to deliberation in *Gender and Justice in Multicultural Liberal States* (2006). Deveaux’s central concern is with the tensions between cultural group rights and protections, and gender equality and justice. Her discussion of this tension takes place in the context of the minorities within minorities debate and the ways that we ought to balance minority groups’ internal cultural and religious concerns with issues of sexual equality and how this ought to take place given the demands of liberal democratic states. Deveaux looks to a democratic and “manifestly political” approach to this problem. Deveaux notes that her discussion “presents a formidable challenge to deliberative democracy” as she argues against deliberative approaches that rely upon moral consensus for legitimacy. Within her discussion of deliberative democracy, Deveaux looks at conflict and focuses upon the best way(s) to secure respect for cultural pluralism. Deveaux takes issue with the way that deliberative theorists approach conflict, and, because of her emphasis on the political approach that deliberants ought to take to addressing conflict in deliberations, her critique offers a response to the democratic concern that Weinstock expresses. While conflict itself does not pose a problem to deliberative democracy, Deveaux identifies a problem with the standard deliberative response to conflict. Deliberative democracy’s preferred approach to conflict resolution is to find a principled solution via a process of rational, moral

---

322 Deveaux, *Gender and Justice in Multicultural Liberal States*, p.112.
323 Deveaux, *Gender and Justice in Multicultural Liberal States*, p.4.
argumentation in which people try to convince others of the shared normative principles that underlie particular claims. This approach can deal with some forms of conflict, including instances in which fundamental values are inherently opposed (as we see in Gutmann and Thompson’s discussion of the benefits of deliberation upon abortion, and their resulting argument that deliberations can produce policy proposals – such as sex education and childcare – that are compatible with the values of both pro-choice and anti-abortion deliberants). The principles at work in a moral approach to conflict resolution are ones that exist at a lower level: they leave the fundamental issue alone and, because the resolutions are practical, focus upon areas in which values coincide (i.e., both sides have an interest in preventing unplanned pregnancies and in ensuring that children and parents have more support).\textsuperscript{324} With this focus, disagreement becomes tractable, and people who disagree on fundamental issues are able to find areas of compromise.

Deveaux takes issue with a response to conflict that relies upon moral argumentation. As she looks at different ways that we can frame disputes, Deveaux argues that cultural conflicts “are primarily political in character, and while they include normative dimensions, they do not necessarily entail deep disputes of moral value.”\textsuperscript{325} Deveaux does not try to address questions of decision-making by setting out principled ways that deliberants ought to deal with claims. This principled approach assumes pre-determined normative standards and subsequent weighting on that basis, and as such is subject to the democratic objection that Weinstock raises. After critiquing the standard deliberative way of dealing with conflict, Deveaux argues for a different approach. She argues that “strategically focussed deliberation – in which participants seek political compromise – is oftentimes a better solution . . . both normatively and practically.”\textsuperscript{326} This political approach, in which Deveaux praises the contributions of negotiation and compromise, is surprising coming from a deliberative democrat. As Deveaux notes, negotiation and compromise are not part of the deliberative

\textsuperscript{324} Gutmann and Thompson, \textit{Democracy and Disagreement}, p.89.
\textsuperscript{325} Deveaux, \textit{Gender and Justice in Multicultural Liberal States}, p.6.
\textsuperscript{326} Deveaux, \textit{Gender and Justice in Multicultural Liberal States}, p.6.
vocabulary. Indeed, deliberative democracy is a response to aggregative forms of democracy precisely because these tactics tend to benefit people with more money and a stronger voice. Replacing aggregative politics with an exchange of reason-giving, such as that found in deliberative democracy, is a better approach for marginalized groups who have limited access to the tools that make aggregative practices successful. This is true even though reason-giving, given existing power-imbalances, is also difficult for marginalized groups. Deliberative theorists reject negotiation and bargaining for good reasons and, if we were to incorporate them into deliberative democracy, deliberative theorists would undoubtedly object to the potential danger of these tactics replacing reciprocity and undermining deliberation that occurs on the basis of public reasons. Deveaux, however, argues that this does not need to be the case. Deveaux’s motivation for calling for the incorporation of negotiation and compromise into deliberative democratic theory is to highlight power relations. This, she argues, happens when we reframe dialogue from a discussion of moral arguments into a discussion of strategic interests. Highlighting power relations in this way strengthens the position of vulnerable deliberants who will have a greater chance of drawing attention to unjust power structures.327

Deveaux’s political approach to conflict resolution still fits within the theoretical framework of deliberative democracy. In calling for a “democratic and manifestly political approach” to replace a “process of moral argumentation and deliberation”,328 Deveaux does not abandon normative standards of evaluation. A political approach to (deliberatively) resolving conflicts requires that deliberants proceed first of all by outlining their interests and needs before moving to negotiation, bargaining, and compromise. This process, however, is subject to the requirement of democratic

327 Deveaux, Gender and Justice in Multicultural Liberal States, p.101. With this conception of deliberative democracy Deveaux does what Chantal Mouffe calls for, which is that “instead of trying to erase the traces of power and exclusion, democratic politics requires bringing them to the fore, making them visible so that they can enter the terrain of contestation.” Mouffe makes this argument in “Democracy, Power, and the ‘Political.’” In Seyla Benhabib (ed.), Democracy and Difference: Contesting the Boundaries of the Political (Princeton: Princeton University Press, 1996), p.255.
328 Deveaux, Gender and Justice in Multicultural Liberal States, p.112.
legitimacy and must meet the criteria of non-domination, political inclusion, and revisability.\textsuperscript{329} The substantive constraints that Deveaux places upon deliberations are important and illustrate the deliberative nature of her approach. The fact that she endorses substantive constraints while simultaneously calling for a political approach to conflict resolution makes her approach particularly well-suited to address the concerns that remain after Weinstock and Quong’s discussions of deliberative democratic legitimacy. Deveaux’s political approach combines Weinstock’s arguments for more democracy with the constraints and evaluation Quong argues for (and, I argue, that address Weinstock’s objections). Deveaux’s arguments about the ways that deliberants ought to resolve their disagreement engage people in rich democratic activity, but her normative requirements (as well as her political approach’s ability to expose unjust power structures) work to prevent unjust reasons from exerting the influence that they otherwise might.

In Chapter 3 I identified three main areas where deliberative theorists disagree over the requirements of public reason (scope, constraints, and the question of including strategic argumentation). One of the challenges that deliberative theorists encounter when we look at problems of effective exclusion and a lack of efficacy, and particularly when these problems extend to protest, is the extent to which the deliberative criterion of substantive inclusion is compatible with criteria of public reason; given the disagreement amongst deliberative theorists over the scope, constraints, and specific application of public reason we are bound to encounter charges of effective exclusion and a lack of efficacy in actual deliberations. This problem is one that we can address by offering an account of deliberative democracy that addresses protest in a larger deliberative framework (because protestors can challenge the deliberative group when they object to the agenda or deliberative decisions that are in many ways a product of deliberative criteria of reason-giving), but it is also important to answer these questions to the best of our ability in order to (hopefully) prevent

\textsuperscript{329} Deveaux, \textit{Gender and Justice in Multicultural Liberal States}, p.114.
unnecessary effective exclusions and to make sure that, as far as is possible, deliberants have the efficacy that they need in order to deliberate as equals.

At this point I want to set out the more specific account of public reason that I think ought to apply to deliberative democracy in order to guard against criteria of reason-giving that effectively exclude deliberants and limit their efficacy. This happens when the scope is too narrow (as it is when we focus upon moral pluralism and require that deliberants have to reach agreement on substantive moral principles) when the constraints are too great (when people are excluded from the deliberative group because of their reasons, or the way that they present their reasons). In order to avoid this, I advocate a deliberative account of reason-giving with a wider scope. An account of deliberative democracy that addresses social pluralism, and one that does so by incorporating strategic arguments and addressing people’s reasons as they concern interests, not issues (which I will say more about in the following section), does a better job addressing conflict and does so by drawing upon democratic values that are better equipped to effectively include and empower people.

Another reason why deliberative democrats disagree so much about criteria of public reason is because of the way that they discuss it in relation to decision-making and agenda-setting. The assumption that deliberative theorists make here is that public reason is necessary to both – that it is, in fact, a requirement of inclusion in the deliberative group itself. I argue that this claim is problematic (and not only for the implications that it has for protestors). As Deveaux sets out her political approach, the way that people exchange reasons in deliberative democracy shows unease with the requirement of public reason insofar as it tends to effectively exclude people and limit their efficacy; here she argues that “particularly where norms of rationality and reasonableness are stipulated as criteria for inclusion in public deliberation, they can have a tremendously exclusionary effect.”

Deveaux’s concern is similar to the fear that Weinstock identifies in his critique of strong

---

substantive constraints. Like Weinstock, Deveaux identifies the danger in presupposing agreement “upon what kinds of arguments and procedures are fair and reasonable.”

Norms of reason-giving that demand this are vulnerable to the exclusions that I discussed in Chapter 2 when I looked at (social) pluralist challenges and at marginalized deliberants’ lack of efficacy in the deliberative group. Deveaux’s critique moves her discussion of deliberative democracy away from public reason, a move that is evident in her argument that “reason-giving in deliberation ought not to privilege, or be restricted to normative kinds of justification, but rather should foreground practical concerns and discussion about the concrete consequences of particular practices.”

This critique of requirements of reasonableness/public reason in deliberative democracy, however, does not necessarily mean that deliberative democrats ought to abandon public reason. Indeed, the normative evaluative work that public reason does still has a role to play, as Deveaux notes that even in the transparent deliberative processes that she calls for when she advocates a political approach “good normative reasons will remain more persuasive in public deliberation than will those interest-based reasons that fail to speak to the needs of other citizens” and argues that deliberative processes must be subject to non-domination, political inclusion, and revisability.

The best way to explain this critique of public reason, and to address problems of effective exclusion and efficacy (including protest) is to step back from public reason when we look at deliberative criteria of reason-giving. Normative criteria of deliberative democracy have two main components: inclusion in deliberations (which is, obviously, necessary to satisfy requirements of effective exclusion) and criteria that influence deliberative agenda-setting and decision-making, and which deliberants determine via an exchange of public reasons. If we want to take effective inclusion and mutual justification seriously then deliberative democracy needs both. Instead of limiting the criteria for inclusion in deliberations (exclusively) to those arguments that meet criteria of public

331 Deveaux, “A deliberative approach to conflicts of culture”, p. 345.
332 Deveaux, “A deliberative approach to conflicts of culture”, p. 347.
333 Deveaux, “A deliberative approach to conflicts of culture”, p. 349.
reason, it makes more sense – both normatively and practically – to let people offer their arguments even though they may not, on the face of it or at all, be public reasons. If deliberative democracy relaxes its criteria about the kinds of reasons that people can exchange in the deliberative group then we can minimize the deliberative group’s normative exclusions. Deliberative democrats may not like some of the arguments that this allows (and they may find some of them to be offensive), but part of what it means to take democratic deliberation seriously is to give people’s arguments a fair hearing. People should not be excluded from making arguments in the deliberative group on the basis of an initial belief that their arguments either do not or cannot meet criteria of public reason (and therefore that these arguments should not be included in the deliberations that influence decisions and legitimate state action). An expansive scope of deliberative criteria of reason-giving works as long as we separate criteria of inclusion in the deliberative exchange of reasons from questions of evaluation. The arguments that factor into deliberative decisions should meet criteria of mutual justification in order to meet the deliberative requirement of legitimacy. If we have a wider scope for the deliberative criteria of reason-giving, however, then people will have a space where they can try, with the help of deliberative processes and tools (mediators, relevant questions, etc) to articulate their arguments as public reasons and therefore as ones that meet the requirement of mutual justification. Expanding the scope in this way facilitates effective inclusion and deliberants’ efficacy because if people are allowed to air all of their reasons then they will be more likely to find public reasons that meet the criteria of mutual justification in the discussions that come out of this. The benefits of this are clear in Quong’s discussion. It is easy to envision people who pursue identity claims working through their arguments until they are able to frame their claims as public reasons; indeed, this is what Quong shows in the way that he makes his argument.

Quong’s discussion shows how important it is for deliberants to have more information if they are to make an informed (and deliberatively legitimate) evaluation of public reasons. Gathering  

334 Deveaux, Gender and Culture in Multicultural Liberal States, 114.
information is important when it comes to articulating claims as ones that meet criteria of mutual justification and in terms of weighing public reasons, even (or especially), in cases of significant disagreement. In this respect, the case of CWT is a good one and so I look at this in order to develop an account of the application of public reason in terms of the strategic arguments and interest-based claims that deliberants can use to communicate their reasons and combat marginalization and effective exclusion. The mutually justifiable collective decision that participants were able to arrive at in a series of deliberations that took place in Colorado show, despite the extent of their value-based disagreement, that substantive constraints are both compatible with an account of deliberative democracy that takes social pluralism seriously and with an expansive scope of public reason. These substantive constraints have practical value even in difficult situations. As I look at the kind of agreement that arose out of CWT’s deliberations and at the circumstances that made it possible I look back to the concerns that Deveaux, Quong, and Weinstock raise in order to see how different approaches to reason-giving impact the extent to which people are willing to deal with conflict.

5.2 A PLURALIST CONCEPTION OF PUBLIC REASON IN ACTION: THE CASE OF COLORADANS WORKING TOGETHER (CWT)

In 1994 the State of Colorado called for residents’ involvement in the creation of a state-wide plan to allocate funding for HIV prevention. The impetus for this 8-month project came from the Centre for Disease Control (CDC), who required that the State Health Department seek out community-based input. The availability of funding depended upon “how successfully the agency was able to gain community-based input in the area of HIV prevention strategies.” Furthermore, this input had to include a broad range of constituents and represent what were often deeply divided viewpoints. The project involved 60-plus participants: these included health officials, straight and

gay activists, social workers, members of conservative Christian religious organizations, and relatives of people infected with HIV/AIDS. Agreement was particularly complicated for two reasons. First, the talks included representatives from Colorado Springs and the Coalition for Family Values: two organizations that initiated Amendment Two, an anti-gay ballot that passed in Colorado and made it “illegal for any local government, city or county, to adopt an ordinance explicitly protecting the civil rights of people who are gay or lesbian.”

Second, in order to secure funding, this deeply divided group had to reach consensus.

Despite the difficulty of the task, participants in these deliberative talks, dubbed “Coloradans Working Together” (CWT) produced the State of Colorado’s 1995 HIV Prevention Plan that set out policy for 3 years and which the state completed successfully. Participants were able to reach consensus despite the extent of their value-based disagreement; that this was possible despite significant constraints on the kinds of reasons that participants could (and could not) use is particularly interesting for deliberative theory.

CWT is a good case to examine for two main reasons. First, given the existence of Amendment Two, there are serious limitations upon the kinds of reasons that deliberants can use. This is clearly problematic from the standpoint of “ideal” deliberations, but it serves to underscore the fact that actual deliberative forums are never as ideal as deliberative theorists would like, and it forces us to account for this fact when we try to determine the best ways to deal with cases of deep value conflict. Second, despite the limitations that Amendment Two imposes upon the kinds of acceptable reasons in CWT’s talks, the procedures that CWT was able to establish (within this larger questionable context) are otherwise ideal. The group was representative, had ground rules that stress respect, and there were a clear set of goals. Additionally, the group had a professional mediator. The


mechanisms that are in place in CWT’s deliberative talks present us with a good opportunity to look at our ability to deal with issues of social pluralism in cases of deep value conflict in actual deliberative settings. This also gives us an opportunity to examine the benefits of Deveaux’s political approach.

The CWT case combines “ideal” deliberative circumstances with considerably less-than-ideal limitations, which, in practical applications of deliberative democracy, we cannot avoid. Deliberative democracy’s typical response to effective exclusions is to theorize institutional ways to make deliberations as close to ideal circumstances as we can. While it is certainly important to do this, at the same time if this is the only focus then it leaves deliberative democracy vulnerable to charges of effective exclusion that arise when supposedly ideal circumstances cannot accommodate the effective participation of all people. Holding these deliberations, given the context, is itself a kind of compromise, but one that must nonetheless meet the normative requirement of mutual justification.

By looking at the CWT case I address the question of what we as deliberative theorists ought to do given the inevitable limitations and practical obstacles that we face, and I show how a political approach that emphasizes interests and strategic negotiation is helpful both practically and normatively (thus endorsing Deveaux’s approach).

Amendment Two had a significant impact upon the kinds of reasons that participants in CWT could make and these limitations are clearly problematic from a deliberative democratic standpoint because the explicit lack of protection and acknowledgement of the equal status of gays and lesbians violates principles of democratic legitimacy. The Amendment pre-empts the participants’ use of certain public reasons (since the terms of the Amendment ensure that gays and lesbians cannot use civil rights to support their arguments) and it does so in a way that undermines their effective inclusion. These constraints, in addition to the question of the kinds of reasons that

---

337 CWT still involves participants and continues to generate three-year Comprehensive Plans. The current plan has $3.7 million a year in CDC funding for HIV prevention. “Allotting Resources for HIV Prevention”; Policy Consensus Institute. www.mediate.com
deliberants ought to exchange, raise another question that I wish to address. Given the nature of these limitations it is unclear whether or not CWT’s talks ought to have taken place at all. This objection is reminiscent of the conflict that Iris Young addresses in *Activist Challenges to Deliberative Democracy*. In the third activist challenge when Young discusses constrained alternatives and structural inequality she argues that endorsing deliberations that set an exclusionary or otherwise unjust agenda is an unsatisfactory response to the kinds of exclusion that marginalized people face. Young argues that a more appropriate response to this type of exclusion is to examine the constraints in inclusive deliberative settings. In the case of CWT the limitations that the Amendment imposes are clearly illegitimate from a deliberative standpoint and an intuitive response might be to discount the process. The option to deliberate on the structural constraints, however, is unavailable here – if Colorado’s citizens do not participate, the CDC will withhold funding. Given the choice of securing external funding or going without, it is fair to ask whether or not participation in these undesirable circumstances is likely to benefit Coloradans, or if participation only lends undue legitimacy to the Amendment and reinforces existing inequality.

Deliberants can try to include too much and in doing so effectively exclude or co-opt people. We see this in the emerging critique of deliberative theory’s neglect of protest. Deliberants are also at risk of missing chances to remedy exclusions because of the desire to either

---

339 Amendment Two was repealed on May 20, 1996 as the result of a U.S. Supreme Court ruling.
340 While there is not, as far as I know, a record of people protesting CWT’s talks, the widespread opposition to Amendment 2 led to a larger campaign “Boycott Colorado”: the group was “a coalition of individuals and groups working to overthrow Amendment 2 through education and direct action. We support the total boycott of Colorado and all of its products until this discriminatory amendment if repealed.” ACT UP/NY Records. Reel 62. Box 82; Folder 11. “Question and Answer re: Amendment and Boycotts.” While the “total boycott of Colorado” might logically extend to CWT’s talks, Joseph Best, one of the people involved in education and outreach for NY: Boycott Colorado notes that “The boycott is not punitive. A boycott propels the issue to the foreground. It works to facilitate debate, and assists in adequately educating the people in Colorado who misunderstood the ramifications of their choices”, thus suggesting that CWT’s deliberations could be compatible with these protestors’ goals. ACT UP/NY Records. Reel 62. Box 82; Folder 11. “Letters re: NY: Boycott Colorado.”
stick to deliberative guidelines or forgo talks altogether. Despite this, the talks occur within a larger and deliberatively illegitimate context (with the constraints of Amendment Two) that most deliberative theorists would urge us to boycott on the grounds that engagement would only lead to unsatisfactory and counterproductive results. While an intuitive response to the legitimacy of talks that deliberately and illegitimately discriminate against some (although not by the choice of the State Health Department that ran them) might be to discount the process – or at the very least not to use it to illustrate the inclusive capacity of deliberative democracy – this context ought not, I argue, lead us to dismiss the results in this case. The limitations that the Amendment imposes are illegitimate, and both deliberative democrats and activists ought to object; however, that consensus occurred despite the deep divisions (CWT participants included both gay men and people who were responsible for putting Amendment Two on the ballot) shows that people can account for social pluralism even when there is deep disagreement. Although there are clear benefits to participation in this case, it is important to emphasize the importance of protest as an option. Not all potential deliberants may agree that participation in CWT is the best option and some may refuse to engage on the grounds that participation does lend undue legitimacy to a process that contains unjust background assumptions (Amendment Two). Participation in CWT, or in deliberations that pose a similar dilemma, would not pose the same normative dilemma if the people who object were able to engage in a form of protest-as-deliberation and to raise their concerns about the process itself.

342 Young, “Activist Challenges to Deliberative Democracy”, p.683.
343 CWT, given the nature of Amendment Two, is an extreme example of a deliberative group that severely limits the kinds of arguments that marginalized groups can make. Deliberative groups ought not to operate with these kinds of restrictions and the response of deliberative groups ought to be to disallow policies that clearly treat groups of people as less than equal citizens. The larger point – that a broader conception of deliberative democracy that includes a deliberative polity and offers a normative justification and conceptual account of protest can help us to address the concerns that (potential) deliberants have when they disagree with the framing of particular deliberations – still stands.
5.2.1 From Challenge to Consensus: Reframing Disagreement

CWT’s task, as set out by the CDC, was to “articulate the most important needs in HIV prevention in Colorado” and then make policy proposals with these in mind. In order to do this, the group had to accomplish several things: first, to identify populations affected by HIV/AIDS; second, to prioritize those populations in terms of need (which required them to agree upon a list of relevant factors in HIV prevention and to rank, on a needs basis, the groups affected by the virus); and finally to take this information and “to identify a preferred (and practical) strategy for preventing the disease in those populations.” The task itself is a difficult one, and it is unclear that agreement is even possible between those people who initiated Amendment Two and those denied civil rights because of the Amendment. Given the circumstances, participants have an uncertain (and deeply distrustful) basis on which to conduct talks. Even more demanding (and seemingly improbable), is the CDC’s mandate that the recommendation has to be the product of consensus.

The CWT talks were structured in a very practical way. The consensus that CWT participants reached did not (unsurprisingly) occur on the level of value differences. Instead, their take on consensus was to reach agreement “after struggling with all interests to find the best solution (‘best’ meaning the solution that satisfies the most important and the widest range of interests).” This framing meant that participants were working toward agreement that was “not a compromised consensus on deep values, but a real, workable, and mutually beneficial consensus on practical strategies.” Mediator John Hughes enabled the group to make progress when he framed the discussion to acknowledge the difference between interests and issues. Conflicts that we could otherwise frame as deep value differences “often entail conflicting strategic interests”, and “to assume the fundamentally moral character of cultural conflicts” is, as Deveaux notes, “to risk

---

misconstruing what is actually at stake.”349 The CWT talks had a political focus. The task, while challenging, is practical and attempts to avoid engaging with value conflicts. The talks, however, do not exclude values, or insist that participants must avoid making any arguments that appeal to them. Indeed, at several points in the talks participants discuss the relation of their values to the issues at hand and, as I will show, it is clear that this approach (which is similar to Quong’s) was helpful in moving talks forward. By changing the level on which participants are expected to reach consensus, and by insisting that the exchange of reasons must address interests, the group sought an explicitly political resolution.

There are (at least) two problems that arise when people frame deliberations around issues. First, deliberants encounter unnecessary obstacles. Whenever we frame talks this way and expect people who have conflicting values to reach a decision upon the issues, we inevitably require that people compromise. The problem is that people are very reluctant to compromise their values since these are inextricably tied up with their sense of selves and therefore seem non-negotiable. When this is the case we cannot expect any significant agreement (let alone consensus), our expectations of policy decisions are limited, and the deliberations themselves are compromised. A second problem is that taking an issue-based approach to deliberations tends to obscure people’s underlying interests. Since people are more likely to agree upon interests than they are upon values, this obfuscation is problematic. As Hughes notes, an interest-based approach is preferable because it often helps to shed light on the concerns that underlie people’s issues. People’s issues and interests are connected: a person’s interest can lie in protecting an issue (or value) that is of fundamental importance to her, but particular interests are removed from the value itself and are therefore better subjects of deliberation. Deliberations that occur on the basis of people’s interests are more helpful in discovering what people want politically and are also more likely to allow deliberants to make compromises without compromising their values. The challenge then is to get people to discuss interests instead of issues.

even – and particularly – when deliberants perceive the topic to be one that concerns fundamental values.

This is when mediators are especially helpful. As Hughes explains, what might originally appear to be an issue upon which a participant is unlikely to cede ground might, as deliberants unpack their claims to reveal underlying interests, end up highlighting another previously unimagined solution. To illustrate this difference, Hughes discusses a case where an employee wants a salary increase. The employee presents the issue as a monetary one (which will only be met by the raise). However, Hughes points out that underneath this issue is an interest in financial security. If this interest addresses the issue at hand, then there might be several options to resolve the conflict that are attractive to both the employer and the employee.\(^{350}\)

Breaking down the conflict by asking questions about issues and interests is an important move in dealing with conflict. Although the money/financial security example above does not address deep value difference, the strategy itself is helpful for this kind of disagreement. In the CWT case participants, guided by Hughes, took a political approach similar to the one that Deveaux advocates and began by outlining their interests and needs. Framing talks around interests and needs allowed people to communicate their actual concerns without trying to make them fit into criteria of public reason – criteria that, because CWT requires consensus to move forward, might stop the talks. Here we see the benefits of a political approach to deliberation that relaxes criteria for inclusion. Partway through the talks, one of the participants identified an additional need that the group – which had so far been making good progress – had not yet addressed. This new need dealt with an issue of framing that confronted the group with a particularly contentious issue. Amidst listing relevant factors in HIV prevention, a participant argued that the group ought “to shift the discussion of AIDS in Colorado from a moral issue into a public health issue.”\(^{351}\) The suggestion that the

\(^{349}\) Deveaux, *Gender and Justice in Multicultural Liberal States*, p.105.


group add this 14th need divided the group. The 14th need concerns the way that participants need to frame the problem itself, and because of this (and given the groups’ deep value differences), disagreement here threatened to stop the talks.

There are two ways that participants could frame the morality versus public health debate. First, participants could debate the morality of the issue. Here, the two value-based viewpoints conflict, with one group “rejecting another’s sexuality as immoral” and the other “arguing for the autonomy and dignity of that sexuality.” Second, participants could move from a discussion of morality to public health. This approach is also problematic because the two factions disagree about this move. Disagreement over the move itself, however, is something that deliberative democrats can deal with and it is something that is easier to deal with if we employ Deveaux’s political approach.

In the face of this disagreement, the mediator facilitated talk about the choice to reframe the talks. On the face of it, the two sides appear to be deadlocked: there is (virtually) no chance of resolving the disagreement along the lines of morality, and the two sides stand in sharp disagreement about the wisdom of shifting the terms of the debate. Deliberation about the issues themselves did not have any traction, which is especially problematic because consensus is necessary to move the talks forward. The mediator’s response to this conflict was to reframe the debate away from a focus on issues even though the larger question deals with values. Hughes brought two people from each side of the debate into a smaller group discussion. The group consisted of the person who presented the need (from the Colorado AIDS Project), and a colleague; arguing against the reframing was a person from Colorado Family Values, and a person from the group His Heart, a Christian AIDS organization. In his role as mediator, Hughes did not prohibit discussion that dealt with moral concerns. Hughes moved discussions forward by allowing participants to work within a larger discussion of morality. Participants were able to engage in a discussion of why their values were 

---

important to them and how they influenced their positions, but they had to move away from a
discussion of those values. Instead, participants had to focus upon “options that they find acceptable,
within their value systems, for the issue at hand.” Here we see debate that addresses non-public
reasons (the larger scope allowing for an honest discussion that lets people communicate their actual
objections) but that does so with an eye to extracting interest-based reasons that meet requirements
of mutual justification. Talking about morality without focussing upon values allowed participants to
work through the conflict and helped them to reframe their talks to centre upon interests that they
could respond to.

The participants from Colorado Family Values and His Heart supported their argument for a
moral framing with the assertion that “if it isn’t a moral issue, people will continue to behave in ways
that put them in danger. Once you have moral underpinnings to keep people from behaving in those
ways, that’s when people won’t die.” This argument appeals to morality, but the dispute concerns
what is effective. The claim is strategic. The appeals to morality are, in these representatives’ minds,
the best (most effective) way to protect against HIV infection. This strategic interest works as
Deveaux argues and gives the group a political interest that they can debate while it also exposes
unjust arguments. From a (reframed) discussion that made some space for issues of morality, the
participants were able to identify a common concern: to stop the virus from spreading. Now, this
common concern is obvious given the topic of the talks, and very broad, and there is still plenty of
room for deep disagreement over the best ways to achieve the goal. Still, this change in focus and
the reminder of the larger goal gave participants a starting point in this particular 14th need conflict.
This broad common concern was enough to motivate the group to address the issue of public health
versus morality without getting trapped in the previously mentioned dichotomy. What could have

been an intractable conflict over matters of principle gave way to a compromise that allowed the group to move forward with their principles intact. After agreeing to address questions of what is effective given the fact of moral disagreement, the group found language to present the issue that was compatible with both groups’ values. Despite their value differences, the group agreed upon the following statement:

There is a need to remove moral objections to HIV prevention and education that is appropriate to the behaviours of the target community. For communities that include members with a range of moral perspectives, HIV prevention methods need to be appropriate to that range of moral perspectives by presenting multiple prevention messages.\(^{358}\)

5.2.2 Deliberative Success and Remaining Problems: General Agreement and Specific Objections

The practical recommendations that the small group produced allowed for a political resolution. This was possible because of the careful wording of the statement. The general language had a specific purpose and simultaneously allowed the participants to reach consensus while ensuring that they did not have to compromise their values when it came time to implement the comprehensive plan. As Hughes notes, the need statement is flexible and it is the participants’ intent that “the wording encourages a range of messages that are tailored to a spectrum of moral perspectives.”\(^{359}\) In fact, the consensus was only possible because the two sides negotiated to retain control over particular spaces in the public sphere. The statement that CWT produced reads quite differently for groups with opposing values. On the one hand, the general assertion that “HIV prevention methods need to be appropriate to the range of moral perspectives by presenting multiple prevention messages” satisfies conservative members of CWT who do not want sexually explicit material to be a mandatory part of school curricula. At the same time, the assertion that there “is a need to remove moral objections to

HIV prevention and education that is appropriate to the behaviours of the target community” satisfies AIDS activists because it allows for the use of sexually explicit material in gay bars. I will look at the implications of these different readings in the next chapter.

It is doubtful that participants would have been able to reach consensus if a requirement of doing so was to abandon their respective commitments (ones with ties to their values). In this respect, the general language served the participants well. CWT’s mandate was to produce a policy that everyone agreed to. Whether or not that policy has (significant) room for interpretation does not matter for the purposes of securing funding and deeming the talks a success. The fact that this approach enabled participants to reach consensus is a significant achievement given the deep value differences amongst the 60 participants. However, the intentional room for interpretation raises questions about the ability of the state to implement the policy without post-talk objections by the same groups who participated in the talks. Questions of successful implementation on these grounds throw the value of the process into question.

When it comes to translating CWT’s statement into concrete proposals two scenarios immediately come to mind. Groups who support Amendment Two are likely to interpret the part of the policy that asks that prevention methods “be appropriate to [a] range of moral perspectives” so as to exclude what they deem to be “sexually explicit material” in sex education classes. This poses a challenge to the ability of schools to teach effective sex education – and in doing so threatens to undermine the purpose of the HIV/AIDS policy initiative. If school boards interpret sexually explicit material to include instruction on condom usage and if this instruction is prohibited due to the “appropriate” disclaimer then the effectiveness of sex education will be compromised. Additionally, in the context of Amendment Two what constitutes sexually explicit could be read to only apply to homosexual safe-sex education. If this were the case then school boards could target specific – and

already marginalized – groups and further entrench the denial of rights contained within Amendment Two. It is difficult to imagine AIDS activists in CWT agreeing to this outcome.

Similarly, it is easy to see objections on the part of some religious organizations that agreed to the statement. The policy allows for sexually explicit safe-sex material in gay bars, but if this “target community” were to leave the confines of “their” public space, and enter public space with other (“space appropriate”) prevention messages then it is easy to imagine objections. “The behaviours of the target community” encompass a large (and diverse) range of actions in a variety of spaces. Effective HIV prevention messages are ones that are highly visible, but this visibility increases the chances of objections. The negative response to the Kissing Doesn’t Kill piece that I discussed in the previous chapter serves as a good example of the kinds of problems that Coloradans are vulnerable to as a result of their proposal. The Illinois State Senate’s initial approval of the bill that prohibited the public display of “any poster showing or simulating physical contact or embrace within a homosexual or lesbian context where persons under 21 can view it” is a discriminatory piece of legislation in a similar vein to Amendment Two.361

The general wording of the statement and the state’s political climate ought to alert us to these problems of implementation and should urge us to expand what we consider to be the appropriate scope of deliberative decisions so that the application of policy decisions does not undermine the work that the deliberative group is able to do. Given the above objections, the main concern with CWT’s consensus is that the resulting policy is over-inclusive and may not hold up once groups turn the general wording into specific (and contentious) practices. This makes the value of seeking consensus questionable if the policy decision is one that will only arise because deliberants settle upon general resolutions that are open to wide interpretation. The question then is whether

361 The exhibit occurred before CWT began their talks but this is the kind of response that marginalized groups affected by CWT would be susceptible to.
there are any benefits to confronting conflict if the decision is one that skirts some of the more contentious issues.

There are, I argue, benefits to confronting conflict in deliberations even if the decision is lacking in detailed substance. The benefits of deliberative dialogue in this case are twofold. First, there is value in the deliberative process even in the face of continued disagreement once deliberations are over. In the CWT case, participants learned why others hold their beliefs and, while it is not sufficient to resolve disagreement, this can go a significant way to make people more understanding of different positions. The ways that participants had to unpack their claims and clearly illustrate the links between their values and public reasons does a lot to dispel mistrust about people’s “selfish” preferences and, in establishing which claims are public and which are not, pushes people to frame conflict in more productive ways. Second, there are benefits to continued debate outside of deliberative groups, and so we should not be too quick to dismiss the deliberative value of talks that do not result in a strong (detailed and specific) outcome. Deveaux discusses the importance of “democratizing legitimacy” and extending our focus of democratic activity to include informal spaces. She argues that extending deliberative politics in this way is particularly well-suited for dealing with intra-group disagreement since it can accommodate internal processes of reform. Just as importantly, the public sphere plays a significant role because it can extend deliberative politics in innovative ways that do a better job in terms of incorporating people who typically lack power in discursive situations. Similarly, Dryzek argues that the key to handling deep differences is to allow for some space between deliberation and decision-making and to engage discourses in the

362 There is a growing literature of theorists who endorse the benefits of deliberation in divided societies. For a good discussion of deliberation in divided societies see Ian O’Flynn. Deliberative Democracy and Divided Societies. (Edinburgh: Edinburgh University Press, 2006) as he argues that “deliberative democracy has crucial, but largely untapped, implications for divided societies”, p.6. John Dryzek also notes the benefits of deliberation in this context. In “Deliberative Democracy in Divided Societies: Alternatives to Agonism and Analgesia.” In Political Theory 33:2 (2005) he argues that we can defend deliberative democracy from attacks from agonists (who argue that deliberative democracy cannot deal with divisive issues) and from consociationalists (who argue that it “cannot deal with divisive issues because it is too open to diverse claims and claimants” (223)).

363 Deveaux, Gender and Justice in Multicultural Liberal States, p.182, 223.
public sphere.\textsuperscript{364} Dryzek also emphasizes the important role that the public sphere plays as a space of political innovation and notes the way that this benefits formal spaces of democratic participation.\textsuperscript{365} While more work needs to be done to detail the ways that formal and informal deliberation work together (which I will address in Chapter 6), this expansive scope that Deveaux and Dryzek call for show the importance of a more comprehensive account of deliberative democratic legitimacy and, taken with the CWT case, suggest that deliberative democracy would benefit from stronger connections between the deliberative group and the deliberative polity.

It is unrealistic for deliberants to expect to resolve all conflict in formal deliberations. Given that this is the case it makes sense for deliberative theories of democracy to focus more normative attention on extra-institutional forms of deliberation, particularly in the case of protest-as-deliberation where the deliberative polity (and the links between protestors and the deliberative group) play such a significant role. While the remaining scope of disagreement in the CWT case is perhaps higher than we would like (given the problems that exist in the implementation of such a general policy), the fact of remaining disagreement itself is not uncommon. Given this, and considering the ways that groups are otherwise likely to deal with disagreement, it is important that we theorize better ways to account for informal deliberative activity and that we develop the connections between the two; this additional task, however, should not deter us from the benefits that this kind of deliberative conflict resolution can offer.

5.3 Protest-as-deliberation: the challenge to deliberative criteria of reason-giving

Despite disagreement over the constraints upon public reason, deliberative theorists agree that deliberants need to exchange reasons if we are serious about establishing a fair and equal process. This poses a problem for protest because there might be fundamental disagreement over the way that the deliberative group weighs people’s reasons. While deliberative democracy, no more than any

other institution, cannot guarantee that deliberants will always be able to weigh public reasons in a way that satisfies the criterion of mutual justification, opposition to deliberative decisions that follow from charges of unfair weighting pose more than a straightforward fallibility problem. The larger problem is that deliberative theory does not have a way to deal with the conflict that occurs when there is fundamental disagreement over the way that the deliberative group deals with people’s reasons. If this disagreement results in exclusion (either formal or effective) then deliberative democracy’s lack of a response casts doubt on the legitimacy of the process.

The deliberative group’s potential for effective exclusion is, I argue, a major reason why deliberative democracy must account for protest. It is important that all deliberants’ public reasons receive proper consideration because without this deliberative legitimacy is in jeopardy. The problem, however, is that deliberative circumstances are not ideal and there is no way to ensure that people’s reasons receive this evaluation. Moreover, given deliberative democracy’s emphasis on the normative work that the exchange of reasons does in the deliberative group, this same emphasis on reason-giving makes it difficult for protestors to convince deliberants that they ought to take their external arguments into account.

Significantly, it is not enough to identify this problem with the deliberative exchange of reasons as an incorrect application of an otherwise solid theory. The problem is not just practical but theoretical. So much of our understanding of deliberative legitimacy rests upon the criteria that govern the exchange of reasons and, as a result, any problems that arise when deliberants apply this threaten the ability of deliberative democracy to live up to the demands of its normative foundations. Deliberants meet requirements of political inclusion and basic equality through the criteria that govern the exchange of reasons and that determine the very practical issues of who can speak and what people can say. Even if we accept deliberative theorists’ collective understanding of what

---

public reason ought and ought not to include (however loose it may be), we still cannot guarantee that deliberants will take all people’s arguments seriously in actual deliberations.

Given the evolution of – and continued disagreement over – the constraints upon the deliberative exchange of reasons, it is likely that the deliberative group will face charges of effective exclusion and that some deliberants will suffer from a lack of efficacy. Because deliberants do not have any recourse when they do not accept the deliberative decision, this reveals a problem with the theory itself. The disagreement amongst theorists over public reason’s constraints, especially when we combine this with the less-than-ideal circumstances in which actual deliberations occur, leaves deliberative democracy vulnerable to oversights that seriously challenge the theory’s claims to inclusivity. The problem is theoretical because there is no way to structure the deliberative group so that deliberants will consistently avoid problematic framings or so that all deliberants will accept the outcome. Although deliberative democracy has institutional mechanisms (procedural rules of engagement, expansive conceptions of political communication, and an increased sensitivity to social pluralism) in place to better enable deliberants to participate effectively and as equals, these mechanisms cannot deal with the problem that arises when people contest the framing or decisions. When contestation happens deliberants may still genuinely perceive the deliberative group to be open and inclusive, with enough fair opportunities for marginalized deliberants to affect the outcome. This lack of ill-intent in a deliberative group that generally goes to considerable lengths to be effectively inclusive, however, does not provide a normative out for lapses in deliberative inclusivity. In cases of unintentional effective exclusion and when deliberants lack efficacy the larger deliberative framework is culpable because it functions without a safeguard. While it is difficult (perhaps impossible) to set out deliberative rules of engagement that will prevent the deliberative group from encountering this kind of contestation, the problem occurs at the level of theory because deliberative democracy lacks safeguards. There is more, I argue, that deliberative theorists can and ought to do in order to better protect people against unjust effective exclusions and a lack of efficacy.
A history of positive institutional change as a result of protest actions and the knowledge that deliberants will encounter these problems should give deliberative theorists sufficient motivation to rethink the deliberative criteria that prevent deliberants from engaging with arguments that come from outside the deliberative group. The safeguards that deliberative theorists need to offer, as I set out in the previous chapter, must allow the deliberative group to re-evaluate their framing and decisions. However, while this is necessary it is also crucial that protestors meet deliberative criteria of reason-giving so that deliberants will acknowledge the appeal to mutual justification that underlies the normative justification for protest. Any safeguard that deliberative theorists set up in order to re-evaluate arguments that they would otherwise undervalue in the deliberative group requires us to evaluate protestors’ arguments. Because this evaluation must be consistent with the normative criteria that underlie the deliberative group, protestors’ arguments must meet deliberative criteria of reason-giving if they are to engage in protest-as-deliberation. The deliberative exchange of reasons serves a very important role in terms of mutual justification and our ability to treat all people as equals. Without insisting on these standards, deliberants risk endorsing situations in which protestors make unjust claims upon others. The evaluation of protestors’ arguments has the same justificatory basis as it does in the deliberative group. We use deliberative criteria of reason-giving to evaluate the legitimacy of arguments and decisions in the deliberative group because public reasons are the only kinds of arguments that people can use if they expect others to accept the claims that they make on them. The aim in protest-as-deliberation is to get deliberants to re-evaluate protestors’ claims so that if protestors choose to do so they can re-enter the deliberative group and play an effective role in deliberations where they can gain recognition and participate as equals. Because of this connection to legitimacy and equality it is in the interest of deliberants to establish that protestors’ reasons are public reasons, and it is in the interests of protestors to make sure that they can communicate this fact (instead of being dismissed on the assumption that they are unreasonable). Additionally, deliberative theorists need to take into account the methods that protestors use to
communicate their arguments. It is not enough that protestors’ arguments meet the criteria of reason-giving; protestors’ actions must also be compatible with the normative criteria of deliberative democracy if their external arguments are to have an effect upon deliberative framings and decision-making.

Because protestors offer their reasons outside the deliberative group they do not have to follow the same rules as people within it. Once protestors leave to engage in protest-as-deliberation they do not have the same relationship with people in the deliberative group and so the nature of the discourse inevitably changes. In addition to the absence of a mediator, who ensures that deliberants meet normative criteria, protestors have greater freedom to use alternative forms of communication. This expansive scope, however, does not mean that protestors (at least those who wish to engage in protest-as-deliberation) can ignore the deliberative process or deliberative democracy’s normative criteria; their process is certainly different than that of the deliberative group but, since the purpose of protest-as-deliberation is to convince the deliberative group of the public nature of their reasons and of the importance of these reasons, its aim must still be deliberative. To this end, the methods that protestors use must not treat people unjustly because to do so would undermine criteria of deliberative legitimacy. Actions such as firebombing abortion clinics or setting (dangerous) traps for loggers are unacceptable from a deliberative standpoint despite the acceptability of the group’s larger pro-life and environmental arguments. With this violation protestors would be unable to convince deliberants that their claims merit inclusion (and greater weight) in the deliberative group. Because protest actions are one step in a continued dialogue between protestors and deliberants, the process – the methods that protestors use to convey their arguments – must not contradict the underlying claim of their push for effective inclusion and greater efficacy: that we treat all people as equals. While some examples of unacceptable protest actions are obvious, such as the illegitimacy of taking pharmaceutical representatives hostage and threatening to harm them in order to make the otherwise legitimate argument that the price of certain drugs ought not to be unnecessarily prohibitive, other
methods are less clear-cut. Do legitimate protest actions include, for example, reclaiming public space? Private (corporate-owned) space? Is blocking access to meetings legitimate? Disrupting meetings? It is not immediately clear what methods count as legitimate. Because of this, deliberative theorists should regulate protest-as-deliberation and offer guidelines so that deliberants do not end up dismissing protestors’ arguments on the grounds that a particular kind of protest action is undermines deliberative principles. Deliberative democrats and protestors need to be clear on the types of protest actions that are consistent with deliberative democratic legitimacy and those that are not.

While it is necessary to evaluate protestors’ arguments, doing so poses a challenge to the way that we understand deliberative criteria of reason-giving. The arguments that both deliberants and protestors put forth must, if the aim is effective inclusion and greater efficacy in the deliberative group, meet deliberative criteria and be accepted as public reasons if they are to influence the deliberative agenda and decisions; at the same time it does not make sense to use the same deliberative criteria to evaluate these different types of deliberative engagement. This is true for (at least) two reasons. First, protest-as-deliberation would not work as a safeguard if deliberants refused to accept that protestors can have (important) public reasons. The need to account for protest arises because of marginalized deliberants’ lack of efficacy when they try to influence deliberations using certain arguments. If protestors’ reasons were unsuccessful because of the deliberative group’s criteria of reason-giving then it does not make sense to subject protestors’ reasons to the same set of evaluative criteria in a different space because this is unlikely to result in deliberants changing their minds. If protest-as-deliberation were to employ the deliberative group’s criteria to evaluate protestors’ arguments, and if this evaluation could address significant problems of effective exclusion

366 I will discuss this in greater detail in Chapters 6 and 7.
367 Agreement will allow protestors to engage in protest-as-deliberation on the issues that they are concerned with. Disagreement on this can, of course, be the subject of deliberations, but focussing their efforts on communicating the specific issue, instead of engaging in protest-as-deliberation over the definition/interpretation of the legitimacy of protest actions is preferable.
and efficacy, then it would be unclear why we need protest-as-deliberation in the first place. If all it took to ensure that deliberants re-weight other people’s arguments was an opportunity for people to reframe any reasons that meet with resistance then there is no reason why protestors could not do this within the deliberative group – and without becoming protestors. While it might be the case that reframing reasons in the deliberative group may convince deliberants of their merit (indeed, Young takes this view) we cannot count on this. The view that reframing reasons is sufficient to convince deliberants of their merit is not a view that leads deliberative democrats to account for protest; if this approach worked there would be no need for protestors because they would not be outside, or have to leave, the deliberative group in the first place. This, however, is not the case. We cannot count on people simply reframing reasons to solve problems of effective exclusion and efficacy. Instead, we ought to learn from protestors’ experiences in the deliberative group and make sure that protest-as-deliberation accounts for the difficulties that protestors face when they try to persuade deliberants to take their reasons (more) seriously. Because we are unlikely to remedy all objections to deliberative decisions just by reframing arguments in the deliberative group it is clear that we need different criteria to deal with the claims that protestors make outside the deliberative group.

The second reason, which follows from the practical concern set out in the first, is that the same way of approaching people’s reasons, if we extend the deliberative group’s criteria to protestors, would end up co-opting protestors. People leave the deliberative group because they argue that fair terms of discourse are missing in deliberations. The structures that would allow people to engage in discussion in a meaningful way are absent either because the agenda, constraints upon acceptable discourse, or the unavailability of other deliberative resources do not allow for their effective inclusion and efficacy in deliberative processes and lead them to object to unfair deliberative decisions. Protestors fear that if they were to engage in discussion on the terms that they object to then this would lead to their effective silencing. Because of this we should not expect protestors to engage in discussion outside the deliberative group and still have to frame their reasons so that they
meet the same set of deliberative criteria that did not allow them to speak effectively in the first place. If we ask protestors to meet the same standards of evaluation as people in the deliberative group then very little of significance changes for protestors in terms of their ability to communicate their reasons. If we apply the same criteria that deliberants use to evaluate people’s reasons then we do not account for protest as protest and as such we fail to offer a response to the problem that (the neglect of) protest poses for deliberative democracy.

Deliberative criteria, as they shape the way that people evaluate reasons, are problematic both for deliberative theorists who need them to be inclusive in order to establish deliberative legitimacy and for protestors whose efforts at inclusion are frustrated by them. Despite this, we cannot abandon the deliberative exchange of reasons when it comes time to turn our attention to protestors and deal with protest-as-deliberation. Much of the justification for the incorporation of protest in the deliberative polity comes from the fact that protestors can meet deliberative democracy’s normative criteria. These criteria necessarily include establishing that protestors have public reasons and that these reasons ought to carry moral weight in deliberations and influence deliberative decisions. The fact that protestors do not meet the criteria in the deliberative group does not necessarily mean that they do not have important reasons, only that other deliberants fail to give them sufficient weight.

The challenge to deliberative democracy is to find a way to undertake the necessary evaluation of reasons so that people do not make unfair demands upon each other. At the same time, we must implement a safeguard to account for problems that deliberants encounter when they object to the influence that these reasons have in the deliberative group and we must do so without falling into the trap of using deliberative criteria of reason-giving to co-opt protestors.

5.3.1 The exchange of reasons in protest-as-deliberation
I argue that we can best meet this challenge by re-thinking our approach to the deliberative criteria of reason-giving. Because deliberants will not always be able to agree on the public reasons that ought
to carry weight in deliberations we need to pay closer attention to the particular way that we apply
criteria of reason-giving. Instead of trying to set out normative criteria that the deliberative group
has to “get right” – with people either exchanging reasons in the deliberative group or accepting the
exclusionary consequences – it is more productive, in terms of both theory and practice, to think
about what we can change given the unavoidable fact that deliberants will encounter serious
problems of effective exclusion and efficacy that are inextricably tied up with the way that we expect
people to exchange reasons. To this end, I propose that we think of the deliberative criteria of
reason-giving in terms of both a normative ideal that ought to guide deliberations, and also in terms
of the particular ways that we institutionalize this ideal. When we distinguish the criteria in this way
we can develop two sets of institutional criteria that we can apply: one in the deliberative group and
another in the deliberative polity. Allowing for a space between the ideal of deliberants exchanging
reasons effectively and as equals and what actually occurs within deliberations does not mean that we
need to relax deliberative criteria (either normatively or institutionally). What it does mean is that we
can build a way to account for objections to deliberative framings and decisions into the framework
of deliberative democracy. Two sets of institutional criteria will help us to deal with co-optation
while still allowing us to evaluate people’s reasons. Because the two sets are different, they can work
effectively as a safeguard. A set of criteria specifically for protest-as-deliberation can give protestors
additional resources to persuade deliberants of the strength of their reasons. It will address the
objection against the efficacy of protestors’ reasons because a new set of institutional criteria means
that protestors will no longer be expected to work within the familiar constraints that brought about
their status as protestors whilst they are simultaneously expected to convince deliberants that their
reasons ought to play a substantive role in the deliberative group. Two institutionalized applications
of public reason both try, albeit in different ways, to meet the ideal of deliberative criteria that
regulate the exchange of reasons. This enables people who face effective exclusion and who lack the
efficacy to challenge the deliberative group’s application of the normative criteria without co-optation and while maintaining an active role in the deliberative polity.

While making space available to protestors (by way of the deliberative polity) is necessary, it is not enough just to carve out this space; we also need to prevent deliberants from repeating their original evaluation (in terms of the weight that they attribute to protestor’s reasons) in this deliberative forum and we need to make sure that protestors can engage with the deliberative group in an effective way. Breaking deliberative criteria of reason-giving down into its normative criteria and then two institutional sets of criteria does not mean that one set of institutional criteria is better than the other. Justifying two sets of institutional criteria might lead people to argue that the deliberative group has the stronger criteria and protestors a weaker one and that, following this logic, it is unlikely that protest will be able to have much of an impact upon the deliberative group. I do not think that this is the case. Of course, people who offer arguments that meet the deliberative group’s criteria are at an advantage because they do not have to overcome the same obstacles that protestors do; their arguments, after all, already have an effective impact upon deliberations. However, because we acknowledge that the motivation for protest-as-deliberation is that we cannot always rely upon the deliberative group, it is wrong to draw the conclusion that their criteria are better than protestors’ criteria. Protestors might, using protest-as-deliberation’s criteria of reason-giving, identify significant gaps in the deliberative group’s criteria. Both deliberants and protestors may mistakenly believe that they are offering strong and fair reasons when they are not and both may fail to recognize the reasonableness of the others’ argument. The point of having two sets of criteria is not to determine which one is better. What matters for deliberative theory and practice is that both deliberants and protestors acknowledge that they might not make the right calls and that deliberative theory has a mechanism that allows the two to continue to exchange reasons despite the serious disagreements that they have.
The disagreement between deliberative theorists in terms of the appropriate constraints upon public reason is an additional reason in support of a call for protest-as-deliberation. I agree with Quong that deliberative democrats benefit from putting constraints upon public reasons (as he does with the requirement that deliberants should examine people’s identity claims before they are potentially admissible). These constraints are compatible with a more expansive view of the steps that deliberants ought to be able to take as they deal with these public reasons [as we see in the way that Quong identifies people’s arguments as proceeding from a non-specific (and potentially inadmissible) “because it is important to my identity” assertions into nuanced public reason claims]. Quong’s approach to public reason and the process that CWT used in order to arrive at a mutually-justifiable policy decision shows the extent to which deliberative democracy is able to account for social pluralism even in difficult situations. CWT’s use of an interest and needs approach over an exchange of moral reasons turned an otherwise intractable problem into an issue that the group was able to resolve. CWT’s process illustrates the practical benefits of Deveaux’s political approach to conflict, particularly in terms of the way that negotiation and compromise are compatible with substantive constraints. This balance that Deveaux strikes between the constraints upon deliberation (non-domination, political inclusion, and revisability), coupled with her “democratic and manifestly political approach” offers a good response to Weinstock’s concerns about the ability of deliberative democracy to be properly democratic, while at the same time satisfying concerns about the theory’s ability to treat people as equals in a pluralistic society. Additionally it can accommodate Weinstock’s important point about deliberative democracy needing to do more to accept deliberants as they are and allow people to make the arguments that they need to without distortion. This approach to deliberative democracy makes conflict more tractable because it exposes power relations while it protects people from compromising themselves.

Disagreements over deliberative framings and decisions point to a larger problem with the deliberative criteria of reason-giving. Deliberative theorists’ lack of consensus on the appropriate
constraints upon public reason reinforces the need for deliberative democracy to have a mechanism to deal with cases where protestors object to deliberative framings and decisions. Still, the central role that deliberative criteria of reason-giving plays in deliberative democracy means that this solution contains a further challenge which stresses the need for us to re-evaluate deliberative criteria of reason-giving. Many of the problems that I address in this chapter deal with the obstacles that arise when people try to translate deliberative democracy’s normative criteria into practical constraints that govern the exchange of reasons. Because the exchange of reasons is so central to deliberative legitimacy there is a lot of pressure on deliberative democrats to ensure that deliberative conditions are ideal, and there is a lot at stake if they cannot achieve this.

Protest-as-deliberation can meet this challenge. The two areas of deliberation (in the deliberative group and the deliberative polity) lend themselves to – and indeed require – different sets of criteria. Re-thinking deliberative criteria of reason-giving in terms of an overarching set of normative criteria that all people ought to aim to meet and in terms of different sets of institutional criteria for the deliberative group and the deliberative polity is an important move for deliberative democracy. The two sets of institutional criteria are both compatible with the normative criteria. The dialogue that protestors and deliberants enter into when they engage with these criteria – and each other – is, I argue, the best response in the face of marginalized deliberants’ charges of effective exclusion and a lack of efficacy.

The specific policy consensus that arose out of CWT is particularly interesting in terms of the ways that deeply divided participants made appeals to public and private space in order to create practical solutions. I will address this in greater detail in the next chapter, where I look at the implications of the general and carefully-worded practical agreement (which, I argue, was only possible because participants could section off space in this way) in terms of the implementation of the policy itself. Additional challenges arise here as conflicting parties again have to address the specifics of the policy’s application.
Chapter 6

THE DELIBERATIVE POLITY: ART, PUBLIC SPACE, AND PROTEST-AS-DELIBERATION

The two sets of institutional criteria that I argue are necessary in the previous chapter depend upon a strong deliberative polity that is able to maintain normative and practical links with the deliberative group while retaining a distinctly oppositional stance. At the same time that the deliberative polity must be critical of the deliberative group deliberants must also pay critical attention to the democratic capacity of the deliberative polity and the extent to which people can question and use this space. My aim in this chapter is to clarify both what deliberative theory requires from the deliberative polity as well as the particular way that we ought to conceptualize this oppositional public space.

As I look at the construction of public space in the deliberative polity my concern goes beyond making sure that protestors have space where they can organize and (constructively) oppose the deliberative group. My main concern is with the ways that people construct this space and, relatedly, the extent to which our understandings of the space itself are open to contestation. Openness and contestation are key for a theory of protest-as-deliberation that relies so heavily upon the ability of protestors to reframe their arguments so that they are likely to capture the deliberative group’s attention and persuade them to reconsider deliberative framings and decisions. Without this, the necessary re-examination of protestors’ claims is unlikely to occur and deliberative democracy cannot account for problems of effective exclusion and a lack of efficacy.

As I look at democratic constructions of public space I focus upon protestors’ use of art. Protest art is particularly relevant to protest-as-deliberation for two main reasons. First, it engages with public space in a way that urges redefinitions of the space itself – redefinitions that are necessary if we are to offer the necessary conceptual changes to deliberative democratic theory. Second, art is important because of the way that it relies upon emotion. Problematizing deliberative democracy’s
response to emotion and reason is, as I will show, important to the expansion of deliberative communication and to conceptions of effective deliberative inclusion. Art functions as a form of political communication. The way that it does this changes the nature of public space. Art provides new access to audiences through the physical spaces that it allows people to enter. The ways that art draws upon emotion to communicate particular messages, moreover, gives people a more effective way to engage in democratic participation than that found in the deliberative group. Moreover, art has the potential to be more inclusive of a wider range of people and cultures, and this makes the kind of inclusive political communication that it facilitates one that is better equipped to equalize power between differently-situated people. The contribution that art makes is reminiscent of the inclusive political communication that Young speaks of when she expands the scope of deliberative communication, and it is of particular importance to protest-as-deliberation. As I look at the relationship between art and public space I look back to this discussion of inclusive political communication as a way to inform the kind of alternative political communication that protestors can use to engage with the deliberative polity. I also argue that the institutional criteria that we need to develop for the exchange between the deliberative group and informal spaces in the deliberative polity will benefit from taking these discussions of inclusive political communication and alternative political communication into account.

I make the normative argument for the need to revisit the way that we conceptualize public space, and the related argument that a particular contestatory democratic construction of public space is necessary if the deliberative polity is to meet its role in protest-as-deliberation. As I do this I break the chapter down into four parts. First, I look at the relationship between art and democracy. Here I look at the ways that visual art and democratic participation intersect. I look at different kinds of protest art and the ways that they use and question public space. I then address the role that persuasion plays in political art. I look at art as it engages people’s judgment via its ability to elicit an emotional response and I then look at deliberative theorists’ response to the use of emotion. Here I
make the normative argument that we need to incorporate persuasion into deliberative criteria of reason-giving in order to expand the inclusive capacity of deliberations and to increase the efficacy of both marginalized deliberants and protestors. I then move on to look at the relationship between public space and democratic theory and I look at deliberative democratic approaches to the public sphere and the impact that different civil society/state relationships have upon the quality of democratic engagement. In the third section I bring these two discussions together and I argue that deliberative theorists ought to do more to realize the deliberative potential of the types of alternative political communication that occur in the public sphere. Doing this requires that we pay more normative attention to the different ways that we can construct public space. I discuss the impact that these constructions have upon the ability of public space to function as a constructive opposition to the deliberative group, and as I do this I address the relationship between formal and informal areas of deliberation. In the final section I revisit my discussion of CWT from the previous chapter and critique the way that CWT’s broadstroke agreements ultimately fail to address pre-existing disagreements.

6.1 Art and democracy

There is a lot of resistance to deliberation when people cannot immediately identify a dialogue as one that unfolds along obviously “rational” lines. Despite the work that theorists do to expand the criteria for the exchange of reasons, deliberation that is emotional in content or tone is not welcome in deliberative groups. In addition to the problems that arise when exchanges of reasons are unmonitored, dialogue that occurs in the public sphere is also criticized on the grounds that it strays from rational dialogue and therefore ought not to carry the same (if any) weight as discourses in the deliberative group. The charge that emotional dialogue is a form of unstructured and normatively weaker discourse holds even if we were to bracket the concerns that deliberative theorists have about extra-deliberative group dialogue posing a problem because deliberants cannot monitor it. Deliberative democracy’s judgment of informal deliberative dialogue operates under two
assumptions: first, that dialogue in the public sphere will inevitably be more emotionally-charged than
the monitored dialogue in deliberative groups and, second, that emotion and reason stand in tension,
and that deliberants ought to beware of circumstances that might see rational decisions undermined
by emotional responses.

These two assumptions are problematic. The role that emotion plays in deliberative
democracy is undertheorized. I will look at its role in this section as I examine the democratic
potential of art and, in particular, the ways that protestors engage in persuasion through art in order
to capture the attention of their audiences and to motivate people to act and engage with previously
neglected issues in new and productive ways. I use art and persuasion as a way to approach the
relationship between emotion and reason in deliberative theory and practice. As a medium, art
frequently relies upon emotion to elicit a response. As a genre, political art consistently challenges
people’s assumptions and raises important questions about the nature of democratic engagement and
people’s ability to participate in discourse using art as an alternative form of political communication.
The legitimacy of this type of democratic participation is not, of course, without its critiques and I
will address a series of objections that people make about the extent to which art can and cannot
engage political issues in a rational (and therefore legitimate) way. I speak to the larger question of
whether or not emotion undermines the ability of people to exchange and evaluate reasons – and the
question, therefore, of whether or not alternative political communication is properly deliberative.
As I do so I will explore the dissonance between the requirement, put forth by deliberative
democrats, that deliberants ought to justify their claims to others, and the argument, put forth by
people who challenge this perceived tension between emotion and reason, that deliberations ought to
engage people’s judgment. The difference in these two positions is important. Justification is in
many respects controlled by a set of deliberative criteria, whereas appealing to judgment relies upon a
more democratic response and opens up the deliberative process to people who wish to engage in
persuasion and, perhaps, to reframe a more flexible set of deliberative criteria. I will make the case
for the benefits of incorporating emotion and persuasion into deliberative dialogue, and I will set out
the impact that this call to reframe reason-giving, in light of the arguments for persuasion, has upon a
theory of deliberative democracy that incorporates protest-as-deliberation in order to do a better job
effectively including people and increasing their efficacy in deliberations.

Artists frequently use emotion to communicate. While artists may not always aim to
communicate a meaning (or set of meanings) to their audience, art is generally meant to evoke
something. Expressly political art is somewhat different than “regular” art in that the artist seeks a
response from people in their capacity as democratic citizens. In one of the most famous examples
of political art, Pablo Picasso critiques the dictatorship of Francisco Franco and the bombing of the
city of Guernica, opposes the Spanish Civil War and calls for democracy in Spain. Guernica (1937) is
widely recognized for its powerful critique; over 70 years later a replica of the painting still hangs at
the UN, where it serves as a cautionary reminder of the impact of war. Picasso communicates the
political message of Guernica through images of violence and distortion that demand an emotional
response from the viewer. The particular political commentary, of course, comes from the
widespread knowledge of the events that led Picasso to create it. Reading Guernica with knowledge of
the Spanish Civil War significantly increases the effectiveness of the political commentary within the
mural, but the direct appeal of the images themselves alert us to the power that visual images have.

Protest art is common in anti-war movements. Lorraine Schneider’s classic folk art image
War is Not Healthy for Children and Other Living Things (1966), a picture of a sunflower surrounded by
the titular text and reproduced on posters, bumper stickers, notecards and more, became the logo for
anti-war group Another Mother for Peace (1967). While Robert Indiana’s pop-art screenprint Love (1967),
while the colourful text originated as a Christmas card commissioned by the Museum of Modern Art
(MoMA) in 1965, went on to become an icon of 1960s idealism. While some images are

368 http://www.anothermother.org
369 http://www.moma.org/collection/browse_results.php?criteria=O%3AAD%3AE%3A2812&cpage_number
=4&template_id=1&sort_order=1
representative of the movement as a whole (as with the above examples), other instances of protest art exist to draw attention to doubly marginalized positions. Willie Herrón and Gronk’s *Black and White Moratorium Mural* (1973), painted at the Estrada Courts housing project in East Los Angeles in commemoration of the Chicano moratorium march in August 1970 – a march that protested the disproportionate deaths of people of colour in Vietnam and which ended in a riot and charges of police brutality – draws attention to not only the Vietnam war but also the “war at home” that connects the peace movement to issues of race and class.\(^{370}\)

In terms of the content of their political commentary, some artists are more textually explicit about the messages that they want to convey and will include written information as a central part of their artworks. This is the case in Gran Fury’s *Bus Shelter Project* (1992). This installation (80 posters distributed throughout bus shelters in Los Angeles and an additional 100 in New York), which was sponsored by the Museum of Contemporary Art (MOCA), consists of a photograph of three female beauty pageant participants (outfitted in bathing suits and sashes) and includes the banner “Women don’t get AIDS . . . they just die from it.”\(^{371}\) The photograph includes additional text that challenges the CDC’s definition of AIDS. In small print, the text informs the viewer that: “65% of HIV+ women get sick and die from chronic infections that don’t fit the CDC’s definition of AIDS. Without this recognition, women are denied access to what little health care exists. The CDC must expand the definition of AIDS.”\(^{372}\) Here, the line between what we typically think of as art and as politics (as separate things) is blurred and the textual political commentary in this artwork prompts people to ask if, in fact, the installation ought to count as art at all.\(^{373}\)


\(^{371}\) Gran Fury Collection. Box 1; Folder 1. “MOCA to Sponsor Bus Shelter Project by Gran Fury.”


\(^{373}\) Political and activist art, with influences from the late 60s and early 70s Feminist and Performance art, activist art engages in processes of representation; because it relies upon the use of public space and people’s engagement with this space to do this, it is difficult to separate art from activism, since each relies so much
This combination of art and political text is fairly common. Barbara Kruger is famous for her works that combine text and photography, many of which are political in nature [“your body is a battleground” (1989) text over a woman’s face, half photograph, half negative; “It’s a small world/ but not if you have to clean it”(1989), text superimposed upon a woman holding a magnifying glass]. ACT UP artist Ken Woodard issued a series entitled “12 Reasons to ACT UP” (1989) as part of the group’s “Target City Hall” action. The 12 posters were all variations that shared a common visual theme (images of graveyards), and that detail one of the reasons that motivate ACT UP's protest against the city government. In another series, “AIDS Facts” (1989), the ACT UP Ad Hoc Gay Pride Committee issued a series of 24 posters with facts superimposed upon different black and white photographs. The posters combined captions such as “US spends more in 5 hours on defense than in 5 years on healthcare” (superimposed upon a photograph of alarm clocks), and “NYC AIDS policy: dykes don’t count” (superimposed on a photograph of the city). Of the On the Road exhibit’s 20 images, 12 included text. These messages ranged from the direct statement of facts, “Face the facts/Total Federal AIDS budget $1¼ billion. Total Federal defense budget $299 billion/Enfréntate a la realidad” (text inbetween pictures of people covering their faces), to the more obscure: “Don’t leave me this way” (text amidst red-inked flowers). The Guerrilla Girls, a group of radical feminist artists in New York City, draw attention to the exclusion of women in the artworld with their poster Do Women Have to be Naked to get into the Met Museum? (1989, 2005). Their poster, which features a naked woman with a gorilla mask on her head (the trademark of the group),


375 Gran Fury Collection, Box 2, Folder 7: Illustrations: photos from protests. Ken Woodard, Reasons to ACT UP (12 Variations).
376 Gran Fury Collection, Box 2, Folder 7. ACT UP Ad Hoc Gay Pride Committee (1989), AIDS FACTS (24 Variations); AIDS Graphics Collection, Box 3 (98,2000).
377 Gran Fury Collection, Box 1; Folder 4. Art Against AIDS: On the Road (1989), Margaret Crane/ Jon Winet, “Untitled” bus panel.
378 Gran Fury Collection, Box 1; Folder 4. Art Against AIDS: On the Road (1989), Nayland Blake, “Don’t Leave Me This Way”, illuminated bus shelter.
challenges the Metropolitan Museum of Art with the accompanying text “5% of the artists in the modern art section are women, but 85% of the nudes are female.”

The link between politics and art is an interesting one. The question “but is it art?” draws attention to two interesting components of political art. On one level, whether political art ought to “count” as “real” art is beside the point for protestors who use art to communicate their messages. What concerns protestors is whether their art is effective: are their visuals capable of persuading people of the merit of their issues? This leads to the second point, which concerns the question of boundaries. When confronted with political artworks, people will often ask if a piece is art OR if it is politics. The assumption here is that art belongs in the realm of the creative, the visual, and emotional, whereas political messages are practical, deal with arguments, and appeal to reason. I will return to this question of either/or choices (and the problems they raise) later in this section. First, I will examine the role of boundaries as art (and political art) spills from the “art realm” into public space.

Art and democracy combine in the spaces where we encounter art. Increasingly, a significant amount of artwork appears in public places. This rethinking of the venues where art “belongs” started in the mid-70s and grew to the point where it is now an accepted practice. As exhibits spill over from the semi-public spaces of galleries and into the streets, artists and curators challenge the traditional boundaries of the art gallery. This shift is about more than adding venues and increasing the visibility of art. The shift is a definite political one, as artist Krzysztof Wodiczko illustrates in his assertion that “city centres are political art galleries.” In one case of (visibly) questioning the appropriate place to display art, the New Museum of Contemporary Art in New York put their display Let The Record Show (LTRS) (1987) in the museum’s window so that it was visible to people on

---

379 This figure is for the original poster. The Guerrilla Girls re-released the poster in 2005: this time the numbers changed from 5% to 3% and 85% to 83%. http://www.guerrillagirls.com/posters/index.shtml
381 http://www.art-for-a-change.com/Krzysztof/krzy.htm
the sidewalk. The piece itself was expressly political and drew an analogy between responses to AIDS and Nazi crimes. Against the backdrop of a photomural of the Nuremberg trials, the Silence=Death project hung pictures of people (including president Reagan) who had made homophobic statements about HIV/AIDS and displayed them with their quotations.\footnote{Douglas Crimp. “Cultural Analysis/Cultural Activism.” In Theory in Contemporary Art since 1989, eds. Zoya Kocur and Simon Leung. (Malden, MA: Blackwell, 2005), pp.144-146.} The curator called a member of ACT UP specifically to offer the group this particular space and the exhibit was designed to elicit responses from people who would not necessarily enter the museum (and choose to view this art).\footnote{Michael Nesline. Interviewed by Sarah Schulman. ACT UP Oral History Project. Interview 014, March 2003, p.28.} Blurring the boundaries in this way raises the question of whether the installation is art or politics. The critical response to LTR’s noted that it “worked in the best tradition of art/agitprop”; the grounds for this judgement rested upon the balance of the artist’s (visual) concept and the politicized voices of the people captured in the material. The combination of images and text, as one critic noted “let [the] guilty speak for themselves.”\footnote{Gran Fury Collection. Box 1; Folder 2, Gran Fury: Background Information. Christian Leigh, Review: ACT UP New Museum of Contemporary Art.} The notion of voice and responsibility, coupled with the space in which the curator chose to display the exhibit, highlight the democratic implications of engagement. The silent are condemned for their shirking of social and political responsibilities, and people (those passing by the museum) are confronted with – and are implicitly asked to respond to – an issue that, at the time, received little sympathetic media coverage.\footnote{For discussions of biased media coverage of AIDS/HIV see: Jon Baggaley. “Media Health Campaigning: Not Just What You Say, But the Way That You Say It!” In A Leap in the Dark: AIDS, Art, and Contemporary Cultures, eds. Allan Klusacek and Ken Morrison. Montréal: Véhicule Press, and Paula A. Treichler. “Seduced and Terrorized: AIDS and Network Television”, In Klusacek and Morrison, eds.} When trying to analyze the extent to which an installation such as this is art or politics, it is important to note that the question is so difficult to answer because of the interplay between the two. Just as art and urban theorist Rosalyn Deutsche notes “the reciprocity between artwork and site alter[s] the identity of each”,\footnote{Rosalyn Deutsche. “Uneven Development: Public Art in New York City.” In October 47 (Winter 1988), p.14} so to does the interplay between art and politics (as politics is...
fundamentally implicated in notions of space) change the nature of both. Any discussion of the political/artistic merits of the LTRS piece is fundamentally implicated in the way that the installation uses (and challenges) public space.

The reach of museums into public spaces extends beyond the physical space of the gallery (even if, as in the case of LTRS, this space is effectively open to the public). The Whitney Museum of American Art’s exhibition Imageworld: Art and Media Culture (1989) included ten billboards throughout Manhattan, Brooklyn, and Queens, NY, as well as 300 posters on subway platforms throughout Manhattan. These installations were all pieces of art that were united by a larger commentary on the mass media’s influence on postwar America. Significantly, the billboards and the subway posters were part of the exhibit itself (and not advertisements for the “real” show housed at the Whitney). No longer directly connected to the physical space of the museum, the Imageworld exhibit takes political art’s reliance on public space even further.

This move to display art outside the museum is still one that encounters significant contestation. The Henry Street Settlement, and art centre in New York City, refused to hang a banner that read “all people with AIDS are innocent” outside the gallery. Gran Fury’s banner was part of a larger exhibition that was due to open at the centre. The centre, which refused to hang the banner on the grounds that it was “too political.” When the centre refused to reconsider their decision, Gran Fury withdrew from the exhibition. In the end, Gran Fury hung the banner across the street from the centre on city property and only then did the Henry Street Settlement reinstate the exhibition. In addition to the dispute over the “appropriate” use of space – and the victory that Gran Fury achieved through the use of city space – the debate brought up the question of the

---

relationship between art and politics in terms of what counts as art. The chief administrator of the centre is on record supplementing the decision not to hang the banner because it was “too political” with the assertion that “Gran Fury was not in her estimation a group of artists and that this was not a work of art.” Although she later denied having said this, the power that the art/politics distinction lends to a particular piece is significant and, depending on the context, may work to either legitimize the art because of its “usefulness” [which may appeal to art institutions, as was the case with the Museum of Contemporary Art (MOCA)’s associate curator who supports the involvement of the museum outside the gallery because of the work that this does “to support this type of cultural activism”], or, in this case, try to discount the piece and refuse to show it because it is not really art.

LTRS, the Imageworld exhibit, and the Bus Shelter Project illustrate art’s presence in public places and demonstrate that it is able to engage with people here. This pushes us to ask what it is that we expect of public space and of art when visual media is explicitly political and when it aims to effect change. In turn this also provides an opportunity for protestors who want to engage in protest-as-deliberation. The key here is the new access that art provides. By questioning boundaries, art speaks directly to people in the public sphere and to a particular way of understanding the ways that art can communicate with people. The fact that art can do so politically is of special importance to deliberative theory. The way that art’s status as a visual media is legitimized as something that enriches public space is helpful for people who may lack influence in traditional political venues (hence the strong presence of murals in the United States’ Chicano communities). The format of visual art is particularly beneficial to protestors. As one artist/activist notes, art is useful because its

(December 1, 1989 – January 8, 1990), and the second at The Painted Bride Art Centre, Philadelphia (November 6-December 8, 1990). Gran Fury Collection. Box 1; Folder 7

390 Gran Fury Collection. Box 2; Folder 9. Kimmelman, “AIDS Art Show is Cancelled Over a Banner.”

aesthetics “sometimes allows us to get into places where we couldn’t hold a demonstration.” Art, in general, does not have the contestatory overtones that (most) other forms of political communication do. This can work to people’s advantage because art can often sneak under the radar of people who would otherwise object to the politicization of public space, and this less “objectionable” method of gaining communicative entry can help to strengthen calls to expand democratic fora in a more richly inclusive way. As art enters into public space it challenges our understandings of democratic participation and, in particular, notions of dissident citizenship.

In addition to expanding democratic fora, art can also help people to create new democratic spaces. As Mark Mattern argues works of art and artistic movements such as the AIDS Memorial Quilt (1987) and rock music of the 1960s can open social and public spaces. Because these art forms involve events (viewings of the quilt and rock concerts) and encourage meetings between people who share these interests, these new spaces become ones “within which communicative interactions, necessary for the creation and sharing of meaning and the development of commonalities of identity and orientation, could occur.” Similarly, our responses to art can also close down spaces and limit dialogue. As Tim Drescher notes, censorship is rare but something that can effectively occur through our responses to art and its “proper” place. He argues that the standard method of censorship “is to object not to a design’s politics, but to its aesthetics, its failure to meet ‘acceptable

393 Holloway Sparks argues for a conception of citizenship that recognizes dissent as a vital element of democratic participation. As she looks at the broader contributions of dissident citizenship Sparks emphasizes the way that this particular way of conceptualizing citizenship highlights the democratic contributions that marginalized citizens make as they push for social justice. Significantly, Sparks also notes that reframing citizenship in this way highlights the limitations of a public-private split. This observation supports calls for reinterpreting both democratic participation (particularly in terms of the relationship between reason and emotion, and especially so given her discussion of the role that courage plays in dissident citizenship) and also in terms of the expansive role that the public sphere ought to play in a richly democratic society. “Dissident Citizenship: Democratic Theory, Political Courage, and Activist Women.” In Hypatia, 12:4 (1997), pp.74-110.
Paying attention to the role of art in public space is particularly important if we want to take the availability of democratic space seriously.

Artists are able to convey political messages through a medium that is effective in terms of its ability to capture the attention of a larger audience. Artists utilize the aesthetic appeal of art for the emotional hold that it exercises upon the viewer and, in doing so, artists are able to elicit responses. These responses may be statements of public support or outcry, directed at art institutions or at the state or corporations, or they may be part of the artwork itself. This was the case with the AIDS timeline exhibit (1989) on display at the Matrix gallery in San Francisco, where the exhibit included a “democracy wall” which consisted of a series of questions, pens, and placards to record responses of people who saw the exhibition. This ability to evoke responses shows the potential contribution that art can make to protest-as-deliberation. The success of art as a form of political communication raises a series of normative questions for deliberative democratic theory. In extending the scope of deliberative democracy to the deliberative polity via protest-as-deliberation, and in acknowledging the ways that people use protest art to considerable success, we need to revisit the roles that emotion and persuasion have in deliberative politics. One question that this raises is whether deliberative democratic criteria – that stress the exchange of reasons and that caution against the bias of emotion – are compatible with art-based democratic activity in the public sphere because of the extent to which art draws from and relies upon emotion.

I argue that art has an important role to play in protest-as-deliberation and, moreover, that art’s particular use of emotion is consistent with a theory of deliberative democracy that takes effective inclusion and deliberants’ efficacy seriously. Art does a significant amount of democratic work in terms of capturing people’s attention and then motivating them to engage with an issue; this is the kind of democratic activity that is not only consistent with the exchange of reasons that a

---

specifically deliberative conception of democracy relies upon, but one that also works to enrich deliberative criteria. As Esther Kaplan, a member of ACT UP, notes, “the things that artmaking nurtures are really good counterpoints to what activism nurtures. Artmaking nurtures reflection and the ability to acknowledge contradiction and to make more sophisticated philosophical presentations. Activism’s struggle is ultimately to make some issue into one of huge public concern.” On this account, emotion and persuasion are not only compatible with deliberative criteria but are necessary for a substantively inclusive reading of the criteria of reason-giving itself.

If protest-as-deliberation is going to work then protestors need to be able to capture the attention of people in the deliberative group. Since the arguments that protestors want the deliberative group to include have already failed to capture deliberative attention once, protestors need to work to overcome the disadvantage of already having been dismissed. This makes it all the more important that protest-as-deliberation has resources to help protestors to interrupt particular deliberative framings. Protestors need to capture the attention of the deliberative group and they need to do so in a way that persuades deliberants that they need to engage with their claims. Encountering unexpected messages in art, and encountering this in unexpected places, works to shock the audience (however mildly); in doing so, it makes this kind of persuasive communication more likely. The emotional impact that art has may be able to spark a dialogical exchange where “calm and dispassionate” appeals to deliberants’ sense of reason (to borrow from Young) cannot.

This use of art speaks to the inclusive potential of deliberative criteria in two different ways. First, art has considerable potential to mitigate one of the obstacles that stand in the way of full and effective inclusion. One of the remaining challenges to deliberative democracy is the ability (or lack thereof) that we have to address the effective exclusions and lack of efficacy that occur when deliberative dialogue is, unbeknown to the participants, distorted. Young notes the problem that

396 Gran Fury Collection. Box 2; Folder 10. “Group Material’s Work Confronts AIDS Crisis.”
hegemonic discourse presents to deliberative theory and she points to the importance of the ways that activists challenge traditional deliberative dialogue. Activists’ methods include pictures, songs, and poetry. Significantly, Young notes that “one of the activist’s goals is to make us wonder about what we are doing, to rupture a stream of thought, rather than to weave an argument.”

Political art can play this role. If we can combine the work that the normative justification for listening to protestors does (in the deliberative polity’s safeguard space) with the kind of democratic communication that we find in political art then there are clear benefits for protest-as-deliberation. The hope is that protestors can use political art to contest the reasons that dominate discussion in the deliberative group and that the emotional hook that art provides will make it easier for protestors to make deliberants wonder if the way that they frame their discourse is, in fact, sufficiently inclusive, if deliberants have sufficient efficacy, and if the decisions that the deliberative group reaches are fair.

Second, there is a deliberative objection to claims that draw upon emotion. The objection here is that deliberations might become overinclusive if we relax deliberative criteria to account for emotion-based appeals and, relatedly, that deliberants will encounter problems fairly evaluating people’s arguments. The concern is that if we allow emotion to supplement deliberative arguments then the success of particular claims might be unfairly influenced by the argument’s presentation and that the content of people’s reasons will carry less weight – in other words, this touches upon the deliberative group’s fear that protestors are manipulative.

If deliberative theorists do risk overinclusivity and bias by expanding the scope of deliberative criteria to include emotional appeals, then the deliberative democratic potential of art and, along with it, the deliberative potential of many of the actions that protestors engage in, may be significantly undermined. Protest-as-deliberation would then run into significant obstacles and the two sets of reason-giving criteria that the theory needs to offer may be difficult to establish. The choice that protestors would potentially be asked to make – a choice, that is, between 1) art that

---

draws on emotion and that is effective in capturing people’s attention, and 2) making arguments that adhere to the deliberative group’s criteria of reason-giving – would likely result in protestors denouncing these requirements as co-optative. If this is the case then it would weaken – if not withdraw altogether – their support for protest-as-deliberation.

Fortunately, there is no need to decide whether the potential problems of emotion-based dialogue outweigh art’s effectiveness as a form of political communication. The deliberative critique of emotion depends upon the false assumption that reason and emotion stand in opposition to each other. Usually, whenever deliberative theorists discuss emotion and reason it is in terms of people making either/or claims or, when theorists take a more tempered approach, the charge is that emotion is a supplement to reason that somehow biases our ability to evaluate the reason itself.

Bryan Garsten critiques this view in *Saving Persuasion: A Defense of Rhetoric and Judgment* (2006). Garsten’s main argument in the book is a response to the prevailing view that rhetorical speech is both destructive in political interactions and poses a threat to democratic deliberation. The reason for this negative response to rhetoric is the fear that persuasion is dangerous because of its tendency to either manipulate people or pander to them. Because both approaches circumvent people’s ability to make informed decisions (the first bypassing people’s judgment and appealing to emotion in order to produce the effect that the speaker desires, and the second telling people what they want to hear, regardless of what the speaker thinks is best, in order for the speaker to capture popular support and to gain power), these “twin dangers” undermine the exchange of reason giving and considered judgement that ought to characterize democratic politics. Garsten’s aim is to challenge

---

401 Garsten, *Saving Persuasion: A Defense of Rhetoric and Judgment*, p. 2. This view, while it is predominant, has its critics amongst deliberative theorists. Young and Dryzek advocate the beneficial uses of rhetoric (and in doing so create a space for persuasion). Simone Chambers also looks at the benefits of persuasion and, as she juxtaposes what it means to persuade people instead of coerce them, she also endorses a deliberative approach that has space for persuasion -- even arguing that the legitimacy of deliberative laws “rests on the persuasiveness of the reasons that can be garnered for those laws.” *Reasonable Democracy*. (Ithaca, New York: Cornell University Press, 1996), p.8.

260
this prevailing view. He offers a defence of persuasion that appeals to democratic citizenship and, as he rebuts these twin dangers as the inevitable outcome of persuasion, he puts forth a defence of persuasion that appeals to the democratic requirement that citizens need to both rule and be ruled.\textsuperscript{402}

Persuasion, he argues, is an important component of this. Persuasion is worthwhile because it “requires us to pay attention to our fellow citizens and to display a certain respect for their points of view and their judgments”; contrary to the “twin dangers”, persuasion and judgement require engagement with the arguments, which is a fundamental component of democratic citizenship.\textsuperscript{403}

The argument for saving persuasion, then, has a democratic basis. One of Garsten’s motivations for his defence of persuasion is to warn against the tendency to close off spaces of persuasion (as is the case in modern politics)\textsuperscript{404}; counter to this tendency, Garsten argues, it is important that we preserve institutional spaces for controversy and that these spaces allow people to engage in a politics of persuasion.\textsuperscript{405}

Garsten addresses charges that emotional appeals (primarily those that occur when we employ rhetoric) manipulate the audience and therefore undermine our ability to evaluate people’s reasons. These criticisms, he argues, take a negative view of people’s capacity for judgment. Garsten acknowledges that there is a risk of persuasion encountering the “twin dangers” of rhetoric, but he notes that, while there are risks of charismatic speakers engaging in manipulation and pandering, truly persuasive dialogue does not fall prey to these dangers nor does it deserve these critiques. As he argues that manipulation and pandering are unfairly mapped onto our intuitive responses to persuasive argument, Garsten makes an important distinction between judgment and justification. His claim is that denunciations of rhetoric belie a fear of people’s ability to evaluate arguments and a larger distrust of people’s ability to engage in democratic activity. The preference for justification requires that people either accept or reject a set of criteria. Here deliberants only need to justify arguments to

\begin{footnotes}
\end{footnotes}
people (in which case people decide whether or not the claims are reasonable); judgment, on the other hand, moves away from this and instead asks that people engage others’ claims and evaluate them in a way that requires them to draw from *their particular* set of circumstances. This appeal to people as we find them, and the expectation that people can and will engage with the claims that people put forth, strengthens a conception of politics that gives persuasion due weight and points to a society that takes democratic participation seriously.

The difference between judgment and justification is of particular concern to deliberative democrats who question the exclusionary implications of different constraints upon public reason. If deliberative theory is to take social pluralism seriously and develop the conceptual basis of protest-as-deliberation, then we need to take Garsten’s critique seriously. I have already noted a series of concerns that deliberative theorists have with particular constraints upon reason-giving. Garsten’s defence of rhetoric and judgment picks up on these critiques. Garsten notes that the presumption of reasonable disagreement rests upon an assumption that deliberants ought to use a process of justification.  

This preference for justification over judgment “reconstitutes individuals in such a way that they can be said to inhabit one shared perspective on public questions”; in doing so, this subjects them to a form of rule that minimizes democratic participation. On this reading, justification is unable to accommodate deliberative contestation because it sacrifices engagement for an adherence to a predetermined set of criteria. These kinds of predetermined criteria, as pluralist critiques of deliberative democracy show, are at odds with an effectively inclusive conception of deliberative democracy that takes deliberants’ efficacy seriously.

Deveaux shares Garsten’s concern that deliberations are not democratic enough. For both theorists the construction of democratic legitimacy is insufficient because it fails to take all people’s claims into account. Not everyone may agree with (or to) a form of deliberation that favours a

---

predetermined standard of what is reasonable and it is this that gives rise to charges of effective exclusion. Instead, a more democratic option is an exchange that does not make the criteria of public reason a requirement of people’s ability to present their claims in the deliberative group.

Deliberative theorists disagree about the extent to which the constraints upon public reason pre-empt particular arguments, and it is unlikely that we will resolve this disagreement anytime soon (which is one reason why protest-as-deliberation is especially important). Following from this disagreement, however, is the related question about the extent to which people are likely to engage in deliberative democracy given the criteria that they have to work within. Whereas disagreement over the constraints upon public reason focuses upon the kinds of reasons that are admissible (and therefore people’s ability to deliberate as equals), the extent to which people are motivated to engage in deliberative politics is an issue that does not receive enough attention.

Because persuasion asks that deliberants draw from emotion to make judgments it engages deliberants. Garsten points out that the discourse of justification can produce feelings of alienation. This alienation is a product not just of the kinds of reasons that people can legitimately use in deliberations (although this certainly plays a significant role); a significant portion of this lack of engagement is a result of the way that we draw the distinction between reason and emotion and correspondingly the ways that deliberants can communicate their arguments in a successful way.

Persuasion works as an effective and normatively desirable spur to action. This is the case because of the way that persuasion utilizes emotion and because, as I discussed in Chapters 2 and 4, deliberation is less effectively inclusive (and has a weaker claim to legitimacy) when deliberative criteria emphasize a calm, unemotional and “impartial” exchange of reasons. Because persuasion asks that deliberants draw from emotion to make judgments it engages deliberants and plays a legitimate role in democratic dialogue. Judgment focuses specifically upon deliberants’ partiality and it appeals to people as we find them (in their different circumstances); as a result it is important both

---

normatively and practically. Appealing to people’s partiality through rhetoric and emotion can draw people into deliberation in ways that a discourse of justification cannot.\textsuperscript{410} Since persuasion appeals to emotion, people are more likely to respond to the issues that are under deliberation. This makes active participation more likely and because emotion engages people in their differently-situated positions, it leads to a way of deliberating that is better equipped to treat all people as equals (avoiding the problems of bracketing that I discussed in Chapters 2 and 4). An emphasis on judgement (rather than justification) is particularly useful here since a lot of what protest-as-deliberation seeks to accomplish involves persuading deliberants that they need to reconsider deliberative framings and decisions. Here the relationship between emotion and reason is clear. After persuading deliberants to re-evaluate protestors’ claims, considered judgment draws upon both reason and emotion\textsuperscript{411} and it is able to capture people’s attention and bring them into deliberations. It is one thing to tell people that an issue is important, but another to make people care enough that they will act upon this. The requirement that deliberants must evaluate people’s reasons using deliberative criteria assuages deliberative democrats’ fears about overinclusivity and emotion undermining the normative principles of evaluation. An emphasis on considered judgment tempers the intuitive reaction that people may have to a politics of persuasion. Whereas this response is typically a negative one that betrays the fear that the merit of people’s arguments will get lost amidst a flash of fancy rhetoric, the contextualizing that deliberative criteria does to a politics of persuasion manages to address the deliberative democratic objection to rhetoric. When deliberative theorists look at rhetoric in terms of the way that it addresses inclusive political communication – in particular through the attention that rhetoric pays to people’s partiality – then it is easy to respond to deliberative democrat’s intuitive fears about persuasion and to situate emotion/rhetoric/persuasion

in terms of the amendments that deliberative theorists put forth in order to make deliberations fair and inclusive in a socially pluralistic society.

The tendency for deliberative theorists is to view persuasion and emotion as attacks upon deliberative criteria of reason-giving because they assume that emotion is a substitute for (or a superfluous and distortionary addition to) reason. This changes when we establish that persuasion 1) links reason and emotion together in a way that encourages deliberants to become more involved in deliberations (thus enhancing the democratic component of deliberative democracy). At the same time it also 2) provides the discursive and evaluative tools that deliberants need in order to engage with claims from their particular perspectives.

The case that Garsten makes for rhetoric is important for deliberative democratic theory and it also has particular resonance for a theory of protest-as-deliberation. Garsten notes that deliberative theorists are reluctant to advance a theory of deliberative democracy that takes this distinction between judgment and justification (and the accompanying problem of effective democratic inclusion and efficacy) seriously. Beyond their objections to the relationship between emotion and rhetoric (which ultimately do not pose the normative problem that some deliberative theorists claim), their reluctance is not normative. Garsten’s specific charge is that deliberative theorists “point toward the possibility of engaging judgment” but then they shy away from drawing more substantive conclusions from the problems that they identify.412 A lot of this reluctance, I think, comes from the limited scope that theorists attribute to deliberative democracy. Young is particularly guilty of this critique: her normative prescriptions initially promise to be quite far-reaching, but in the end they turn out to be limited to (an albeit improved) existing deliberative framework. Her discussion in Activist Challenges is a good case in point, as she acknowledges the deliberative contributions of protestors but does not develop substantive ways that we could amend deliberative democratic theory to take these activists’ lessons into account. Deveaux expands the

scope of deliberative democracy to encompass informal spaces of deliberation and, importantly, the ways that protestors and minorities within minorities can challenge dominant deliberative discourses. Deveaux’s account of the specific ways that protestors can influence deliberation in the formal sphere is, in terms of the larger practical and conceptual implications, underdeveloped, but her call for this expansive scope is necessary if we want to make the substantive changes that allow deliberative theory to account for protest and in this respect is an important step in this direction.

Deliberative activity in the public sphere is necessary if we are to take protest seriously. The kind of dialogue that occurs in the public sphere also supports arguments for rethinking the relationship between emotion and reason. The discrepancy between (formal) deliberative groups’ requirements of calm and reasoned deliberation and the “everyday experiences of debate” in informal spaces lead Hoggett and Thompson to note the benefits of deliberation in public spaces where people “do not have to leave their emotions behind in order to enter these spaces as democratic citizens.”

Echoing Garsten’s arguments that emotion is constitutive of reason, Hoggett and Thompson take their study of affect-infused deliberation and argue that deliberative theory needs to account for the role that emotion plays in deliberation. The question as they pose it is not if we should allow emotion (since it already occurs and, following Young’s assertion, any form of deliberation involves a particular kind of rhetoric), but rather which kinds of emotion make a normative contribution to deliberations and “through which expressive forms.”

A closer look at the role of art in the public sphere can help us to address this question and to strengthen deliberative communication and inclusion.

415 Hoggett and Thompson, “Toward a Democracy of the Emotions”, p.114.
6.2 Public space and democratic theory

In the previous chapter I looked at the important role that the deliberative polity plays as a safeguard for the deliberative group (and, in turn, of the important normative work that it does in deliberative democratic theory). The deliberative polity guards against unjust exclusions while it simultaneously allows us to expand the range of potentially admissible claims and to increase people’s efficacy. The deliberative polity deals with public space, but its particular function demands more from public space than deliberative theorists typically acknowledge. The difference between deliberative theorists’ typical treatment of public space and my discussion of the deliberative polity is a significant one. The deliberative polity plays an important normative role in protest-as-deliberation and the particular conceptualization of protest that it requires makes it important to distinguish it from other deliberative discussions of the public sphere.

The emphasis on the role of the public sphere is not new to deliberative theory. As I discussed in Chapter 2, Habermas sets out the significant role that the public sphere plays when it comes to connecting the deliberative process with decision-making. In Habermas’s discussion it is the way that the two work together that makes deliberative democracy legitimate. As I also note, there are problems with the way that Habermas conceptualizes the relationship between the public sphere and the deliberative group – problems that lead to effective exclusions and which ultimately undermine the deliberative legitimacy that he tries to build.

Deveaux takes a different approach to legitimacy and the role of the public sphere. As she addresses challenges to a democratic approach to conflict resolution, Deveaux asks “why should a democratic conception of deliberative legitimacy prevail over other understandings of legitimacy?” This question brings Deveaux to a discussion of “democratizing legitimacy”, which involves a particular kind of focus on informal spaces. One of the ways to pursue effective inclusion and increase efficacy is to look at the impact that internal processes of democratic reform have. When it

---

comes to injustices in cultural rules and practices, Deveaux notes that reform is much more likely to occur if it originates inside the group (instead of coming from external institutional sources). In order to take advantage of this kind of democratic work, Deveaux argues that we need to expand a thinner conception of democratic legitimacy than the one typically found in accounts of deliberative democracy. It is important, in terms of democratizing legitimacy, that there are fewer substantive constraints in these informal sites of deliberation. Opening up informal space in this way makes it more likely that contestation will occur and that informal spaces will provide the foundation for initial stages of change. Corresponding to the need to legitimize democracy is Deveaux’s insistence that formal spaces of deliberation ought to democratize legitimacy. Deveaux approaches formal spaces of deliberation with this in mind in order to see how it is “possible to protect and empower vulnerable individuals” when they may choose to remain silent (or participate in minimal ways) in deliberations. Empowering vulnerable minorities and encouraging social reform, then, depend upon the procedural and substantive constraints that the deliberative group requires, both of deliberants and of people in the public sphere. It is important that formal deliberative spaces pay normative attention to informal spaces and that they “incorporate evidence of citizen’s democratic activity in deliberations about contested social practices.”

Dryzek also notes the benefits that occur from paying deliberative attention to the public sphere while ensuring that this informal space retains a strong democratic and contestatory element. As Dryzek looks at deliberation in deeply divided societies he argues that the best way to approach deep differences is to partially decouple the deliberative and decision-making aspects of democracy. On the face of it, Dryzek’s approach shares many similarities with Habermas’s

---

417 Deveaux, *Gender and Justice in Multicultural Liberal States*, p 223

268
approach. However, Dryzek critiques Habermas for reasons similar to the ones that I set out in Chapter 2. Dryzek rejects Habermas’s sequencing and makes the case for the informal ways that “discursive engagement in the public sphere can influence collective decisions.”

Deveaux and Dryzek take a different approach to the public sphere than Habermas. They do two things that he does not, and their approach makes for a normatively stronger conception of deliberative democracy. First, their discussion of the relationship between the public sphere and the deliberative group is not, as Dryzek acknowledges in his account, a two-step process of the kind that Habermas favours. Deveaux and Dryzek (like many deliberative theorists in the last 20 or so years) address effective inclusion and efficacy within the deliberative group itself and not, like Habermas, in terms of input that feeds into the formal deliberative group but is ultimately separate from deliberative decision-making. Deveaux and Dryzek’s approach here is not unusual. It is the second way that they approach the public sphere that is particularly relevant. After they establish the procedural constitution of the deliberative group, Deveaux and Dryzek take an additional look at the public sphere. Here, they argue that the public sphere plays an important role insofar as it influences how deliberants will set the agenda and what types of reasons people in the deliberative group will use to guide the deliberative process and to inform deliberative decisions. This role is distinct from the two-step model that Habermas sets out. This re-examination of the public sphere happens after Deveaux and Dryzek put forth a conception of deliberative democracy that views deliberative inclusion in a fundamentally different way than Habermas does (choosing instead to make inclusion in decision-making a key criterion of deliberative legitimacy). The attention that Deveaux and Dryzek pay to the public sphere draws attention to the assumptions that people in the public sphere hold and also to contestation in the public sphere that is relevant when we examine the claims that people in the deliberative group tend to make – particularly in cases where there are minorities within minorities. This, of course, challenges the clear line that Habermas draws between the public sphere

---

and the administrative sphere. The normative justifications that Deveaux and Dryzek offer for their expansive conception of deliberative democracy address issues of effective inclusion and efficacy in ways that Habermas’s theory, with all his demarcations, cannot. Deveaux and Dryzek call to expand deliberative politics by paying more attention to the relationship between formal and informal spaces of deliberation because of the kinds of subtle (and not so subtle) influences that it has upon deliberation in the (formal) deliberative group, but it is important, contra Habermas, that they do so after setting out the role that people ought to play in decision-making deliberative bodies. Asking questions about the role that informal deliberation has upon formal deliberation is important in terms of strengthening deliberative legitimacy. In Dryzek and Deveaux’s work the specific ways that people in informal spaces of deliberation are to affect and participate in the deliberative group still need further examination. I take up this issue in section 4.

In addition to these contributions to the deliberative group, the public sphere also plays an important role in deliberative democracy’s capacity to address protest. As I note in the previous chapter, the deliberative polity relies upon the public sphere; it provides both a normative and practical link between protestors and the deliberative group and it allows for a deliberative exchange between the two in which contestations can unfold as productive democratic opposition.

The necessity of turning our deliberative attention to the public sphere, both in order to account for the ways that informal deliberation affects formal deliberations and in order to develop deliberative democracy’s normative justification of protest, reinforces the significant normative role that the public sphere plays in democratic societies. Importantly, the need for a porous relationship between the deliberative group and the public sphere illustrates the importance of the deliberative polity. Because democratic legitimacy depends upon public space it is important to understand the nature of informal (public) space and its relationship with formal deliberative space. There are different ways of constructing public space, of determining who “the public” consists of, and of

---

understanding how this public ought to function if our concern is with deliberative legitimacy. The deliberative polity takes a particular approach to these questions. This is important because if the deliberative polity is going to enable marginalized deliberants to make good use of informal channels of deliberation so that they can impact formal deliberations in a meaningful way, and if it is to provide a space in which we can treat protest as a form of deliberation, then public space needs to be able to accommodate a specific type of contestatory democratic activity.

The claim that a strong public sphere is necessary for a flourishing democratic society is not a contentious one. What presents deliberative theorists with a challenge are the various forms that public spaces can take and the assumptions that people make about the role of public space. Too often, the line of questioning around this does not do enough to develop the deliberative democratic potential of public space. It is important for democratic theorists to pay attention to the types of activity that occur in the public sphere. A lack of associational activity could signal either fear of an increasingly undemocratic state that restricts people’s freedom of association or it could indicate a move away from the type of attachments that motivate the organization of political communities. Additionally, the rise of particular types of associational activities – for example, white supremacist groups who reject liberal democratic principles – can also indicate weaknesses in democratic activity. Indeed, this kind of “bad civil society” drives theorists to pay closer attention to the public sphere in order to see what kinds of activities and participation promote democracy and, moreover, why these forms of bad civil society exist.

Simone Chambers and Jeffrey Kopstein take up these questions. In two separate discussions about the role of civil society in relation to the state, Chambers and Kopstein draw our normative attention to the many different ways that civil society can impact the democratic strength of the state. In *Civil Society and the State* (2006), Chambers and Kopstein provide an overview of six different versions of the civil society/state relationship in order to illustrate the debate over civil society and to make the point that they develop in *Bad Civil Society* (2001) that the question that democratic theorists
ought to be the most concerned with is not whether or not people participate in civil society groups and activities, but what kind of participation people choose and the institutional context that influences these decisions.\(^\text{425}\) Chambers and Kopstein acknowledge that particular types of civil society can have significant impacts upon the capacity for the public sphere to provide a space of freedom from and constructive opposition to formal areas of governance – upon, in other words, the democratic strength of the public sphere itself. This observation is important for theories of deliberative democracy that rely upon the public sphere. Because there are six different ways that people in civil society can position themselves in relation to the state it is important to look at the specific kinds of impacts that particular types of civil society/state relationships can have on democratic engagement as well as at the things that states can do to encourage the kinds of civil society that complement a democratically vibrant state. The dangers that Chambers and Kopstein identify with bad civil society in particular reinforce the need for deliberative theorists to pay more attention to the procedural and substantive constraints that regulate (and encourage) deliberations, both within the deliberative group and within the larger deliberative polity.

Each relationship that the state can have with civil society has different impacts upon the kind of democratic activity that can then occur within and between these spaces. As Chambers and Kopstein note, what often gets left out of analysis of the democratic role of the public sphere are questions that deal with what makes public space valuable. This is problematic because far too much of the time people fail to ask the right questions about public space. The typical response is to ask if people have access to public space, and instead they argue that what people ought to ask is if public space allows people to foster democratic relationships or if it contributes to bad civil society. On top of this, people need to focus more normative attention on the types of democratic relationships that are available (and attractive) to people in civil society. The six versions that they discuss display different levels of engagement, from civil society that exists apart from the state (voluntary groups

that are possible because of freedom of association and which are “designed primarily to keep the state out, not to keep anything in,” to civil society that functions against the state – to challenge its authority and politicize issues that the state would rather silence as, for example, with the revolutions of 1989. Civil society can also function beyond the state and manifest itself as a global civil society (a function that is especially relevant to global projects of deliberative democracy, but which I will not address here). The remaining three kinds of the civil society/state relationship engage with the state in constructive, but more and less oppositional ways. At times, civil society can work in partnership with the state. In some respects this can end up being an extension of the state in which civil society takes on state functions. While this can be beneficial in terms of the state’s ability to provide certain services to people, there is also a danger that “civil society may begin to act and look like the state” which could compromise the ability of civil society to act as a check on the state. Civil society can act in support of the state without entering into that kind of partnership. It can function as “schools of citizenship” that, amongst other things, promote the kinds of values that the state thinks are desirable in democratic citizens. This, of course, can also run into its own problems in terms of clearly demarcating the space for civil society as a space of freedom from the state. Finally, civil society can function in dialogue with the state. This dialogue is one that holds the state accountable as people engage in “creative and critical dialogue” that aims to provoke a response from the state, which will then “defend, justify, and generally give an account of its actions in answer to the multiple and plural voices raised in civil society.”

This last version of the civil society/state relationship is the one that most closely resembles the role that I envision the deliberative polity playing in protest-as-deliberation. The conception of

---

deliberative democracy that I advance takes up the questions that Chambers and Kopstein advance about the kinds of civil society that are desirable and the institutional arrangements that make some conceptions of civil society more likely than others. Protest-as-deliberation requires that deliberative theorists pay particular attention to the relationships within the public sphere and between the public sphere and the deliberative group. While I identify deliberative democracy in terms of the dialogue that civil society (in the form of the deliberative polity) has with the state, there are still a great deal of questions that need answers in terms of the way that people will enter into a dialogue with the state, and where and how they will do so. Just as Chambers and Kopstein’s different versions of the civil society/state relationship have various implications for the democratic capabilities of the state, so too do the different ways that we can envision public space and the ways that people respond to and speak within it have the potential to impact the deliberative polity and the deliberative group in number of different – more and less democratically rich – ways.

In order to properly conceptualize the relationship between the deliberative polity and the deliberative group we need to look at the ways that protestors organize and engage with the deliberative group and, importantly, at the ways that they use public space to accomplish this. To this end, Chambers and Kopstein’s discussion of the role that institutional factors play upon the types of civil society associations that people are drawn into is particularly important. One of the things that Chambers and Kopstein emphasize in their discussion of bad civil society is the impact of socio-economic conditions insofar as they lead to an increase in the prevalence of bad civil society associations. In response to this, they argue that we “need to put civil society back into contact with some traditional issues of social justice”\(^4\) so that the existence of bad civil society groups will be less appealing to people who are in vulnerable situations and who see these groups as an alternative to poor situations.\(^3\) In their calls for this it is Chambers and Kopstein’s hope that institutional changes can have an impact upon people’s commitments to productive democratic associations.

make a similar claim about the way that deliberative theorists ought to structure the deliberative polity. My focus on activity in the deliberative polity requires that we rethink the constraints that regulate deliberative politics and that we reframe and expand them to cover the deliberative polity.

6.3 Democratic constructions of public space: realizing deliberative potential

The different sets of literature that I discussed above suggest that normative work on the connection between formal and informal spaces of deliberation would benefit from taking advantage of an expansive form of political communication that 1) makes use of persuasion, and 2) pays specific attention to the construction of democratic public spaces. In this section I apply earlier discussions of public space, emotion and rhetoric, and the democratic capacity of protest art to my theory of protest-as-deliberation. As I look at Deveaux and Garsten’s recommendations and at successful art-based protests, I revisit my earlier discussion of the amendments that Young makes to deliberative democracy. While I do not wish to diminish the significant normative work that greeting, rhetoric, and narrative do in communicative democracy’s expansive conception of reason-giving, I do wish to draw attention to the limitations of deliberative theories that stop at the borders of the deliberative group. Young’s work is of considerable normative importance but she fails to fully develop the potential of inclusive political communication because she stays within the boundaries of the deliberative group.

Specifically, what I want to develop is the connection between inclusive political communication (found in the deliberative group) and the ability of protestors (through their use of persuasion) to engage institutions in democratic dialogue. I map this discussion onto arguments for an expansive scope of deliberative democracy (as set out by Deveaux) and I make the normative case for developing the potential of inclusive political communication by turning our attention to the deliberative polity. I argue that if we think of protestors as developing a form of alternative political communication – one that has its roots in inclusive political communication but which extends...
beyond it in terms of acceptable forms of communication – then we can 1) strengthen the normative case for protest-as-deliberation, and 2) conceptualize the ways that the criteria that govern the deliberative polity ought to differ from the criteria in the deliberative group. In doing this I hope to develop a normative account of the conceptual changes that we need to make a theory of deliberative democracy that takes the normative justification of protest seriously.

Since the motivation for incorporating greeting, rhetoric, and narrative into deliberative criteria in the first place was to address the exclusions that occur when people talk past each other, it makes a great deal of sense to take the deliberative role that inclusive political communication plays and see if it can help deliberative democrats to make sense of the relationship between the deliberative group and the deliberative polity.

In order for the deliberative polity to facilitate people’s ability to engage in protest-as-deliberation, the space itself must be public in a very particular way. Protest-as-deliberation requires more than the assertion that people must be able to oppose the deliberative group from the outside. Protestors must have sufficient access to public space and this space must be one that they can use to capture the deliberative group’s attention so that they are in a good position to persuade deliberants of the significance of their arguments. As I discussed in Chapter 4, the Kissing Doesn’t Kill example shows that dialogue can take place between the public sphere and the state. This exchange, however, relied upon two assumptions that we need to take into account: first, that Gran Fury had a legitimate (legal) claim to particular public locations and, second, the belief – shared by a significant number of people – that content-based restrictions that the CTA placed upon the posters was a deliberate and unjustified attempt to silence a particular message. If Gran Fury’s project was questioned in terms of their right to public space or their right to advance a particular message then they would not have had the kind of public support that was necessary to fuel the extended dialogical exchange. The assumptions that sustained the Kissing Doesn’t Kill-inspired events are of particular importance for
deliberative theorists. When we look to establish institutional mechanisms for the deliberative polity we need to make sure that we enable a substantively democratic construction of public space.

Even when our language appears to support a democratic conception of public space, this apparent openness may not translate into people’s ability to make use of this space in a way that helps them to combat the lack of efficacy that they encounter or to rectify their effective exclusion. There are ways of framing what is public that neglect the processes involved in its definition and that overlook the relationships that take place within what we label public space. When this happens public space is no longer something that all people can equally engage in. The limited definition effectively excludes people, limits their efficacy, and is therefore one that cannot fully support protest-as-deliberation. In this framing people encounter limited access both to the physical space itself and to the power that follows from being able to use this space to challenge activity in the deliberative group. In order for public space to be substantively democratic we need to recognize that it is more than a physical space; we need to focus our normative attention upon the processes that go into definitions of public space itself so that people always have the capacity to challenge ideas and practices. Importantly these processes need to remain contestable and not, as is often the case, controlled by a particular section of society.

My argument that deliberative theorists need to offer a normative response to protest as something that is outside of, and in opposition to, the deliberative group requires a public space in which protestors can present their oppositional arguments. The normative concerns that I have about protest being co-opted as deliberative theorists try to account for it extend beyond the dialogical relationship that protestors and deliberants ought to build in the deliberative polity. The (separate) space that protestors have is necessary to a deliberative theory of protest that is not co-optative, but it is not sufficient. Importantly, we need to make sure that this public space is one that does not effectively silence people.
The language of what is “public” takes as given that a designated space is open to all people who can physically access it. This assumption presupposes that all people have an equal claim upon and equal access to the space itself. This understanding of public space, however, ignores the ways that spaces are regulated. One of the more telling examples of the disjunct between the appearance of and access to “public” space is evident in the Vancouver Public Art program (VPA), which operates with a definition of public space as “publicly accessible areas of private developments which are . . . open and freely accessible to the public for 12 or more hours daily.”\(^{434}\) This definition challenges our assumptions of what it means to say that a space is public. The limitations that the VPA places upon this space control access to the space itself. The space is only effectively “public”, as we generally understand the term, for a minimum of twelve hours a day. The rest of the time the city can prevent people from entering the space and its “public” nature exists in a grey area.

More importantly, the restrictions that the VPA’s definition place upon people’s access to space illustrate a more troubling acceptance of the extent to which institutional bodies exert control over the nature of the supposedly “public” space itself. Deutsche makes this argument in “Art and Public Space: Questions of Democracy” (1992) when she looks at the impact that constructions of public space have upon democracy. Deutsche critiques the vocabulary that is typically deployed in these discussions and notes the ways that the “language of democracy” works to limit the debates that are necessary for a (truly) democratic practice to occur. As Deutsche challenges approaches that assume an essential conception of public space she looks at new ways of describing it that escape this and she argues that the language of democracy is itself a public space of debate.\(^{435}\) As we look at the contestation that ought to occur within and about public space, what is important for the democratic potential of public space is who decides what the space ought to look like (conceptually), how people use the space and interact with each other via the space, and how open this is to participation and contestation. In the VPA’s case the meaning is imposed upon people and does not come from (all

of) the people who would otherwise have an uninterrupted collective claim to this space. In the VPA’s definition there is a disconnect between the supposedly open nature of the space and the ownership and control behind it. More troubling is the degree to which people accept this disconnect and continue to regard spaces with these kinds of limitations as public spaces in a way that does not problematize the term “public space.”

This is not to say that people do not contest definitions of public space, nor do I mean to suggest that people do not question the appropriate scope that public spaces ought to have. What is problematic, however, are challenges to the use of public space that pit members of the public against each other and, in doing so, assume an unproblematic definition of the public that excludes people. One challenge over the construction of public ownership that ignored the democratic aspect of public space occurred over the ability to access Jackson Square Park: a public park (under the jurisdiction of the City of New York’s Department of Parks and Recreation) in Greenwich Village. Despite the “public” nature of the park, a contentious debate arose over who the park belongs to. This dispute occurred after the park had been renovated as part of a larger effort by the City of New York to “clean up” the city’s neighbourhoods, a cleanup that saw the displacement of a significant number of poor and homeless people. Positive responses to the city’s efforts existed alongside strong condemnations of this push to gentrify the neighbourhood. Different visions of the city came into conflict, all trying to assert the legitimacy of their preferred approach.

After Jackson Square Park was renovated some members of the community (defined at the time as people who owned homes in the vicinity of the park) wanted to lock the park at night. The reason for doing this was to keep out homeless people who had, before the renovation, frequently slept in the park. The discourse of the Jackson Square Park debate did not acknowledge the homeless population as members of the community; their continued use of the park led some

members of the community to lament that they had “taken over” the space itself\textsuperscript{436} – an accusation that still did not grant the homeless population recognition as members of a community that they lived in. The dispute over access rights to Jackson Square Park was exacerbated by the physical restriction that the padlock entailed and by the fact that it was a local community group – and not the Parks Department – that had possession of the key.\textsuperscript{437} It is common for parks to have curfews and thus to be effectively closed at night, but the lock made explicit the assumptions about who, within the neighbourhood, had a legitimate claim to the park and who did not. These assumptions played out in the media debate surrounding the issue. Here the questions about “the public’s right to put a padlock on a public space”\textsuperscript{438} presupposed differential rights for people living (with and without homes) within the neighbourhood and, ultimately, assumed a public that excluded self-identifying members of an unrecognized public.

There are two main dialogues that are (or should be) taking place here. First, the debate speaks about – but often around – issues of homelessness in New York City, especially in the context of gentrification and a lack of sufficient resources to deal with the increasing demand for affordable housing created by the city’s transformation. Second, the debate speaks directly to the definition of the public itself. While the issue of homelessness is clearly an important one and is interconnected with our understanding of the public and the rights and responsibilities that the network of people therein have, it is the second debate that I will focus on because it is of particular importance for the deliberative polity’s ability to support protest-as-deliberation.

Deutsche sets out two main ways to define what we mean when we speak of public space. First, we can define public space as “a set of institutions through which the state is held accountable to citizens.”\textsuperscript{439} This, as I discussed above, captures the idea of a public as a space of contestation insofar as we situate it in relation to the state. This distance from the state is necessary, but it does

\textsuperscript{438} Roberts, “The Public’s Right To Put a Padlock On a Public Space”
not tell us what this separate space ought to look like, who exercises control in it, and how this occurs. The second approach defines public space as “a space – though not necessarily a physical or empirically identifiable terrain – of discursive interaction.”\textsuperscript{440} Importantly, what we need to avoid when we look at the use of public space is the assumption that “public” and “use” are self-evident concepts; if we fall into this trap then this approach “threatens to erase public space itself.”\textsuperscript{441} The problem with Deutsche’s second definition, of course, is that “discursive interaction” gives us an incomplete account of what, exactly, happens within public space. It is unclear who the discursive interaction is supposed to be between (institutions and citizens? People within the public sphere?) and what, if any, norms ought to govern this interaction in order to ensure that the kinds of activities here make the space a properly democratic one. This second definition does, however, speak to the need to think about public space as a process that occurs between the people who share it. This attention to public space as a process provides a good (albeit incomplete) basis for us to examine what the public space in the deliberative polity ought to look like.

As Deutsche examines reactions to the Jackson Square Park debate she critiques the ways that the discourse allows those involved in the dispute to avoid the underlying issue – that of the construction of public space itself. Deutsche argues that whenever public debate does not address “public”, “use”, and “public use” the people with less power inevitably suffer the effects. In this example, the framing of the discourse meant that the homeless were “not only evicted from a park . . . they are denied access to the definition of the public, an eviction which, we might say, closes down public space.”\textsuperscript{442} This underscores the need to pay attention to the closing down of public space because in the Jackson Square Park example it happened despite the fact that people involved in the debate used the language of public space – and the accessibility that goes along with common understandings of the term – to close it down. This closure of public space occurred despite the fact

\textsuperscript{441} Deutsche. Evictions: Art and Spatial Politics, p.259.
that people paid specific attention to “the public” and to issues of local control (at least on the face of it). This response speaks to Chambers and Kopstein’s discussion of the different ways that the civil society/state relationship can unfold. As it does so it points to additional layers that emerge when we try to map out what it means for civil society to engage in a dialogue with the state. This closure of public space, because it occurred unproblematically within the language of public space itself, has significance for the way that we should structure the deliberative polity so that it can facilitate protest-as-deliberation.

The idea that democratic public space has its legitimacy and function in its status as an oppositional body (found in Deutsche’s first understanding of public space) also extends to the second understanding where people are in (constructive) opposition to the state and where they have the ability and means to challenge arguments that dominate the deliberative group). At the same time we also need to acknowledge that the space exists as a series of relations in which people, collectively, can challenge the nature of the space itself. In order for this to happen the definition of the public has to go beyond the superficial one offered by the VPA and found in the discussion of Jackson Square Park. Whenever space is closed (or partially closed), people need to ask why this is the case, what purpose it serves, and who it excludes. The public must be understood as all people who share a physical space and who have obligations to each other because they coexist within it. This is important, particularly because it brings us back to who the collective is. Deutsche underscores the importance of insisting upon public space as a space where this collective – who is within it and what people can do with and to the space – is continually being questioned and, as such, is always open to reinterpretation and challenges. Chantal Mouffe, as she responds to the idea that the public sphere is (properly) a space where the legitimacy of the debate over public space occurs,

notes the importance of “the mobilization of passions” and argues that this kind of questioning “is why artistic practices have such an important role to play in the public sphere.”

When we look at the deliberative polity in terms of its ability to provide a context for successful protest-as-deliberation we need to make sure that we always take access to public space into account, especially when we assess the legitimacy of the exchange between the deliberative group and the deliberative polity. While people in the deliberative polity who wish to engage in protest-as-deliberation do not have to (and ought not to) work as a collective (it is difficult to imagine different protest groups who have been effectively excluded from the deliberative group for different reasons uniting to re-enter the deliberative group), the opportunity that the deliberative polity provides protestors with ought to be one that all people in the deliberative polity have equal access to. Taking this access seriously means that deliberative theorists must question any restrictions and exclusions. The deliberative polity needs to be expansive and we need to avoid the dangers that occur when a definition is imposed and goes unchallenged. Moreover, taking access to public space seriously also means that we need to pay more attention to the ways that people can participate in the space because the nature of participation can change the space itself and, in turn, the democratic capacity of the space.

**6.3.1 CWT: overlapping publics, informal deliberation, and disagreement revisited**

In the previous chapter I raised potential objections to the practical recommendations that CWT’s participants produced. My objective in doing so was to question the use of a process that required consensus but where the agreement was sufficiently open to interpretation so as to promise groups with very different positions official sanction to pursue their policy goals. The problem with this, as I note, is that both “sides” in CWT’s deliberations have reasons to object to these broadstroke allowances when it comes down to the specific (and contradictory) ways that people could implement.

---

policies. Much of my critique about the way that CWT’s agreement becomes problematic at this later stage deals with the relationship between formal and informal spaces of deliberation. In the case of CWT, consensus was possible in the deliberative group; the agreement, however, breaks down when groups revisit these conclusions in the public sphere.

These implications provide a good impetus to revisit the scope of deliberative democracy. While there are benefits to the kind of broadstroke agreement that CWT’s deliberants were (surprisingly) able to reach, we need to be careful that we avoid endorsing a deliberative approach that further entrenches the original conflict at a later stage. As Deveaux points out, the relationship between the formal and informal aspects of deliberative democracy is important to a theory of deliberative democracy that takes questions of democratic legitimacy and contestation seriously. The relationship between the formal and informal aspects of deliberation is also of particular importance to the theory of protest-as-deliberation. As I look at some of the challenges that deliberants meet in a theory of protest-as-deliberation I argue that the deliberative group needs to engage in a partial evaluation of protestors’ reasons. Meeting this challenge involves convincing the deliberative group that protestors ought to have the opportunity to participate in formal deliberations where their arguments will be fully evaluated along with other public reasons. The merit of protestors’ arguments is not the primary focus of the deliberative exchanges in protest-as-deliberation. The substantive evaluation of these reasons will come later when protestors re-enter the deliberative group. While this two-stage method is, I argue, the best normative approach to conceptualizing protest in deliberative democracy, a partial evaluation of protestors’ arguments at this stage of the deliberative process does raise some pressing questions.

The two main questions that arise here implicate the relationship between the formal and informal spaces of deliberation that Deveaux addresses. When we revisit CWT and examine how their agreement plays out in the informal sphere it is clear that we need to do more work to establish what kinds of substantive issues deliberants ought to deal with in formal spaces of deliberation and
what kinds of issues we can leave to later informal deliberations. The agreement that CWT’s deliberants reached about sex education policy brings up this first question. As my analysis will show, broadstroke agreement on controversial issues is not sufficient to address issues of effective inclusion and efficacy that are caught up in the details of particular policy issues. My discussion of the way that groups reintroduce conflict in the implementation of CWT’s sex education policy is important if we want to take Deveaux’s arguments for framing conflict in political and not moral terms seriously. Unless we do more normative work on the relationship between formal and informal spaces of deliberation, I argue that we cannot take advantage of the benefits of the explicitly political approach that Deveaux advocates and which CWT’s deliberants tried to follow.

The second issue that emerges in this re-examination of CWT’s policy implications deals with contestation over the issues and public reasons themselves. When we look at the specifics of the broadstroke agreement, some of the contentions that arise later on deal less with the appropriate space for decision-making but rather challenge the specifics of arguments that concerned parties raise. As I argue that this initial (formal sphere) agreement was possible in CWT because of tacit agreements about the ways that participants would carve out public space I return to my earlier discussions of the democratic construction of public space that is necessary in order to make protest-as-deliberation work. I focus on some of the particular ways that CWT’s agreement breaks down when we challenge these spatial boundaries and I return to Deveaux’s discussion of the democratic work that needs to happen in the public sphere if deliberative democracy is able to address conflict without neglecting minority groups. Again, this question implicates the relationship between formal and informal spaces of deliberation and, after I sharpen the specific problem, I will return to the larger question of the appropriate scope of deliberations in terms of the deliberative group’s ability to address conflict in normatively productive ways.

As I discussed in Chapter 5, the unanimous statement that CWT’s participants produced concedes ground to each side. Conservative members of the group have the wording necessary to
block what they deem to be sexually explicit material from sex education curricula and to significantly curtail the content of sex education classes. At the same time, AIDS activists can still tailor safe sex information to particular audiences so that sexually explicit safe sex material is still “appropriate” in areas where gay men meet, in significant numbers, to engage in sexual activity (gay bars, pride events, etc). Agreement on the statement was possible because of a tacit agreement to share control over public spaces. When we take a closer look at what this larger space entails and who it involves, however, problems arise because these spaces that participants carved out during negotiations bleed into each other when it comes time for people to implement the policies.

6.3.1.1 Issue one: accommodation, exclusion, and public school curricula

CWT's statement has deliberately ambiguous wording. The second half of the statement focuses upon sex education curricula in public schools, but it does so in a way that avoids mentioning sex education. The wording itself states that “For communities that include members with a range of moral perspectives, HIV prevention methods need to be appropriate to that range of moral perspectives by presenting multiple prevention messages.” “Prevention messages” logically extends to sex education, but given that the issue is so controversial the deliberants kept this out of the statement even though this is clearly one of the key points that the group negotiated. Once we accept sex education as the unspoken motivation for this part of the statement we can see what the vague wording tries to accomplish. Moreover, we can see why this way of balancing formal and informal deliberation fails to successfully address conflict. The difficulties that CWT faced trying to accomplish this particular goal tell us why the wording had to be so vague, why it does not satisfy their stated goals, and why trying to resolve disagreement in formal deliberations is problematic if we begin and end our discussion of deliberations in the deliberative group.

The wording of the statement appeals to both parents and students who disagree upon the “appropriateness” of sex education. This disagreement plays out in public schools, otherwise known here as “communities that include members with a range of moral perspectives.” In this community there are students, both straight and gay, who are sexually active and want safe sex education and access to prophylactics. There are also students who explicitly reject premarital and same-sex sex and who do so on moral grounds. To further complicate this, students have parents or guardians who argue that they – not the students – are the ones who ought to consent to the kinds of information that their children receive. The statement, then, manages to encompass multiple audiences with conflicting perspectives on how school boards ought to approach the issue of sex education. While this agreement is important in terms of CWT’s ability to reach a collective decision on an important and deeply divisive topic, the way that it does this raises additional concerns of effective inclusion when it is time to implement the general policy.

The prescriptive (if such a vague assertion can be understood as prescriptive) part of this statement leaves a great deal of room for interpretation. There is nothing in the wording to elaborate upon what kinds of prevention messages are “appropriate”; the only guidance that the statement offers is the similarly vague assertion that school boards ought to deal with multiple audiences by “presenting multiple prevention messages.” Two main ambiguities influence the way that we can read this statement. First, it is unclear how we ought to read what is “appropriate” within the context of the broad community that the policy impacts. Is appropriateness limited to the fact of presenting more than one prevention message (and not necessarily the ways that people present these messages)? If so, then there appeals to be significant room for both restrictive and properly inclusive types of sex education. Second, it is unclear who decides what is appropriate. Is “appropriate” something that school boards need to determine before they decide what kinds of prevention messages they can offer – even if it is in a tailored way – to the “range of perspectives” within the

---

445 Forester acknowledges that the subtext of CWT’s statement covers fundamentalist Christian objections to
school? If this is the case then there is considerable scope for school boards to define appropriateness in very different ways (and to be influenced in their particular definitions by the lobbying tactics of various concerned groups).

If what people consider “appropriate” within the school community depends, in large part, upon who will be receiving (specific) sex education messages and what kinds of pressure school boards receive from the community then there are several different ways that school boards can deal with this. And, indeed, there are several different ways that school boards have historically dealt with this issue. One way of dealing with multiple demands and objections is to allow students to opt-out of sex education classes. Whether or not schools require parental consent or allow opt-out clauses in sex education classes or condom distribution plans depends upon decisions that are made by school boards (within the confines of what the State allows). These decisions frequently encounter challenges, both in terms of public pressure and via the legal system. In the state of New York, parental consent is necessary if the matter concerns a health service; if a program is health related, however, the requirement changes and the school can avoid the question of parental consent. The definitions of what constitutes a heath service and what does not leaves the issue of parental opt-outs vulnerable to attack from both advocates and opponents of sex education and condom distribution plans. In the meantime, the rights of students to receive safe sex education and tools remain vulnerable to the outcome of negotiations that take place between parents, activists, school board officials, and lawyers.


In addition to concerns over definitions of “appropriateness”, deliberative theorists should also be concerned with CWT’s treatment of moral perspectives. The particular way that CWT incorporates this into the statement that will influence school policy presumes that school boards, at the very least, need to be conscious that sex education is a moral issue for some. The particular wording of the statement does not specifically deem sex education itself to be a moral issue; rather, it acknowledges that some people interpret it as one. At the same time the admission, however tempered, that sex education has a moral element, means that it will be difficult for the school board to avoid engaging in a discussion of the curricula without addressing the morality of sex education. If this happens, then there is a good chance that the issue itself will be framed as a moral one. When sex education is framed in this way the school board opens the door to opt outs, parental consent forms, and the curtailing of particular elements of sex education classes, all of which are distinctly at odds with AIDS activists’ goals. This kind of reframing is likely to meet significant opposition and strong disagreement of exactly the kind that CWT attempted to avoid; as such, it should prompt us to question the value of CWT’s deliberations.

Leaving the implementation of particular policies to groups outside formal deliberative spaces is not a good decision in the case of school curricula. Different schools may implement a general policy in very different ways. This unevenness is not in the best interests of students or of HIV prevention efforts and is likely to meet considerable resistance. Shifting the jurisdiction of the debate from federal or state-wide decisions to particular schools is inappropriate. When we take into account the types of issues that arise when there is deep disagreement over sex education

---

448 There is no consistent sex education policy in the US. Sex education is not a requirement in many states and policies differ between school districts. Even though New York City was the first school system in the country to make condoms available to students, sex education is still not a requirement that state, although a discussion of HIV/AIDS is mandatory. Youth Education Life Line (YELL), an affinity group within ACT UP with a special focus on AIDS education, conducted a survey of New York City schools to see if area schools were complying with the mandates of the existing AIDS curriculum. The data that YELL collected in the 1997 survey found that only 10% of the students has received the required six classes and that 39% did not recall being offered any AIDS education. YELL then presented this information juxtaposed with the Board of Education’s report that there was only one school out of compliance with AIDS education mandates and were
curricula it is clear that leaving substantive details of public policy to these smaller bodies can lead to uneven (and normatively problematic) results. The debate that will take place in and around schools is likely to be about 1) the morality of sex, and 2) parental versus children’s rights. Given these framings, it is unwise to leave what clearly extends beyond a matter of implementation to small and often fragmented spheres.

Parental objections to schools “forcing” “morally objectionable” sex education onto their children raises important questions of autonomy and the roles that the state and parents/guardians should play in mediating minors’ exposure to information (and, ultimately, deciding what is “best” for them). Significantly, the debate that occurs about parental versus children’s rights is itself a matter of what we think ought to be public and private. In the case of minors, parents/guardians must contend with the state. Here the former claims that they have the right to raise their children as they see fit (and therefore ought to be able to limit the values that their children are taught) and the latter, as a semi-public institution, asserts a responsibility to children (and argues that they should be able to provide them with the education that is necessary so that they can make well-informed decisions as they grow older). This additional layer of public/private contestation brings us back to the construction of public space and to protest-as-deliberation.

When there is disagreement over particular sex education curricula it is likely that people who object to policy interpretation and implementation will continue to challenge the decision. As they do so, it is also likely that protestors will make use of public space to continue debate on the school/ school board’s decision. When sex education curricula does not include sufficient information on safe sex, AIDS activists have been known to challenge the policy at the schools in question. In some cases, AIDS activists will set up a parallel space for sex education in which they assemble outside schools – close to the building but not on school property – and distribute safe sex information and prophylactics that they argue ought to be made available inside the school. For the

thus able to assert that their concerns about the quality of AIDS education in New York City were justified.
most part, when activists oppose limited sex-education policies they meet little resistance provided
that they keep their direct actions out of the schools themselves (and out of school-related arenas, such as the town hall meetings where AIDS activists, including students, have been arrested\(^{449}\)). Although activists’ presence might in turn bring a police presence, protestors are typically allowed to engage in direct action and protest (distributing prophylactics and safe sex information and pushing for changes in the curricula) without being asked to leave.\(^{450}\) These protests are highly visible (activists will bring posters, such as the *Kissing Doesn’t Kill* one, to announce their presence and to communicate some of their arguments), and as such they allow protestors to reach a large number of one of their target audiences. Acceptance of their presence, however, relies upon more than whether or not activists distribute material on public space. The type of information that activists distribute and the means that they use to do this are also relevant. If activists were, for example, to distribute clean syringes outside public schools (perhaps in response to school’s discussions, or lack thereof, on drug awareness and prevention), then the response would be significantly different.

These protestors’ assertions of students’ rights to receive sex education (and, at the root of this, the objection to who ought to make this decision) is also a critique about a particular conception of public education that denies students access to information and resources that treat them as people capable of making informed decisions. There are two lessons that we can draw from this closer look at implementing a sex education policy on the basis of CWT’s guidelines. First, deliberative theorists cannot rely upon informal deliberations as much as CWT’s deliberants were asked to do. The ways that the debate over public and private space plays out in the case of sex

\(^{449}\) http://www.actupny.org/YELL/laughteraction.html

education policies in public schools should caution us against supporting a conception of deliberative democracy that accepts the types of “agreement” that CWT’s participants drafted. Informal deliberation about the particulars of the (very loosely defined) policy is clearly not the best solution in this case. The issues that arise when the people affected by the policy try to work out the details are the kinds of big issues that formal deliberations are meant to address. Debates over public versus private space and parental rights versus children’s rights versus the state’s rights are not, by any stretch, issues of implementation. Rather, they are the kinds of substantive issues that warrant thorough deliberation in a forum that is capable of evaluating the merit of the various parties’ competing public reasons.

Second, the way that we categorize public space matters. The protests that AIDS activists staged outside public schools can affect both future decisions of school boards and can also appeal directly to the students themselves. Beyond the fact that protest may be necessary when decisions are improperly relegated to informal or small-scale bodies, the impact of AIDS activists in this case tells us something important about deliberative democracy’s response to protestors. If we want a deliberative democratic theory that has an effective safeguard against exclusion, then we need to remember that the effectiveness of protestors’ actions was due in large part to their location and what protestors were able to do there. Without this kind of direct and highly visible contestation directly outside public schools, existing policies are likely to continue relatively unchallenged.

6.3.1.2 Issue two: “the public” and targeted exclusions

The first half of CWT’s statement urges that “there is a need to remove moral objections to HIV prevention and education that is appropriate to the behaviours of the target community.” This part of the proposal was, despite its own general and open-to-interpretation language, designed to satisfy AIDS activists and to provide a counterpoint to the rest of the statement that gives conservative forces room to restrict sex education classes.
The assertion that there is a need to “remove moral objections” was necessary in order to ensure that AIDS activists had access to particular spaces that they needed in order to continue their HIV prevention work. This particular framing ensures that people will be able to engage in effective HIV prevention and education work. When the language of morality enters into the debate it is, as Deveaux notes, much harder for deliberants to reach agreement. This was the case in CWT’s formal deliberations and it provides the motivation to remove the question of morality for (some of) the implementation work that remains. Another reason to remove moral objections is due to the fact that approaching issues in terms of morals obscures the power relations that are at work. Although the practical approach that activists put forth is necessary to reduce HIV transmission in high-risk populations, and was accepted as a public reason and a general fact on these grounds in CWT’s talks, there was an additional motivation for agreement on this practical approach. The agreement, I argue, came about because of the way that AIDS activists and conservatives agreed to approach public space. In many ways, the question of morality receded into the background not because deliberants no longer wanted to address the moral issues that (some argue) arise in HIV education and prevention, but because deliberants were able, through an agreement, to divide public space into different sections, and to defer the issue of morality to later questions of application in smaller, informal deliberations.

The wording of this first part of CWT’s statement asserts that we ought to remove moral objections in “the target community.” As I discussed above, CWT’s deliberants did not agree upon the desirability of eliminating the language of morality from their policy statement. The extent to which morality ought to play a role is deliberately vague in the section that speaks to sex education in public schools, but the fact that it is something that the school boards need to acknowledge and

---

452 Deveaux, Gender and Justice in Multicultural Liberal States, p.15.
accommodate (through the “multiple prevention messages” that are necessary to “include members with a range of moral perspectives”) tells us that morality does play a role in the way that people frame discussions and that deliberants are unwilling to abandon this altogether.

Given the deep disagreements that exist between AIDS activists and conservatives, this decision makes sense. Instead of agreeing upon the specific role that morality ought (or ought not) to play – as Deveaux does – the easier approach for CWT was to assign the role of morality to a grey space that either side can apply or ignore as they choose. This approach, combined with the way that the two groups agreed to carve up public space, explains why conservatives are willing to remove moral objections in some cases. It is a lot easier for conservatives to cede ground where the likely “target community” sites are ones that they, and the majority of the rest of society, can avoid. The dissimilarities between the application of a state-wide sex education policy and the nods to target community exceptions are clear; the first is a policy that directly affects all public-schooled children and their families, while the second is one that speaks to subaltern spaces such as gay bars and pride events and which, as a result, can effectively be sanctioned off as quasi-public spaces.

One particularly telling illustration of this kind of approach to public space occurred in Australia over posters that the Victorian AIDS Council (VAN) distributed as part of an HIV/AIDS campaign. The council targeted a series of posters specifically to a target audience of “party-going, recreational drug-using, sexually active gay men.” The council was aware that their posters could “be explicit in a way television advertisements could not be, since their distribution has been mostly confined to gay venues and gay publications where discussion of sexuality is not a problem and is not subject to conventional moral views or notions of propriety.” As a result of this freedom, the group commissioned a poster “You’ll never Forget the Feeling of Safe Sex” (1985), which depicted a

naked man in bed, in order to eroticise safe sex messages. The eroticisation was, the council argued, important as a “prerequisite” for messages that they could reasonably expect their target audience to listen to. As David McDiarmid, the poster’s artist, asserted in “a safe sex promotion there isn’t room for ambiguity. Your message has to be crystal clear.” In a similar vein, the AIDS Council ACT (also an Australian group), issued an AIDS education poster “Fuck Safe Shoot Clean” (1993) that carried the title’s text and pictured two men kissing. This poster was also designed for a specific target community and for “distribution to gay venues and the adornment of private gay spaces.”

The success of these two posters and, importantly, their lack of opposition, stands in contrast to the reactions that occur when less graphic posters enter the public arena. VAN encountered a backlash when another poster that they commissioned – this time one that pictured two fully clothed men kissing and which carried the text “When You Say Yes – Say Yes to Safe Sex” (1990) – resulted in considerable public outcry. Another poster (this time by an AIDS Council of New South Wales) that pictured “two men in implied sexual poses” was ruled obscene by the Queensland literature review board.

In this part of CWT’s statement, the language instructs us that we are removing moral objections. The logical assumption to draw from this assertion is that these moral objections play a significant role in the ways that people structure their discussions of policy “application” in informal spheres of deliberation. These spheres do much more than apply criteria. Here people, without the monitoring of formal deliberative groups, determine the types of reasons that will carry weight and those that will not. The fact that morality does play a role in the application of CWT’s policy is of particular significance since deliberants are expected to determine the specifics of a policy in an informal realm of deliberation where it is unlikely that people will (as they would in formal deliberations) question the assumptions that guide deliberations themselves. Australia’s safe sex

---

poster examples illustrate that CWT’s way of approaching the issue of morality – that is, to avoid addressing it in formal deliberations but to assume that people with opposing moral beliefs will find their “own” spaces to act according to their beliefs – presupposes the availability of “safe” (assigned) spaces. The tacit agreement to carve up public space reveals yet another problem in the ways that we conceive of public space; if formal deliberative groups are able to effectively move a discussion of morality into informal spaces then this makes it more likely that informal practices will perpetuate marginalization and do so with the tacit support of the formal deliberative group. This is something that deliberative theorists need to prevent.

There are two main things that we can take from this issue. One is that deliberants will not be able to escape issues of morality – or, more specifically, the impact that morality will have upon issues that affect people as a collective (and therefore ones that deliberants ought to deal with using public reasons) – unless deliberants directly confront the issues that deliberants will otherwise talk around (and then bring up in practical applications). The other is that deliberations tend to presume a fragmented conception of the public sphere. This is unhelpful insofar as it perpetuates the above problem. These two observations show us why we need to pay attention to the way that we approach the public sphere, and reinforce the need to set out clear guidelines as to what the deliberative group ought to be responsible for and which issues informal deliberative groups can address. This needs to occur without upsetting the requirement that all affected people ought to have a significant role in resolving issues of public concern. The best way to do this is to emphasize the expressly political approach that Deveaux calls for and to make sure that the deliberative group does not try to avoid taking responsibility for issues of public concern by allowing issues that affect everyone (in these cases public health and homophobia) to sneak into a public sphere that allows people to simultaneously avoid and entrench problematic issues. The public sphere that the deliberative polity needs in order for people to engage in protest-as-deliberation must be one that

allows people to keep the deliberative group in check, lest the relationship between formal and informal spheres of deliberation allow issues of public importance to go “missing” in the exchange.

These examples show us that, as it stands, we cannot rely upon deliberation in informal spaces to address some of the larger questions that inevitably re-emerge here when the deliberative group does not offer clear implementation guidelines. This is especially significant when informal spaces are set up to avoid conflict. Whenever informal deliberative spaces engage in what are effectively decision-making practices on issues whose influence extends beyond the scope of these informal groups, then the deliberative group needs to intervene. If the deliberative group fails to do this then, because of the far-reaching impact, this threatens effective inclusion and deliberants’ efficacy. The deliberative group’s intervention should take the form of a willingness to establish more detailed guidelines for the deliberative polity that do not leave room for these kinds of interpretations to happen. This space should be open to contestation and deliberative theorists ought to pay more normative attention to the relationship between formal and informal spaces of deliberation. Constructions of public space are especially important in protest-as-deliberation: there is “public” space and there is public space. Supposedly public space that fragments the polity in a way that frustrates dialogue (as is the case when a multiplicity of informal deliberative groups have the kind of decision-making power that they ought not to have) poses a problem to deliberative democracy. Public contestation means less (in a normative sense) if it is confined to weakly democratic spaces and activities, if informal deliberative groups escape the normative scrutiny of the deliberative group (insofar as they implement the deliberative group’s policies), or if the deliberative group lacks incentive to recognize the challenges that arise in the deliberative polity. In order to make sure that this does not happen we need to set out institutional constraints on the deliberative polity and its relation to the deliberative group. I undertake this task in the concluding chapter when I outline the conceptual changes that protest-as-deliberation requires us to make.
If a theory of deliberative democracy is to offer a normative justification of protest then it must supplement the moral justification with clear procedures that outline how a sustained dialogical exchange between deliberants and protestors is to take place. The account of the deliberative polity that I set out in this chapter details the way that deliberative theorists ought to situate formal and informal spaces of deliberation in relation to each other and draws attention to some of the problems that can arise if the deliberative group tries to avoid conflict.

A theory of protest-as-deliberation can only offer a normative account of protest if the deliberative polity functions as a specific kind of contestatory democratic space. It is not enough for the deliberative group just to have a space that is available for people (protestors) to contest problems with the way that the deliberative group evaluates public reasons; the form that this space takes is of fundamental importance. It is important the people in the deliberative polity have the resources that they need to engage with deliberants in an effective way. These include both the dialogical tools that are necessary for protestors to reframe their arguments in a way that allows them to capture the deliberative group’s attention and to make them reconsider their initial judgment of protestor’s claims, and it also requires that people have access to the physical space that protestors need as a platform if they are to do this. My focus upon protest art and the way that it allows protestors access to places and audiences that would otherwise be unavailable, as well as the power that art has as a mode of persuasion, offers insight into some of the ways that protestors can engage in productive exchanges with the deliberative group. Additionally, art allows people to engage in a form of alternative political communication that, by virtue of the medium’s ability to combine argument and emotion, is more inclusive of a wider range of people and as such makes an important contribution to the inclusive capacity of deliberative democracy and to the efficacy of deliberants and protestors.

The alternative political communication that we see in protest art is particularly useful to a theory of protest-as-deliberation when we combine this potential for effective engagement with a
specific look at the space in which it occurs. As I note in my discussion of protest art, art itself challenges public space and uses it in a variety of ways in order to appeal to different audiences and to raise different questions. These lessons, particularly when we combine them with democratic theorist’s work on public space, offer important insights for the kind of deliberative space that a theory of protest-as-deliberation needs. It is not enough to have contestation between the deliberative polity and the deliberative group. In order for the deliberative exchange to accomplish what we need it to, the deliberative polity itself must allow for (and encourage) contestation within the deliberative polity in the public sphere. This kind of contestation should continually challenge definitions of what counts as public, who defines this, and what recourses people have in order to access public spaces and to make use of them in ways that allow them to engage with others.

The concerns that I note when I revisit CWT illustrate some of the problems that arise when deliberative democrats do not pay sufficient normative attention to the public sphere. The extent to which agreement in formal deliberative groups can be undermined by the application of policies in fragmented sections of the public sphere point to the need for deliberative theory to set out a stronger conceptual account of the relationship between formal and informal deliberative groups. This account should limit the ways that the deliberative group can rely upon informal deliberations to resolve difficult issues. Informal spaces are, of course, important, but it is the dialogue between the two, as well as the subsequent ability for the deliberative group to evaluate the wider range of public reasons that protestors bring back to the deliberative group, that results in increased deliberative legitimacy. This dialogue is only productive insofar as it is effectively inclusive (that is, that all people have access to it, the spaces that it occurs in, and the means necessary to make their voices heard), and insofar as neither people in the deliberative group or the deliberative polity try to circumvent the deliberative group as a legitimate decision-making body.
Chapter 7

CONCLUSION

There is considerable support for the deliberative turn in democratic politics because of the rich account of legitimacy that deliberative processes offer. The requirements of reason-giving and justification do a considerable amount of work insofar as they facilitate the effective inclusion of differently-situated people, increase their efficacy, and deal with social pluralism in a productive way.

The only surprising thing about this increasing support for a deliberative theory of democracy is the considerable lack of attention that theorists pay to protest. Deliberative democracy, after all, is still part of a larger democratic theory where normative justifications of civil disobedience abound and where people widely acknowledge the important ways that these justifications enrich democracy, particularly in terms of strengthening effective inclusion and efficacy.

The normative case that I make for a theory of protest-as-deliberation fills a gap in deliberative democratic theory. Protest-as-deliberation works as a safeguard for deliberative theory when deliberants are unable to give people’s reasons the weight that they deserve and when deliberants who suffer the brunt of this leave the deliberative group in (justified) protest. Since deliberative legitimacy depends upon the ability of the deliberative group to effectively include all affected deliberants, and to make sure that this inclusion is of a sufficiently rich kind that takes deliberants’ efficacy seriously, expanding our conception of deliberative theory so that it takes place within a larger deliberative polity and so that deliberants can engage with protestors is necessary if deliberative democratic theory wishes to live up to its ideals.

The normative justification for protest-as-deliberation has two implications. First, the deliberative group does not have an obligation to exchange reasons with people who clearly violate the basic principles of deliberative democracy. Deliberants would not suffer any loss of legitimacy if
they were to refuse to address white supremacist arguments. The second implication, since the aim of protest-as-deliberation is to try to make sure that everyone can exchange reasons within the deliberative group, is that a full evaluation of reasons can only occur in the deliberative group where other deliberants will offer reasons that challenge protestors and where people can monitor this exchange and ensure that it meets the procedural and substantive requirements. In terms of practical implications, this means that the arguments that protestors bring to the deliberative group from the deliberative polity will face further evaluation beyond that which protest-as-deliberation requires. This takes a significant amount of pressure off protest-as-deliberation. It is not the role of the deliberative polity to make absolutely sure that the reasons that protestors offer will hold up to the scrutiny of the deliberative group. Protest-as-deliberation’s aim is more modest: to provide a reason to continue to deliberate and, in doing so, to act as a safeguard for the deliberative group. If protest-as-deliberation is to accomplish this then the normative justification of protest must have strong support in a larger conceptual argument that sets out the relationship between the deliberative group and the deliberative polity so that deliberants and protestors will be able to engage in the deliberative exchange that protest-as-deliberation requires with the assurance that their deliberative partners will have good reasons to enter into a dialogue with them and, just as importantly, to make sure that protestors and deliberants have the resources that are necessary to make this exchange happen successfully available to them.

7.1 The conceptual requirements of protest-as-deliberation

The normative justifications for protest-as-deliberation tell us why protestors ought to frame their arguments in terms of the criteria that underlie deliberative democracy and they tell us why those in the deliberative group ought to listen. Instances of the dialogical exchange that protest-as-deliberation requires (as we see in the Kissing Doesn't Kill example) illustrate that the theory itself is

---

[460] Of course, this does not preclude deliberants from responding: they might want to offer a statement for their refusal to engage with them. The point here is that not all protest will have even a prima facie claim to
feasible. However, the Kissing Doesn’t Kill example is, as I note, not strictly speaking a protest action: the sponsors of the On the Road exhibit arranged and financed access to public space. While the installation was controversial in several respects (and contains important elements of dissent), the right of the posters to be in their allocated spaces was only disputed in terms of the content of Gran Fury’s poster and the legal challenge here was overturned shortly after the Illinois State Senate introduced the obstacle. Importantly, On the Road did not have to fight to secure physical space; the location was negotiated and financed before the display arrived and neither Gran Fury nor the other artists had to worry about whether or not they could find or afford a space to display their posters.461

These issues of space and access are of great importance for people who wish to engage in protest-as-deliberation. The process of dialogical exchange is a struggle for legitimacy. Protestors, after all, are trying to convince people in the deliberative group of the significance of their reasons and the deliberative group, while they may be willing to listen, remain sceptical. Since the value of their arguments is in question, protestors need to eliminate further obstacles to their exchange with the deliberative group. Attempts to engage the deliberative group in dialogue ought not to be overly burdensome for protestors otherwise it restricts the deliberative polity’s capacity to act as an effective safeguard. Part of what it means to establish the deliberative polity as a place where deliberation ought to take place is to conceptualize this larger space (in terms of both a location and a process) by unjustified exclusion because the deliberative group does not accept their reasons.

461 The poster was produced by Gran Fury, with members of the group and their friends serving as the models, makeup artists, and the photographer. Gran Fury is well situated to do this because many of its members have a background in creative and commercial arts. Not all protest groups, of course, will have this advantage. Robert Avaszuez-Pacheo, as interviewed by Sarah Schulman. ACT UP Oral History Project. Interview 002, December 2002. p.58. Speaking within an aggregative democratic framework George Yúdice notes that: “given the two complementary systems in which the art world operates – the market (galleries and auction houses tacitly supported by museum practice) and the nonprofit/public foundation overseen by ‘expert’ panels – there is little chance that a truly contestatory art will be funded.” Given this state response to art (and in light of the democratic contributions that art can make) it is especially important that a deliberative democratic society makes space for this kind of contestatory art. “For a Practical Aesthetics.” In Bruce Robbins, ed. The Phantom Public Sphere (Minneapolis: University of Minnesota Press, 1993), p.216.
developing criteria that outline the process of protest-as-deliberation. Without these protestors and deliberants may not have the tools that they need to communicate effectively.\footnote{Indeed even aggregative democracies, which do not have the same predisposition as deliberative democracies to reject dissent, do not do enough to protect and promote dissent. Steven H. Shiffrin. \textit{Dissent, Injustice and the Meaning of America}. (Princeton: Princeton University Press, 1999), p.97.}

Many of the critiques that I outline in Chapter 6 – the relationship between civil society and the state, the democratic potential of art, inclusive political communication, formal and informal deliberations – stress the important role that particular framings of institutions and relationships play in terms of promoting democratic engagement and legitimacy. The types of constraints that we place upon processes and institutions in these areas influence our expectations and the kinds of results that we can realistically expect to see. We see this with the kind of civil society that different democratic societies can expect, with Young’s two amendments that contribute to her theory of communicative democracy, and with CWT – both in terms of the success of formal deliberations and with the after-the-fact implementation of these issues. This is, unsurprisingly, also the case with protest-as-deliberation. Because it depends upon public space, protest-as-deliberation has a special interest in the type of civil society that flourishes and, consequently, has a special interest in the way that the deliberative group responds (conceptually and practically) to the ways that people construct and use public space. I will draw from these earlier critiques and suggest a series of conceptual changes that deliberative theorists should push for in order to ensure that protestors will be able to confront state power (as it occurs in the deliberative group), and that also enable (and encourage) the deliberative group to respond to this engagement.

The conceptual support that I offer begins with the normative case for protest-as-deliberation. As I show in my discussions of Smith and Dupuis-Déri, protestors’ normative appeals to deliberative democracy are compelling. As I also show, however, these appeals on their own are insufficient to sustain the necessary dialogue between protestors and the deliberative group. Maintaining the balance between confronting deliberative groups and trying to reshape the terms of
discourse within the group so that protestors can, if they choose to do so, re-enter (on their own terms) is a difficult task. Many practical problems stand in the way of protestors’ ability to engage the deliberative group in a way that is both feasible for marginalized groups who already encounter problems communicating their reasons, and that fits in with people’s conceptions of the types of activities that are legitimate and ought to be taken seriously (or at the very least not dismissed outright for what is deemed to be a “poor location” or otherwise regrettable strategy). Accepted modes of speaking, widely-accepted beliefs about the “best” standards and practices, beliefs (and laws) about the distinctions between public, private, and corporate space all work to keep protestors “in their place” and can stall the effect of moral pleas for the deliberative inclusion of protest. In order to address these obstacles it is necessary to set out a series of amendments that deliberative theory ought to make to deliberative institutions. These amendments are meant to do two things. First, in order to address many of the problems that protestors encounter in terms of being taken seriously by the deliberative group, we need to do more to connect the normative justification for protest-as-deliberation with the motivation for both deliberants and protestors to engage in a dialogue with each other. As Melissa Williams notes, there are two main motivators for the deliberative group to include marginalized groups: “the desire to be just, or at least be able to justify one’s position to others” and “the need to stem conflict in order to avoid its costs.” These motivations also make sense in terms of the deliberative group’s motivation to engage with protestors. Once we establish that there is a compelling normative argument for deliberative theorists to establish a safeguard that accounts for protest, then there is considerable normative pressure on the deliberative group to engage in a sustained dialogue with protestors. When we frame it this way – that is, when we situate the claim in terms of a requirement of deliberative democratic theory – it becomes increasingly harder for deliberants to dismiss protestors. Refusals to engage with

protestors who challenge the deliberative group’s effective exclusions and lack of efficacy reflect poorly on the deliberative group and throw deliberative legitimacy into question. Additionally, if the deliberative group wants to protect itself against serious challenges and to avoid more seriously disruptive acts of protest, then this provides a very practical reason for the deliberative group to listen to protestors’ arguments.

Protestors also have a motivation to engage in protest-as-deliberation. This specific kind of engagement allows protestors, when we take into account the way that the deliberative group changes its response to protest, to play a more effective role. If the goal is to persuade the deliberative group to alter the deliberative agenda and/or the decision, then protest-as-deliberation makes it more likely that protestors will be able to persuade deliberants. The legitimacy that protest-as-deliberation extends to people who challenge the inclusive capacity of the deliberative group and their efficacy within it means that protestors can focus their energy upon the persuasiveness of their arguments instead of exerting most of their energy trying to make the case that the deliberative group ought to listen to them. This motivation is contingent upon two factors: the mechanisms that are in place to prevent co-optation (which I will discuss shortly), and, relatedly, the fact that protest-as-deliberation is not the only kind of protest that is available to those who object to the deliberative group.

The justification of protest-as-deliberation limits the arguments that protestors can make and the ways that they can pursue their claims. Protestors must refrain from protest actions that cause, or threaten people with, physical harm. Apart from these normative constraints, protestors are free to act in ways that the deliberative group does not (yet) condone and, indeed, their success will often depend upon this; persuasion, after all, benefits from the tools that are (newly) available to protestors outside the deliberative group. As a result, taking the normative argument for protest-as-deliberation seriously means that deliberative democracy ought to make a series of conceptual changes that deal
with the ways that protestors can speak with deliberants and the fora that are available for this dialogue.

7.1.1 Ways of Speaking: Discourse in Protest-as-Deliberation

The amendments that Young makes to deliberative democracy have important implications for theories of deliberative democracy. As I discussed in Chapter 2, Young’s argument that deliberative democrats ought to reframe their criteria of reason-giving to include an inclusive form of political communication and to treat difference as a resource go a considerable way to make deliberations more effectively inclusive and to increase people’s efficacy. Young takes her normative arguments and, in the way that she presents them, suggests practical ways that deliberants can effect these changes in actual deliberations. Greeting, rhetoric, and narrative, although normatively inspired, also have a practical basis. The deliberative group reconceptualizes the requirements of deliberants’ participation emphasizing the different ways that deliberants can present their reasons at the outset and requiring that mediators enforce a process that upholds these ways of participation – to make sure that deliberants take these normative changes seriously.

Persuasion plays a crucial role in protestors’ success. As I discussed in Chapter 6 when I look at Garsten’s argument, the requirement that deliberants use judgement (instead of justification) draws attention to the power structures that are in place and that work to unfairly limit the efficacy of marginalized people in deliberations. A theory of deliberative democracy that includes protest-as-deliberation ought to do more to encourage persuasion both in the deliberative group (where it supports an expansive scope of deliberative criteria of reason-giving) and in the deliberative polity. An emphasis upon persuasion and the recognition that judgement is important if we are to take democratic decision-making seriously supports the kind of alternative political communication that, I argue, we ought to support in the deliberative polity. In order to engage in persuasion effectively, protestors ought to have more freedom than deliberants when it comes to the role of discourse and the ways that they can re-present their claims in the deliberative polity (freedom that also protects
against their co-optation). As I argue in Chapter 4, protest-as-deliberation ought to draw upon the
amendments that communicative democracy makes and we ought to expand our conception of
inclusive political communication to include alternative political communication. Practically
speaking, this means that in protest-as-deliberation protestors will have dialogical tools that are
unavailable to people in the deliberative group. Alternative political communication that includes art
and draws from emotion serves a similar function as greeting, rhetoric, and narrative do in the
deliberative group, and allows protestors to communicate their reasons in different, more persuasive,
ways.

The conceptual changes that we need to make to deliberative democracy all depend upon the
deliberative polity, the establishment of which is the largest and most important conceptual change
that deliberative theory needs to make. Making the deliberative polity a part of deliberative theory
and practice requires a series of smaller conceptual changes to ensure that the appropriate links and
constraints are in place. In the following section I look at the new deliberative fora and at the
conceptual and practical steps that deliberative theory can take to make sure that a viable form of
alternative political communication is available to protestors.

7.1.2 Deliberative Fora
In Chapter 4 I revisit the normative criteria of deliberative democracy that Young sets out in order to
show that protestors can meet them. Protestors’ ability to do this is important, but equally so are the
corresponding conceptual changes that we need to make so that protestors will not face practical
barriers to the dialogue that they try to establish with the deliberative group. All four changes that
correspond to these normative deliberative criteria deal, in one way or another, with the available
forums of deliberation.

1) Protestors should propose solutions to collective problems and offer reasons for them
This requirement assumes that the deliberative group will listen to these reasons and, when they determine whether or not protestors meet this criterion, evaluate them in at least a preliminary way. Practically speaking, protestors can meet this criterion if deliberative theory adopts the approach to the deliberative exchange of reasons that I set out in Chapter 5. Having one overarching normative standard for the exchange of reason-giving and two institutional applications of these criteria allows protestors the space (outside of and in opposition to the deliberative group) that they need in order to represent their claims in a more persuasive way. Thinking of deliberative criteria of reason-giving in this way also addresses concerns that deliberants have about the danger of unmonitored claims, and this variegated approach allows deliberants to think of protestors as at least potentially reasonable.

**ii) Protestors should criticize proposals and remain open to criticism**

To do this protestors need access to public space. This public space must be outside of and in opposition to the deliberative group if protestors are to meet this criterion without being co-opted. The deliberative polity allows the deliberative group to engage with protestors without co-opting them because the clear separation between the deliberative group and the deliberative polity (unlike the inclusive deliberative settings that Young calls for) both underscores the opposition to the deliberative group (an opposition that protestors can only really communicate when they are not deliberating as an ad-hoc group that falls within the deliberative group’s jurisdiction) and forces deliberative theorists to address the different ways that people can use dialogue and public space in order to engage in this critical dialogue.

**iii) Protestors should bracket the influence of unequal power**

This requirement relates to the need to monitor the claims that deliberants make. The normative argument for deliberants to engage with protestors follows from protestors’ appeal to normative deliberative criteria and the two-stage process of evaluation (that results from the two institutional accounts of deliberative criteria of reason-giving). In order to convince deliberants that their claims
belong in the deliberative group, protest-as-deliberation encourages protestors to frame their reasons as ones that treat all people as equals and, as such, as ones that are deserving of respect (and inclusion). The public way that protestors go about presenting their claims in the deliberative group further encourages the kind of transparency that is compatible with bracketing unequal power. In the second stage of evaluation the deliberative group can monitor protestors’ reasons to ensure that they do treat people as equals, and protestors can, in turn, hold deliberants accountable for the effective exclusions, power imbalances, and lack of efficacy that led them to leave the deliberative group in the first place.

**iv) Deliberants should bring all potentially affected people together to make decisions**

This final criterion, while deliberative democrats typically use it as an argument not to engage with protestors is, instead, a criterion that we can only meet if we set up a safeguard in deliberative democracy that requires deliberants to engage with protestors. This criterion, if we take effective exclusions seriously, requires a richly inclusive theory of deliberative democracy to conceptualize the deliberative polity as the larger space where we can actually bring all potentially affected people (including protestors) together. The decision-making part of this criterion still occurs in the deliberative group, but it does so only after taking the “potentially affected” part seriously by implementing protest-as-deliberation as a safeguard.

In order to make the deliberative polity a space in which deliberants and protestors can engage in a sustained dialogue without undue obstacles, protestors ought to have greater access to physical space than they currently do. Part of what it means to reconceptualize public space in a way that deepens its democratic potential means rethinking the forums that are available to people who wish to communicate their claims to the deliberative group. In order to engage with the deliberative group, protestors must be able to make better use of public space. This requires us to take a more expansive view toward the availability of billboards and in terms of the polity’s responses to graffiti, posters, non-violent occupations, public art, etc. When deliberative democrats reconceptualize the
nature and scope of deliberation in this way, the deliberative polity becomes more than an expansion of deliberative space: it changes the nature of the space itself. If deliberative theorists are to take effective exclusions and marginalized people’s lack of efficacy seriously and if we wish to remedy this by adopting protest-as-deliberation as a safeguard, then the access to space that protestors have must also come with greater legal rights. Conceptual responses to public, private, and corporate space ought to be rethought so that protestors have a real opportunity to use public space to communicate with deliberants. This means, for example, that guerrilla protest art ought not to receive the kind of criminal prosecution that it currently does. Deliberative theorists should support movements that reclaim public space both by a general attitudinal shift that sees public art as an activity that makes an important (deliberative) democratic contribution and therefore as something that should be encouraged, not suppressed, and, second, by revisiting zoning bylaws that address this particular use of space. A combination of increased social acceptance of this public use of space along with a new legal approach would encourage protest-as-deliberation and the context that is necessary if it is to flourish. This kind of reclamation is already a significant part of mural movements. Mike Rios’s painted his mural *Homenaje a Frida Kahlo* on a commercial billboard in San Francisco’s Mission district to coincide with Frida Kahlo’s exhibit at the nearby Galería de la Raza. For two years, the owners of the billboard competed with artists and political activists as the messages changed between commercial and artistic/political until the owners “gave up and donated the billboard to Galería de la Raza.”

This example shows the persistence of public artists and activists, but we cannot rely upon property owners to cede space in this way. The deliberative group, as part of a larger effort to address positional pluralism and to rectify structural obstacles, ought to ensure that protestors can, despite their economic position, access the space that other people can afford to purchase.

---

The deliberative democratic defence of protest that I develop relies upon a series of conceptual changes that are meant to ensure the following things: that deliberants cannot ignore the moral plea to account for protest, that protestors have the tools and the kind of space that is necessary to communicate their reasons in an effective way and without encountering co-optation, and that regulate the relationship between the deliberative polity and the deliberative group (and, in doing so, offer a better account of the ways that deliberants can use public reasons to evaluate people’s arguments and to reach legitimate deliberative decisions). These conceptual changes are missing in other deliberative theorists’ discussions of protest. The changes that I propose work to give practical instruction to what protestors need in order to contribute to deliberative legitimacy, and they also satisfy significant concerns that deliberative democrats have about the normative contribution that protest can actually make given the necessary deliberative requirements of reciprocity and mutual justification.

There are, of course, remaining challenges for deliberative theory. As I discuss protest there are, broadly-speaking, two main types: 1) protest that deliberative democracy needs to be able to engage with in a theory of protest-as-deliberation if it is to satisfy its own normative criteria (legitimate protest), and 2) protest that, whether it is through the particular arguments that protestors offer, or because of the violent methods that protestors use to communicate their arguments, undermines normative criteria and does not obligate deliberative accommodation (illegitimate protest). This distinction is an important one because the democratic justification for protest requires that protestors appeal to the same foundational normative arguments that democratic majorities do; at the same time, however, this classification does not capture the entire story. There is room for a significant amount of disagreement within what I classify as legitimate protest. My reason for classifying some protest as legitimate is to demonstrate that these kinds of protest actions are reasonable and do not undermine the normative criteria of deliberative democracy. The purpose of protest-as-deliberation is primarily to address deficiencies in deliberative democracy’s legitimacy.
that occur when the deliberative group effectively excludes people and when deliberative processes limit people’s efficacy. Protest-as-deliberation does this by creating the deliberative polity as a space where protestors can reframe their arguments and re-present them to the deliberative group in a more persuasive way. The aim in doing this – from the standpoint of deliberative legitimacy – is to strengthen marginalized people’s efficacy vis-à-vis other deliberants and to secure a richer kind of deliberative inclusion. During this re-entry process protestors benefit from the deliberative polity and the reconceptualized deliberative requirements that are necessary to secure an effective exchange between the deliberative group and the deliberative polity. The dialogical benefits of protest-as-deliberation are useful for all protestors – those who want to enter or re-enter the deliberative group and those who wish to remain outside.

Not all protestors will want to re-enter the deliberative group, and protestors who fall into this category may engage in both legitimate and illegitimate kinds of protest. Protestors who fall under my broad category of “legitimate” protest may offer arguments and methods that are in line with normative deliberative criteria. What is different about these protestors, however, is their belief that they can do more good by remaining outside the deliberative group. In its role as a safeguard, protest-as-deliberation should be able to change the tone and direction of many deliberative discussions; still, there are bound to be cases where the overwhelming deliberative sentiment is one that does not find the reasons for a particular agenda convincing. This, in itself, does not pose a fundamental problem for deliberative democracy. The point of protest-as-deliberation is to work as a safeguard, but it does not (nor should it) guarantee that all protestors will be able to shape the agenda or change the outcome of the deliberative group. Protest-as-deliberation is the first in a two-step process of evaluation, but the deliberative group still determines the outcome.

Protest-as-deliberation works to ensure that protestors can continue to press the deliberative group when they feel that the group is on the wrong track, but some protestors may press the deliberative group on issues that would require a major reframing of the kind that the deliberative
group is unlikely to undertake. If this is the case then protestors may argue that there is little, if anything, to gain by re-entering the deliberative group. To use the NWMO case as an example, people may leave the deliberative group because the question of generating nuclear waste is not up for debate. Engaging in protest-as-deliberation may result in the deliberative group revisiting the starting point and engaging in deliberation on the original question as to whether or not they ought to continue to use nuclear energy. Debate on this foundational issue may satisfy some protestors who were opposed to the way that deliberations originally took place. Making their arguments in an official forum, exchanging reasons with others on this topic, coming to an agreement about the amount of nuclear energy that people ought to use, and perhaps even agreement to replace it in some areas, might be enough to make protestors accept the legitimacy of the deliberations and their level of efficacy within them. Other protestors, however, may be unsatisfied with anything other than a decision to eliminate nuclear energy altogether. Protestors who hold this view may not want to re-enter the deliberative group because they doubt the receptiveness of the deliberative group to serious talks on this option. Instead, protestors may decide that they can do more good by maintaining opposition to any plans that endorse nuclear energy from outside the deliberative group where their refusal to enter deliberations makes their rejection of the deliberative group’s framing very clear.

While protest-as-deliberation cannot satisfy protestors who do not want to re-enter the group (the decision about agenda-setting and deliberative decisions, after all, has to be made by the deliberative group), it is not without its benefits. Some people may charge that protestors who have no interest in re-entering the deliberative group refuse to try to persuade deliberants from within the deliberative group because they know that their reasons are not (conceptually) strong enough to have the desired effect. This belief, given the even greater lengths that the deliberative group has gone to in order to be effectively inclusive (inclusive political communication in the deliberative group and alternative political communication in the deliberative polity) and to improve marginalized delibertant’s efficacy may entrench the perception of these protestors’ unreasonableness. While some people may feel this
way, protest-as-deliberation is, I argue, still beneficial because protestors with these stronger objections will have all the tools that protest-as-deliberation makes available. They can then use these tools to assert their opposition to the direction that the deliberative group takes and to emphasize the significance of their disagreement. Protestors may still ultimately be unsuccessful in achieving their ultimate goal (radically changing the deliberative agenda and, in this case, eliminating nuclear energy), but since protest-as-deliberation does not make any claims to guarantee outcomes anyway, and since the deliberative group has a stronger obligation to listen to all protestors who have normatively acceptable reasons, then these protestors are not worse off and will have greater visibility in protest-as-deliberation (which is, realistically, the most that they probably expect).

That this is the case (and that this type of protest still benefits from a system that aims for reintegration into the deliberative group) does not, however, weaken the theory of protest-as-deliberation. One objection against the benefits that a theory of protest-as-deliberation brings to protestors who have no intention of participating in the deliberative group is that the theory makes it easier for protest to occur and might encourage people to leave the deliberative group permanently. While the structures that protest-as-deliberation creates might make the decision to remain outside the deliberative group a more attractive one, it is not protest-as-deliberation’s job to make sure that all people choose to deliberative in the deliberative group. What protest-as-deliberation requires is that people have the choice to do this and, if people do re-enter the deliberative group, that they will be able to do so with stronger arguments that, as a result of additional argumentation in the deliberative polity, carry more weight in the deliberative group. Protest-as-deliberation is not responsible for people who may choose strategies that resist participation in the deliberative group.

Other implications may follow from a theory that helps people to strengthen their arguments in order to re-enter the deliberative group. It is easy to imagine groups who oppose the arguments that protestors put forth and who, in their own protest over this reintegration and renewed strength of protest groups, leave the deliberative group themselves. While it would be better if this conflict
unfolded within the deliberative group, if groups choose to leave in protest against marginalized people’s increased efficacy in the deliberative group then this does not pose a problem to the theory; the objecting group can make use of the deliberative polity to offer their own reasons against these newly-introduced reasons and the dialogue can continue. Protest-as-deliberation, much as in the deliberative polity where no decisions are ever final, is an ongoing process and one that the people involved in have to resolve for themselves. The deliberative polity provides one more arena in which this process can take place.

Protest-as-deliberation does not extend to illegitimate protest. My discussion of deliberative democracy’s appropriate normative response to (all) protest is limited to this one aspect of “legitimate” protest and so I will say little about this illegitimate protest here. Just as deliberative theorists ought to expect that legitimate protest will occur in deliberative democratic societies, we should also expect illegitimate protest. While exchanging reasons with unreasonable people does not make a lot of sense, a deliberative response to illegitimate protest that follows an expansive conception of freedom of speech is, I think, the best and most appropriate response given the deliberative nature of society. Having people’s unreasonable views out in the open (where a certain amount of monitoring can take place) is, I argue, preferable to a restrictive account of freedom of speech which will drive these views underground where they could potentially cause more harm. I do however think that deliberative democracy would benefit from a detailed account of the appropriate deliberative response to illegitimate protest. Deliberative theorists need to set out a policy on freedom of speech. Assuming that at least some illegitimate protestors may take advantage of the structures and resources that protest-as-deliberation makes available we need to reconcile this with the availability of deliberative fora and tools that legitimate protestors have as they engage in protest-as-deliberation. Deliberative theorists will then need to ask a series of questions including what, if anything, ought deliberative democrats to do if illegitimate protestors use public space to try
and communicate their own arguments? Are there ways that the deliberative group can regulate this space without hindering protestors who adhere to normative deliberative criteria? What happens in cases where it is not entirely clear if protestors’ reasons are legitimate or illegitimate? In the case of the last question my intuitive response is that spaces should remain open and that, until it is clear that protestors have crossed a line and their arguments or actions threaten physical violence, that the deliberative polity should remain as far as is possible a space of contestation. Similarly, my intuitive reaction to the issue of illegitimate protest is to support freedom of speech (both in order to avoid driving protest underground where the effects could become more harmful and also in case “objectionable” arguments do, in fact, speak positively to issues of inclusion and equality) while at the same time engaging in deliberation upon the best response to hate speech (and what counts as hate speech) when we encounter it in the public sphere.

Deliberative theorists also need to look at the role of violence in protest. Most importantly, we need to pay deliberative attention to what constitutes violence: what are the normative differences between violence to property and violence to people and animals? What is the appropriate response when protestors use a critique of the harm that the practices that they protest against cause as a justification to inflict their own (purportedly less damaging) harm upon the perpetrators of this “greater” violence? What constitutes harm? When does persuasion cross over into intimidation and manipulation? We can look to discussions within protest literature to begin to tackle these questions, but these protest-based responses need a specifically deliberative treatment.

*       *       *

I hope that other theorists will pick up on these remaining challenges and that future discussion can build upon the arguments that I set out in this dissertation. Recent developments in the democratic potential of cultural activity and contestation in civil society, especially Deveaux’s arguments about the ways that we need to re-frame cultural conflicts, discussions of informal democratic activity, and

---

465 For a discussion of free speech and harm see Cass Sunstein. *Why Societies Need Dissent.* (Cambridge, MA:
the space and support that we ought to offer for cultural dissenters, are particularly relevant to the arguments in this dissertation. While my focus here is upon protest, Deveaux’s work deals with the impacts that reconceptualizations of conflict have upon deliberative politics that, while they recognize the contribution of protest, do not focus upon ways to incorporate protest as it exists outside of and in opposition to deliberative politics. Deveaux’s work deals with questions of power and resistance in civil society that applies more specifically to the conceptualization and processes of deliberative groups. Her work on power and resistance is an example of the increasing role that critical theory plays in addressing problems in the intersection of multiculturalism and feminism. Here the debate opens up some of the messier (and more interesting) ways of dealing with conflict, in addition to acknowledging the important role that public debate ought to play in practical issues. Relatedly, theorists are paying increasing attention to the less traditional political work that occurs in civil society. Catriona Mackenzie, for example, draws attention to the initial stage of democratic change that we find in “innovative cultural imagery” 466, and Deveaux picks up on this potential.467 The links between the changes for deliberative politics that I propose in this dissertation are relevant to the recent work in the areas of conflict and democratic resistance in civil society. In developing my theory of protest-as-deliberation there were continual reminders that many of the obstacles to deliberative democratic participation concern the extent to which people are willing and able to engage in deliberations; moreover, these limitations are not always ones that are so great that they require us to frame problems of effective exclusion as ones that call for protest. Instead, many of deliberative democracy’s limitations concern a more subtle (and insidious) lack of desire to engage in deliberations. While there are those who will undoubtedly argue that it is not deliberative theory’s job to make deliberations particularly appealing – and that instead we ought to set our sights lower

and ensure accessibility, effective inclusion, and efficacy for those who do wish to participate – there are, I argue, compelling deliberative reasons to do just this.

A common thread between my argument on the normative approach that deliberative democracy ought to take toward protest, and the work on conflict and resistance in civil society, is the extent to which the willingness to engage in deliberations depends upon the ability of people to do so given the available deliberative resources. In this respect the deliberative potential of civil society is of great importance. In addition to my examination of public space insofar as it concerns protest, non-traditional settings and non-traditional means of participation can have a considerable impact upon deliberative groups and, more broadly, upon deliberative discourse itself. The impact that art, literature, entertainment, and grassroots community projects have upon the willingness of people to engage in political dialogue is particularly compelling insofar as it extends the deliberative relationship between formal and informal spaces of deliberation. The extent to which alternative forms of deliberation enable us to create new spaces of deliberation is interesting in terms of the ways that we can expand the deliberative polity. It can also help us to better understand how the contributions of deliberative activity in civil society affect the way that we frame deliberations, particularly in terms of agenda-setting and dealing with multiple discourses. Looking at the connections between these cultural forms of deliberation and more traditional forms of deliberation and exploring the implications that this may have in terms of changing the nature of deliberative discourse can help to further advance a deliberative understanding of inclusive political communication.

Bibliography


Chambers, Simone and Jeffrey Kopstein. 2006. “Civil Society and the State.” In The Oxford


324


Archives:


Reel 24; Box 32; Folder 10. (National Health Care Working Group)

Reel 24; Box 32, Folder 11. (ACT UP/NY Needle Exchange Committee)


“Why Needle Exchange?”


Reel 24; Box 32, Folder 17. (Presidential Project)


Box 32; Folder 21. (Strategy Weekend Working Group)


Box 32; Folder 26. (YELL)


Reel 62. Box 82; Folder 11. *(Colorado)*


“Question and Answer re: Amendment and Boycotts.”

Reel 62; Box 82, Folder 13. *(ACT UP/NY Outreach Committee)*


Reel 62; Box 82, Folder 18. *(Education/Prevention)*


Box 3.


“Reasons to ACT UP” Series (17,2000; 18,2000; 19; 20; 21; 22; 23;24;25;26;27;28)

Gran Fury. “Kissing Doesn’t Kill” (87,2000.3)


Box 1, Folder 1. *(General correspondence 1988-1991).*


Box 1; Folder 2. *(Gran Fury: Background Information).*


Box 1; Folder 3. *(Gran Fury Slide Presentation.)*

Box 1; Folder 4. (Art Against AIDS: On the Road (1989)).
Blake, Nayland. “Don’t Leave Me This Way”, illuminated bus shelter.
Crane, Margaret / Jon Winet, “Untitled” bus panel.

Box 1; Folder 7. (Images and Words: Artists respond to AIDS).

Box 2, Folder 7
Illustrations: photos from protests. Ken Woodard, Reasons to ACT UP (12 variations).


Box 2; Folder 10. Press Clippings (1990-94).
[No author recorded]“Group Material’s Work Confronts AIDS Crisis.” [Publication unrecorded]

Newspaper articles: