Handbook of Public Policy Analysis

Theory, Politics, and Methods

Edited by

Frank Fischer
Rutgers University
Newark, New Jersey, U.S.A.

Gerald J. Miller
Rutgers University
Newark, New Jersey, U.S.A.

Mara S. Sidney
Rutgers University
Newark, New Jersey, U.S.A.

CRC Press
Taylor & Francis Group
Boca Raton London New York

CRC Press is an imprint of the
Taylor & Francis Group, an informa business

34 Public Policy Mediation: From Argument to Collaboration

David Laws and John Forester

In this chapter we explore the resonance between the work of policy analysis and the work of public policy mediation. Mediators' practice turns out not only to be a form of policy analysis but to have implications for advancing the broader practice of policy analysts as well. We examine public policy mediation as a form of practice that has developed in the United States over the past twenty years—a practice that "deform[s], constrain[s]...and enable[s]" policy-making in ways that can be practically instructive for all those interested in "exploring the communicative dimensions of collective debating and deciding on matters of collective concern," including, of course, debates about the substantive content of policy issues.[1]

Mediation responds in a practical and institutional way to the plural perspectives in contemporary policy analysis that challenge efforts to root choices in a single privileged viewpoint or a monopoly upon systematized reason. So our exploration of mediation takes on theoretical as well as practical significance. Assessing public policy mediation can also give us insight into what it means to "engender a practice" of deliberation as a response to a policy problem. Many features that shape contemporary policy analysis—from the reworking of policy's institutional base to the need to negotiate knowledge *in situ*, to demands to enhance democratic legitimacy directly in policy arrangements—all imply efforts best understood in this way, as constituents of deliberative practice (Laws and Hajer 2006).[2]

Such reflection on mediated negotiation practice can help us better understand the problems and tensions that have triggered recent interest in deliberative forms of policy assessment. Understanding policy analysis as it integrates features of mediation practice can help us to highlight institutional and deliberative opportunities that narrower epistemological notions of methods of inquiry neglect, distract us from, and undermine. Such institutional and performative features of mediators' work are just those that the turn to deliberative policy analysis has emphasized: the carefully selective framing of interests and concerns, the networks of actors that develop around policy problems, and the potential for practical deliberation on questions that draw together facts and values in the face of uncertainty (Hajer and Wagenaar, 2003; Forester).

Normatively, our account highlights failures of conventional forms of policy analysis that may leave the players in many policy settings with the equivalent of poorly negotiated policy outcomes, as well as without the benefits of the processual and substantive learning that mediated negotiations can enable. In short, if we can easily become more stupid (or strategically misinformed) when we're kept apart, acting unilaterally and poorly able to listen—either because of our defensiveness,

1. Gomart and Hajer 2002, p. 10.
2. Chambers (1996) in an effort to work out the practical implications of communicative ethics, notes that "[I]mplementing practical discourse, then, is not so much a question of setting up a constitutionally empowered 'body' of some sort as it is of *engendering a practice*." (171–172, emphasis added)

cynicism, arrogance, or overconfidence—policy analysis and planning can learn practically and productively from settings in which parties meet each other in ways that enable them to learn interactively, craft new options and, in the process, transform or rebuild their relationships. In improving policy analysis in these ways, we might further develop democratic policy-making practice and the possible meanings of democratic politics as well.

By "mediation" we refer to a form of practice that brings together diverse stakeholder representatives to listen to one another's concerns, to learn about environmental contingencies, and to negotiate consensus agreements on courses of action that they can then implement (Susskind et al. 1999). Students and practitioners of mediation share a set of terms that they actively contest—including, for example, "consensus," "stakeholder," and "neutrality"—in a continuing conversation about the commitments that define the practice. Because internal reflection on these issues is well developed, the debates in the mediation field resonate well with basic concerns of policy-makers in this period of institutional fragmentation and shifting bases of political legitimacy. We focus on a form of mediation practice called "mediated consensus building" that seeks to inform the development and implementation of public policy.[3] In consensus building processes a "mediator" engages, supports, and shapes the participation of diverse individuals who represent stakeholders. In what follows, we describe mediation with special attention to practicing mediators' points of view as they move through and develop a process that proceeds in a series of stages, from conflict assessment, through convening or constituting a deliberative process, to fact-finding and learning, to negotiating agreements that commits them to future action.

WHAT DO MEDIATORS DO?

In this section we provide a sense of what mediators do when they become involved in policy-making, echoing the model that mediators most often use to describe their practice.[4] This account elaborates mediation as a sequence of stages, each with a distinct character and focus, stages that anticipate and build on one another and are linked by the efforts of the mediator. Success in mediation typically means navigating the stages in this sequence and the transitions between them.[5] These stages pose distinct challenges and demands; each one requires that mediators bring competency to complex and contested policy controversies.

We focus here on four steps in this sequence of stages that animates public policy mediation. The first is the effort to assess the conflict or controversy to determine whether a fuller mediated conversation among interdependent stakeholders offers any promise for successfully negotiating an agreement on the policy issues at stake. The second is the convening of a diffuse assembly of representative actors as a group that will construct a sense of its own identity and its own ability to act. Third comes the parties' efforts to learn, to deal with disputed facts. We close by looking at the effort to negotiate practical solutions in light of strong differences of opinion and interest. Together, these moments illuminate a kind of pragmatic public deliberation whose theoretical and practical significance political scientists and analysts have recently discussed quite widely (Bohman and Rehg 1997; Dryzek 1987, 2000; Fischer 2000). All along the way we hope to address contemporary policy analytic themes like learning and reframing, at a performative as well as at a substantive level.

3. See Susskind, McKearnan, and Thomas-Larmer (1999) for a comprehensive view of the core commitments in public policy mediation.
4. The Consensus Building Institute describes the major phases of consensus building as: "Convene; Clarify Responsibilities; Deliberate; Decide; Implement Agreement." http://www.cbuilding.org/research/Cards/CB_ESSENSTEPS.pdf.
5. Mediators are also careful to note that success can involve parties reaching the agreement that it does not make sense to continue or to move on to the next stage.

Assessment

Public policy mediation usually starts with a request for help. Historically these appeals have been occasioned by controversies—for example, about the need to build something or prevent something from being built, about the need to make a rule, or about the allocation of risks or resources. Disputes over building affordable housing, siting waste treatment plants and halfway houses, creating standards for the cleanup of contaminated sites, the allocation of federal housing funds, or the federal regulation of crane safety operation are just a few of the situations in which public action has been contested and in which the public officials responsible have turned to mediation to find an alternative to traditional forms of policy development and implementation.

A mediator's first response—upon receiving any invitation to intervene—would be to undertake a "conflict assessment." Assessment is the institutional device that "enables the [mediator]—and thereby the convenor—to identify the relevant stakeholders, map their substantive interests, and begin to scope areas of agreement and disagreement among them" (Susskind and Thomas-Larmer 1999, 104). The formal focus of such a conflict or convening assessment is to determine whether it makes sense to take the next step and organize a formal meeting of stakeholder representatives given their diverse perspectives and goals and varying degrees of trust, and, if so, to suggest a design and preliminary agenda.[6] The mediator develops the assessment by interviewing the "stakeholders."[7] The mediator draws on the authority of the sponsoring agency to initiate these contacts and provide a context for discussion, but acts at arms length and by her own standards.

For the mediator, assessment provides a kind of "intake" mechanism that roots the intervention in direct interaction with everyone "[w]ho is involved and affected by the issues, . . . [w]ho will need to implement any agreement that is reached . . . [and] [w]ho could potentially block implementation of an agreement" (Carlson 1999, 179) This foundation of direct engagement expresses a practical sense of the demands of action and mediators' sense of the sources and importance of their legitimacy. Mediators, of course, are neither judges nor arbitrators. They seek to enable stakeholders to learn together, to assess and invent options creatively, and to negotiate mutually beneficial agreements upon action or policy.

> The legitimacy of consensus building processes, which are often used as adjuncts to more traditional democratic forums, depends on whether they are viewed by stakeholders and the public at large as representative of all interests and points of view. A bedrock principle of consensus-based processes, therefore, is that everyone with a stake in the decision should be represented at the table. This principle helps to ensure that any consensus agreement reached will be seen as legitimate by all relevant parties and have broad support when implemented. (Carlson 1999, 185)

The interview process by which mediators initially engage stakeholders is already a step in the process. The interview setting creates a sphere of intimacy in which the mediator tries "to get to know each stakeholder individually." At the same time mediators test the practicality of moving forward by educating "the stakeholders about what it takes to bring a consensus process to a successful conclusion." (Susskind et al. 1999, 104)

Finally, the interview process is a relational transaction in which stakeholders "assess the assessor" and gauge whether that person is likely to be impartial and effective as a mediator" (ibid). As mediator Susan Podziba (1998) put it:

6. Mediation originates in settings where advocates who press contending views reach impasse and request help in seeing if they can move forward. This anchors mediation in the need to act and in the disruption of action by anger, confusion, and disagreement over what is to be done. This anchors mediation in the particulars of problems, of time and place, and of the experience and aspirations of people affected by the action.
7. The term "stakeholder" provides legitimacy to parties' involvement and guides analysts'mapping of the issue networks (Heclo 1978) that exist around the problem.

> When the process team began its work in Chelsea, its members were clearly 'outsiders' and, therefore, suspect. In seeking entry into the community, the mediator met with community leaders, the people others sought out for needed information. In meeting with these individuals, the mediator learned about the city, but perhaps more importantly, she let them know who she was. She answered questions about her work and family because she understood that the information shared with these leaders would be spread throughout the city. Thus, the interviews were a mechanism for informing the community about the 'outsiders' and they provided an opportunity for trusted people to obtain, and then share, real information with peers. (23)

In her account of working successfully to build consensus on a new city charter in Chelsea, Massachusetts, Podziba provides a sense of the scale and focus of the assessment process and the relationship between the substantive and relational facets of careful assessment practice:

> The Chelsea Process commenced with approximately 40 interviews with community leaders—formal leaders and informal opinion makers. Interviewees ranged from sitting aldermen to heads of community organizations to the city Santa Claus. The interviews had multiple goals. First and foremost was to learn of the perceived causes of Chelsea's problem, why the city was put into receivership, the elements needed for its new government, and what would be required for the new government to last over time ...
>
> In addition to gathering information about the city, the interviews allowed leaders of the community to be personally apprised of the process, and initiated the creation of relationships between the mediator and the community. The interviews served as an opportunity to let people know the mediator and her assumptions regarding her role in the process. (9)

Thus the assessment phase roots the prospective mediation process in the history and particulars of the conflict as expressed in the diverse narratives of the groups and individuals affected by the decision and whose commitment is needed to act. It combines analysis of these views and begins to build relationships between the mediator and the stakeholders.[8] The effort to assess and initially catalogue interests is balanced by the consistent appreciation by the mediator that she is engaging a story that is still unfolding—and that her ability to shape this unfolding story hinges on enabling these interviewees (and later participants) to depart from their publicly proclaimed scripts and refine their stories, their objectives, fuller interests, possible actions, new suggestions or demands, and so on.

Conflict assessment, like subsequent stages of mediation, is organized to help the interviewees retain the ability to surprise the assessors and participate as authors of the process and outcome. Mediators work to explain "why the assessment is being done, who is sponsoring it, and why it is important for all stakeholders' views to be heard" (Susskind et al. 1999, 110). Assessing the contested issues and relationship at hand, mediators pursue their analysis through "open-ended questions" that "allow interviewees to share their perception of reality... without the imposition of an alien framework of analysis" (Moore in Susskind et al. 1999, 112) .

The tension between these facets spills over to the output of the assessment process, a report that summarizes the views of stakeholders and recommends whether or not to continue, and (in the case of a positive recommendation) presents a design for how to bring stakeholders together.[9] This document is shared with all the stakeholders and is supposed to "provide... the parties with an impartial map of the underlying conflicts that will need to be addressed" (Susskind et al. 1999, 104).

8. Susskind et al. 1999, 116–117 cf. Susskind and Cruikshank 1987, 86. Forester, 2006a.
9. Readers can review examples at http://www.podziba.com or http://www.cbuilding.org.

A positive convening assessment will also engage stakeholders by rendering the perspective they have described accurately and, at the same time, framing the variety of perspectives in relationship to the problem and to one another.

> Seeing their own interest described in print often helps each party feel heard and understood. Reading about other parties' interests provides everyone with an accurate portrait of opposing views and the prospects for agreement. (Susskind et al. 1999, 104)

Thus the conflict assessment phase of the convening process—and this is characteristic of mediation more generally—combines information gathering and relationship building in the context of the specific case-defined logic.

CONVENING STAKEHOLDERS

Conflict assessment concludes with a decision by the sponsoring public agency to move ahead or not to start at all.[10] A decision to go ahead then means bringing together a group of stakeholders who may never have met, or have only met across a barricade, to discuss face-to-face the very issues over which they are in conflict. The focus of the convening process is to constitute these diverse individuals as a group with a sense of its identity and its role in the policy process: a group convened now less to debate issues than to negotiate agreements upon action or policy.

To get a feel for the distinctive way in which this transition occurs in mediation, we turn to a transcript of an actual convening meeting. The sponsoring agency is the Maine Low-Level Radioactive Waste Authority (the Authority). The stakeholders are a diverse group that includes representatives of state agencies, advocacy organizations, and general interest organizations (e.g., hospitals and the teachers' union). They have come together at the sponsoring Authority's invitation to discuss convening a citizens' advisory group (CAG) to advise the Authority on how to best fulfill Maine's responsibilities for managing low-level radioactive waste as set by federal law.

Discussing the decision to move ahead involved reviewing commitments on all sides. The convening authority must consider whether it is willing to support the process and it must specify how it will act on the outcome if consensus is reached. The members must consider their obligations to each other and to the convening authority. Will they commit to procedural responsibilities,[11] agree to uphold principles of participation, and "[i]f the process generates a consensus... to support and advocate for the agreement within their own organization and stakeholder groups as well as with the public" and, if they do form agreements, to honor them by agreeing to "refrain from commenting negatively on the agreement?" (Susskind et al. 1999, 126) The mediators clarify their role and their managerial responsibilities, both by describing it and, as we will show, more convincingly, by starting to act on it. Convening is the time at which these commitments are first made explicit and explored directly through interaction. It often provides participants with their first experience of working together under a consensus decision rule.[12]

10. Conditions for the latter might include the refusal of a key stakeholder to participate.
11. "Member and alternates agree to 1. Attend all of the regularly scheduled meetings. 2. Arrive at each meeting full prepared to discuss the issues on the agenda... 3. Present their own views and the views of the members of their constituencies and be willing to engage in respectful, constructive dialogue with other members of the group. 4. Strive through the process to bridge gaps in understanding, to seek creative resolution of differences, and to commit to the goal of achieving consensus." (Susskind et al. 1999, 125)
12. "Consensus means that there is no dissent by any member. There will be no formal votes taken during deliberations. No one member can be outvoted. Members should not block or withhold consensus unless they have serious reservation with the approach or solution selected by the rest of the group, they should make every effort to offer an alternative satisfactory to all stakeholders." (Susskind et al. 1999, 125)

We focus here on the accounts the sponsoring Authority and the mediator provided, the way these procedural commitments are reflected within them, and the efforts of the stakeholders to respond by reframing their roles and the agenda and, in the process, testing, specifying, and securing further those procedural commitments that animated their practical agreement to deliberate and negotiate. In becoming authors of the agenda, the stakeholders clarify their roles by taking ownership of their process and beginning to function as a group (public).

The sponsoring Authority's account of its role and the role of the CAG was articulated in a letter sent to stakeholders inviting them to attend the first meeting. This letter described the Authority's eagerness "to create a Citizen's Advisory Group to advise it on key decisions that will need to be made in the siting process" for a low level radioactive waste disposal facility. The letter went on to frame "the first task of the group": "to assist the Authority in developing environmental and other technical criteria by which portions of the state will be excluded from consideration as possible sites of a low-level radioactive waste disposal facility." The letter concluded by underscoring how "crucial" it was "that all groups with a stake in this decision participate in each and every step of the siting process."[13]

This invitation already began to parse the role of the Authority—asking questions—and the role of the citizens, expressing preferences and offering advice on these questions. The comments by a member of the sponsoring Authority that opened the first meeting of the Citizens' Advisory Committee re-expressed this interpretation as the context for the meeting:

> The Authority's job, as given to us by the Maine legislature, is to plan, design, and operate if needed, a low-level radioactive waste facility in Maine within the framework of Maine laws and federal law and regulations.

This institutional context, expressed in legal mandates and responsibilities, framed the Authority's role and, reflected through this, its sense of roles for its consultants and the citizens it had invited to consult. Objecting to this framing would mean taking on the history and framework of rules and responsibilities that the Authority embodied, as mandated by the state legislature, in the context of the meeting. This context tied the desire "to attain the widest possible consultation in order to assure that any Maine facility that is developed takes into account the wisest possible technical information and the widest interests of the people of Maine" to expectations that the "work of the Citizens Action Group" will uphold this framework by "proceeding at a reasonable pace so that everyone can ask questions and learn what they need to learn to offer well informed and wise advice."

The mediator's opening statement restated these expectations and their implications for the group whose members were eyeing each other for the first time around the table:

> The goal I think, from the Authority's standpoint is to get the best possible advice they can get on a series of questions that they *have to answer* if a facility is going to be sited. We will obviously be operating within the framework of federal and state law... I hope people around this table—and others we may want to add—will make the best effort to give the best advice we can to the Authority in making the decisions it is obliged by law to make.

The mediator then went on to describe his role and, in the process, to set up a contrasting set of expectations that focused on giving fair value to the rights and standing of the stakeholders within the process:

13. Letter from the Maine Radioactive Waste Authority, May 8, 1989. All quotes from the Citizen's Advisory Committee are from Laws 1989.

> My job is to serve as facilitator—or you might say, referee—perhaps for today's and we hope a series of subsequent conversations... My task is not just to convince myself I'm neutral, but to convince all of you throughout the conversations that *I'm working to ensure that everybody's voice is heard and that collectively the voices on this advisory group communicate a set of concerns to the Authority in as clear and compelling a fashion as possible.*

Framing his task in terms of ensuring that the advisory group had a voice, tying his legitimacy to his ongoing ability to convince the group of his "neutrality,"[14] and thereby deputizing them as agents of the process, led to an account of the CAG that broadened its role beyond giving the Authority advice on specific questions. The mediator began by describing the Authority's desire to stand convention on its head and "engage the entire community in what the appropriate criteria are for choosing a site [and] choosing a technology."

He then extended this account in two ways. First, in substantive terms, he framed a broader role of stakeholders as authors who "invent policy suggestions," rather than "merely respond to decisions." Second, by asking for their consent, the mediator framed the group as the final arbitrator of questions about the legitimacy of the process:

> I think that this process that we're about to enter into with your concurrence, if that is to be, is one in which we will be inventing policy suggestions, not merely responding to decisions made by the Authority.

The latter commitment was deepened in subsequent comments by the mediator, comments that gave the citizens the responsibility for monitoring the process, control over its future, and suggested norms for evaluating the process as a conversation:

> I'm not, however, in the public relations business, not in business—like some—of getting hired on to suppress conflict, not in the business of steering this group toward any one outcome. The moment any of you feels that we're in some way biased in how we're behaving, please tell us, give us a chance to try to make a correction, and if we can't correct it then we will bow out. Our job is for you to perceive us as neutral and we're willing to be held accountable on that score.
>
> If you ever have concern about how the discussion is going, please interrupt the discussion and raise the point about the process. If you feel someone else or you are not being recognized, interrupt. We do not operate by Robert's Rules of Order. *We seek to talk to each other in the way that you would normally carry on a dialogue.* The only concern is the logistics, not the formalities.

These two accounts of the role of the CAG contrast sharply. In the Authority's account, the CAG is an auxiliary body, defined by the Authority's responsibilities and drawing its legitimacy from the Authority's institutional status. The mediator's account raised the possibility of a broader role, defined by the CAG, and rooted in a legitimacy that is generated directly by the representative character of the group and the self-given character of the agenda and rules. The dramatic tension between these accounts was raised, and resolved, in an interaction that started with a presentation by one of the Authority's consultants.

The consultant was, by most accounts of consulting in such circumstances, acting in good faith. He entered the process with a monologue that shifted the focus of the conversation, got down

14. Neutrality is a problematic phrase that is the subject of much disagreement. It is probably best thought of as a term of art that describes a nonpartisan attitude and actions.

to work, and begin to talk about substance, implicitly moving on from the review of these institutional conventions:

> What I'm here to do today is to talk about low-level radioactive waste. What is it? Why are we here?

This defined part of his role, which worked to help each CAG member "put everything in context... [by] trying to show you relatively, "Is this bad? Is this high? Is this low? Where does this stand in the norm of the type of radiation we get?" He would also help the CAG "[g]et into some of the engineering disposal technologies that are either in existence today or are being planned to be used by other states, compacts, or counties." This shifted the focus even further to the technical features of options like "shallow land burial... [that] relies solely on the geology and hydrology of the site to contain the movement of radionucleides."

To the stakeholder sitting at that table, this self-evident transition to substantive concerns also interpreted and presumed the role of the CAG as listening, trying to understand, asking questions, and commenting on the difficult choices that the Authority faced.[15] The substantive orientation began to insulate the reflection on roles and on the ground rules for interaction that was opened by the tension raised in the mediator's comments. This tension was deepened as the consultant described the process that he took the Authority to be in the midst of:

> We developed the BEP (Board of Environmental Protection) rule last year. The methodology development—the exercise we're going through right now—is underway in the '89–early 1990 timeframe, followed by site selection leading into a detailed characterization. I say characterization—as we identify sites we will have to go in and do exhaustive geotechnical hydrological, and environmental studies of those sites, which will then require NRC licensing in this particular case. We're looking optimistically at a construction completion in either late 1995 or early 1996, if all the approvals can be maintained. Any glitch in any of those approvals will obviously have a potential major effect on the overall schedule.

By participating in this conversation, the citizens around the table are now assenting to an entire process that has the self-evident character of an institutional backdrop that sets the stage. The agenda and sequence are set, they can be taken for granted, and with them the topics of the conversation and roles within the conversation. The focus is technical issues about siting. The schedule is tight and any effort to question the process could disrupt the ability of the Authority and the State of Maine to meet their mandated responsibilities and put it at risk at in the national policy process.[16]

Some CAG members accepted the role that had been offered by responding with factual question like, "How much waste will go into the facility?" and, "Should we discuss radioactivity in terms of curies or rems?" Others chipped away at the conventions, asking questions like, "Do these facilities require permanent staffing?" or, "Is there any technology today that will isolate nuclear

15. By focusing on geology and technology the consultant invites stakeholders to take up his implicit interpretation of the proper role of the committee, thereby rendering less visible and problematic the nontechnical role of the committee. See Austin (1962, 117) on understanding this process as a sequence of illocutionary acts.

16. Rendering this as a recitation of facts also set truth or accuracy as the basis for discussion. And there was not much to dispute. The Authority *had* developed the BEP and *was* in the process of methodology development that *would* lead to site characterization. The presumption that these prior activities legitimately mandated the current process—that might have been controversial — was insulated from just the kind of scrutiny the facilitator had invited.

waste-for thousands and thousands of years?"—questions that called for limited reflection but did not challenge the role framing that was being taken up in the meeting.

This went on until the representative of the Friends of Maine Woods entered the discussion:

> On that particular point... I would argue at great length. The type of containment we've seen here *is entirely irrelevant*. Murphy's Law is going to work on every one of them and I think you've admitted that... you don't know how long it's going to take to watch these: a thousand years or a hundred and ten. I certainly would dispute your saying that it is very clear they will have something to do with the nature of the site that might be selected. *I think they have no bearing at all.*

The incompleteness of this statement is contextually eloquent. Its force cannot be explained in its content and this disjuncture inserted the thin end of a wedge between the perspectives of the citizen participants and those of the Authority and its consultants, reopening the possibility for reflection. The critique is hardly explicit and could easily be dismissed as unintelligible or out of order. It opened an interaction with the mediator in which his earlier commitments, and his invitation to "interrupt the discussion" "[i]f you ever have concern about how the discussion is going," were invoked and were now re-expressed performatively: the mediator's "call me on it" had been called indeed. The mediator's response treats the comment as reasonable and understandable, despite its surface inarticulateness:

> What would in your mind have the most bearing on the selection of sites?

This helps the citizen make his critique more explicit:

> I think you have not demonstrated—and we're a long way from being convinced—that there is safe way to dispose of this. You're asking us today to make assumptions.

The mediator's response moves reflexively from questions about available technologies and levels of exposure to the very assumptions and categories on which the whole conversation was being pursued:

> Let me come back to that. I'm glad you raised it. The Authority has to operate as if there might be a need to site a facility, because the state law and the federal law require them to do so.

This opened the possibility, immediately embraced by the participants, that the CAG might operate on a different basis. As citizens, the stakeholders might try to be independent, even skeptical, in order to keep questions regarding the safety and the operation of a facility open to scrutiny.

> Then the state law and the federal law had better convince us that they are safe.

The mediator further developed the reflexive opening by reframing this comment into a question that the CAG members could try to answer as a group. He continued,

> The question, I think, for the group is, 'Can you operate in the light of the Authority's request to seek advice on siting criteria, while holding your view that it would be preferable not to have a facility or a need for a facility at all?

Once this question was posed explicitly, the basis for critique and the disagreement about the proper way to frame the process become more explicit. A CAG member articulated the disagreement in terms of preserving the right to say, "No":

> I think we're saying [that] "None of the above" might be our choice. And also you reassured me, when you first spoke, that we may say "exclude," and you didn't say "only one area." We might say, "Exclude the State of Maine."

Another citizen in the group turned this critique into an opportunity for the CAG members to reflect in positive terms on what goals they would choose for themselves as a group, given the opportunity. His proposal tied the notion of a self-generated goal to the common good and suggested a direct and deliberative expression of democracy.

> On your last question, I'm not yet certain I can participate in the siting evaluation of preference criteria or any of that, but I do think it may be an appropriate time when we come back to try to decide for ourselves just exactly what the goal of this citizens' body is.
>
> I have a proposal for a goal for this body. If you would like to think about it and discuss it, my proposal would be that the goal of this body is to make recommendations to the Authority which will result in the safest possible management of radioactive waste in the State of Maine. That would be my recommendation. That means that other decisions of risk, of technology, all will fall out at a later time after we have been able to obtain the information we need to make those kinds of decisions.

The speaker ties the goal to the participants' common status as citizens of the State of Maine. This question opened further reflection on the "logic of appropriateness" (March and Olsen) that mediated the relationship between CAG's goals, its institutional status, and the behavioral implications of both. The sponsoring Authority members present found the new proposal relatively easy to accept because they could differentiate between their responsibilities and the role that citizens might choose to play. A representative from a state agency had a more difficult time with the new goal. He was concerned that it would require him to participate in discussion that would raise tensions with professional responsibilities that implied limits on what he could say or do. This give and take eventually circled around to the speaker who had originally proposed that the CAG reflect on its goals:

> The goal is the safest possible management of nuclear waste in the State of Maine. I don't know that, I'm certainly not convinced that an in-state facility is the safest possible management of the low-level radioactive waste in the state. I'm not convinced that the continued operation of Maine Yankee is the safest possible management. I don't know yet that a compact is the safest possible management of the waste we have in this state. I think that remains to be seen. But I think that the goal of doing the best we can with that waste is what we should be shooting for.

This statement provided the kernel around which the question about goals was eventually resolved by interaction among the members of the CAG. The outcome reflected these concerns and proposals. The goal was amended to address the perceived need for a "debate of ideas": "To understand and share information about this issue with interested groups of citizens in order to help the Authority reach the wisest and fairest decision." The phrase "for the people of the State of Maine" was added. Another amendment addressed the tie to the Authority's obligations and responsibilities: "To assist the authority in evaluating potential specific sites in more detail using these [siting] criteria and in assessing possible incentive and compensation packages."

Citizenship defined the basis for participation and for reflecting on what kinds of questions and behavior were appropriate, along with setting behavioral expectations for a process that the participants would stand behind as legitimate and valid. This initial round of "constitutional" process constituting deliberation more or less concluded with a comment by a citizen member who differentiated the role of citizens from the responsibilities of the Authority. He underscored the dual responsibilities that had been used to define the office of citizen: First, he noted the "strong tie" standard of the common good that others had articulated— to address the safest management of the radioactive waste in Maine for the people of the State of Maine. Second, to fulfill their deliberative obligations, he argued that participants also needed to cultivate and respect each other's independence of thought:

> While I can sympathize with the uneasiness and need of the Authority to try to get some sense of what to do—that's why they're asking us for our ideas and recommendations—when you ask somebody for advice, you want to know for sure that you're getting the straight story—whether it's what you want to hear or whether it's not what you want to hear. The reason I'm uncomfortable in specifically addressing disposal site criteria—exclusion criteria, preference criteria, all that stuff—is because it's exactly what they want to hear.
>
> I think that this body ought to keep itself aloof enough, independent enough, and become educated enough, that it can tell the Authority what the Authority may not want to hear, if we deem it in the best interest of the safety of the people of the state. If that means ignoring the federally mandated time limits, so be it. That's not what the Authority wants to hear because they're mandated to work under those state and federal time frames and constraints. But I think we should be free to say, "That's full of beans and you ought to do something about it.
>
> I think that's our role. I think we're supposed to reflect the public, not to be subsidiary staff to the Authority. That's how I sense the role that you want to pick—as subsidiary staff—in order, in other words, when it comes around to fish and wildlife you can say, 'Well these lakes are not good. This pond doesn't have any trout any more, so it probably is a better site for a facility. That's what staff do. That's not what a *citizens'* advisory group ought to do.

This summary rooted the legitimacy of the process in interaction of citizens who are free to state their minds in the context of a collective effort to come to agreement. If this conflicts with rules and mandates—so be it. Through this effort to reflect on and articulate the goals and ground rules that would bind them, the CAG convened itself as a public in relation to the Low-Level Radioactive Waste Authority. This process drew on the procedural commitments articulated by the mediator, and it was given fair value in part by his interventions in the development of the conversation. This interplay that drew on and created a directly democratic quality of self-generated terms of interaction distinguished the convening phase and opened the possibility of the continuous questioning of all parties interests and possible options that adept mediators sustain throughout duration of consensus-building processes.

DELIBERATION: LEARNING VIA FACT-FINDING AND DEALING WITH INTERDEPENDENCE

The next phase of mediation is broadly characterized by its deliberative character. This relates to questions of knowledge and the potential of mediation to draw on the domain specific knowledge of participants as well as to manage the "contradictory certainties" (Swartz and Thompson 1990)

that characterize many policy controversies. Mediators, we shall see, focus attention on action that frames questions in terms of how to act, in terms of "what can we do?" rather than upon whose argument is more right or more true.

Here, in processes of mediated negotiations, we see a surprising shift of attention from that typical of policy debates. Indeed, while policy debates are adversarial encounters, in which arguments are used strategically, whether face-to-face or waged through the media of think tanks, funded research, advocacy science, and the newspapers, mediated negotiations displace the argument-focused work of debate and substitute instead an action-oriented negotiation that calls selectively upon knowledge generation via joint fact finding rather than adversary science to support its claims.

Here the cultivated judgment of mediators can help inform and broaden the policy analysis that sharply demarcates knowledge from action. Mediators know that all parties to a dispute come with their justifications and reasons and so shift the focus from reconciling beliefs to creating new bases for action. Mediators know that many public policy disputes resist resolution through identifying the definitive facts or getting them in order. Each side typically has its own definitive facts, its own experts, its own advocacy organizations. As a result, mediators know that working in such contexts cannot be reduced to moderating debate or arbitrating truth. Mediating negotiations calls forth practical efforts that reach beyond what "moderators" do and suggest new roles from which policy analysts can learn (Forester 2006b).

We consider briefly two strategies used by mediators. Both have direct implications for policy analytic practice. The first concerns joint fact finding, the second concerns a studied movement past gullibility that attempts to assess parties' interests in ways that will not be held hostage to the gamesmanship and creation of mutual ignorance by deliberate misrepresentation that leads to stalemate or suboptimal public outcomes.

LEARNING AND JOINT FACT-FINDING

Canadian mediator Bill Diepeveen recounts a case involving city neighborhood representatives, the city planning department, and a local hospital whose nuclear magnetic resonance imaging machine seemed threatened by the nearby placement of a new light rail line (Forester 2005a). The hospitals wanted the light rail buried in tunnels underground. The city argued that the underground placement of the line would be prohibitively expensive. We quote Diepeveen at some length so that we can then draw lessons about issues of adversary science, fact-finding, and the risks of nonmediated, nondeliberative policy analysis. This case, he tells us, offered lessons "related to the 'my expert versus your expert' routine," surely an abiding problem of policy analysis. As we will see, Diepeveen's and other mediators' work on fact-finding offers lessons for policy analysts too.[17] He tells us:

> We were debating one issue: The impact of the light rail transit on the nuclear magnetic resonance imaging (MRI) machines that are in the hospitals—because the trains, which are powered by electricity supplied by overhead lines, go by and create a magnetic field which interferes with the operation of the MRI ...

17. Diepeveen's and related mediators' accounts are part of an on-going research project by Forester to assess oral history based "practice stories" of mediators' work. These accounts represent not full histories of cases but rather revealing representations of mediators' own framing of their practice. These frames give us not last words but first words, albeit from the trenches of engaged practice, to explore as they characterize and pose institutional and micro-political aspects of mediated negotiations and public deliberations, as assessed, for example in J. Forester, *The Deliberative Practitioner*, MIT Press. 1999. All quotes from Diepeveen come from Forester 2005a.

> We had a big debate about that. The institutions were saying that the train needed to go underground because the concrete tunnel and the steel rebar in the tunnel will dissipate the magnetic fields.
>
> The City's saying, "Absolutely not—it's too expensive to put this thing underground. We've got to keep it above-ground."
>
> So for me, this learning experience was about, "Well, how do you deal with these conflicting opinions?" We weren't getting anywhere in the argument, and each group had their own expertise to support their positions."

So far, of course, Diepeveen has found himself in the traditional policy analytic role. The hospitals and health care interests press for one alternative and bring experts and analyses and the facts to bear; the city representatives make a contrary argument, not taking on the scientific analysis of the hospitals immediately, but bringing yet other considerations of cost and viability to bear. Diepeveen wondered, as policy analysts must often wonder in the face of incommensurable arguments, how are we to settle such debate?

Diepeveen continued:

> As a group, they had to realize firstly that they were stuck and secondly that as long as they remained fixed on those positions, they weren't going to get anywhere. Now one of the things we had talked about at the beginning was that when the negotiating group members took the agreement back to their various organizations for ratification, they would be able to do so in the full confidence that the information on which the agreement was based was sound and defensible. That meant that they wouldn't have to go away and say, "We agreed to this because so and so in the negotiating group said it would work."
>
> What this situation did was force us to answer the question, "Well, let's see if we can get some information jointly—let's get something we can all agree on."

Notice here that the mediator and negotiators and stakeholder representatives anticipated and prepared themselves to deal with questions based fully on suspicion and prior distrust of the other parties. No party would be asked to sign on to an agreement or to believe an option to be viable simply because someone in the negotiating group, one of the other parties, said it should be so. Here we see realpolitik drive procedure and caution and foster the capacity for all parties to build confidence. The entire mediation process had been founded on the expectation that blind trust would be required of no one. The initially adversarial, quasi-deliberative conversation built in the expectation, the assurance, that stakeholders would somehow gain confidence together in pursuing the soundness of crucial underlying information. But what did this mean practically? Diepeveen continues to explain:

> So we sat down as a group and said, "What's the question?" We jointly defined the question clearly and got agreement on it.
>
> Then we asked, "Well, what are the skills that are needed in order to actually answer the question? What kind of skills does a person need?" After we reached an agreement on that, then we said, "Ok, who's out there?"

Here the deliberative conversation moves from debate to negotiation, from questions of "What do we know?" to questions of "What can we do?" Debate, of course, remains important: the stakeholders are deeply divided in their beliefs about the threats to the MRI equipment and the effectiveness of feasible options. But they are beginning to see that they are divided not only on questions of what's true and right, but on questions of what they might do, including, crucially,

how they can learn together. Here, the mediator becomes pivotal, not so much by moderating debate—assuring fairness and turn-taking and various rules of procedure—as by posing questions for joint action that explore and specify the theme of "What can we now do?" (Forester 2006b). Diepeveen helped the stakeholders define what they needed to know and where they would turn to find someone with the background to answer the technical and economic questions they had. So far, we have all "information," but the mediator here, unlike a moderator of debate, has been preparing the way for joint action:

> And we did a request for proposals and ended up agreeing on a European consulting firm . . . All of the information was sent to them, and it was information that the committee had agreed that they would need.
>
> So, in fact, what happened was that this consultant became a servant of the negotiating team, the entire negotiating team. It wasn't your person, it wasn't my person: it was *our* person. That was really important because it gave people the comfort they needed in order to take the agreement back to their constituents with confidence.

At this point, as Diepeveen makes clear, negotiation had displaced debate, and everyone had learned in the process. The implications for policy analytic work could hardly be more striking. An argumentative process of adversarial science has been transformed into a political deliberation among deeply suspicious and skeptical parties who have moved from the warfare of "my expert against your expert" to facilitated negotiation in which their commitment to quality of information was intact, but the rules (and behavior) of procedure had been radically transformed. We wish to note particularly the mediator's enabling this move by contentious, distrusting parties to joint fact-finding (choosing appropriate expertise together and learning jointly from a jointly legitimated source) and to open alternatives to argument as their sole mode of conversation.

Policy analysts, we suspect, may also often be similarly caught: these stakeholders have experts who claim "A" and those stakeholders have experts who claim "B" (and so on). The analysts themselves have little option but—if they are not simply to limit themselves to the claims of "A" and "B"—to try to find yet other sources of expertise "C" to help them to assess the questions at hand, including of course the views "A" and "B" of the other experts. But a mediator works with the parties so that they choose and thereby legitimate the experts and sources that ground their beliefs about contested questions. The policy analyst without the benefit of a mediated deliberation, in contrast, may only choose (and hardly legitimate) yet another source of (nevertheless perhaps suspect) expertise.

Diepeveen's account helps us understand what's at stake in this move from debate to another model of policy inquiry:

> The consultant then came back with a recommendation that said, "In this particular case, above ground or below ground, it's still going to impact the MRIs. You're going to have to protect the MRIs . . .
>
> As a result they ended up talking about putting one-foot thick lead walls all around these machines. But because it was independent, the city people could go back to their political bosses and say, with confidence, "This is what we have to do."
>
> The health care and academic reps could go back to their Boards of Governors and say, "You know, yes, we thought that [going] underground would solve the problem, but technical expertise says that it's not going to make a difference [to put it underground]." This group in particular was very concerned about the issue because while the initial concern had been about the impact on the MRIs, there was also an issue of aesthetics, their desire to keep the power lines and tracks and train underground.

The mediated deliberation, Diepeveen suggests, makes joint action possible because it provides confidence by upholding independence in the context of a shared sense of "This is what we have to do." He summarizes:

> We started out with my expert vs. your expert. What turned the corner was a realization by the parties that that wasn't going to get them anywhere. They realized that they could talk until they were blue in the face, and the other wasn't going to convince them. So now it was a matter of saying, "Guys, how are we going to get around this?" What do you need in order to get around this? '
>
> They all said, "Sound technical information that's independent." As a [community] guy I'm not making my decision because you, the health care reps, say it's a good deal, or because you say it's not going to have an impact. And the health care reps aren't going to make their decisions because the City rep says it's not going to make an impact. We're going to make a decision based on sound technical expertise that's coming from the outside, that is defensible, that's independent from someone who's not working for you, not working for me.

Diepeveen's story of what he'd learned in this joint fact finding process can teach us about more than the shift from adversarial debate to legitimate action. What distinguishes his practice from the work of a "moderator of debate" is a practical sense of how to continue to open possibility in a policy controversy that otherwise conveys the feeling of going nowhere, of stakeholders stuck in perpetual rhetorical warfare, launching broadsides for their positions, against one another, with little mutual recognition accomplished and less agreement upon joint action.

MEDIATING NEGOTIATIONS: DEALING PRACTICALLY WITH INTERDEPENDENCE

We turn now to the part of mediated negotiations that might be most visible to outsiders—the negotiation itself—even if it builds directly upon and depends wholly for its success upon the prior work of conflict assessment, convening, and mutual learning or fact-finding as we have discussed them so far. We turn once more to Diepeveen's account now to pose a puzzle that we will then try to solve with our account of negotiation. The puzzle emerged in Diepeveen's work to mediate inter-municipal disputes in Canada. He tells us:

> We had one situation where I was meeting with a municipality, and the Reeve (their chief elected officer) and his chief administrative officer both said, "You know what, you might have 100% success rate now, but you won't by the time this one ends. Because this one isn't gonna go. There's no way there's gonna be an agreement, there's too much bad blood between the two municipalities."
>
> It was an annexation dispute, a small annexation. It was really not a big chunk of land—it might have only been an acre or two. It was quite small, but what made it look so impossible were the negative relations between the two municipalities—the total lack of trust.

So Diepeveen sets the stage: conflict between politically established entities, "total lack of trust," predictions from elected leaders and administrative staff as well that face-to-face discussions will be pointless, will only fail. Diepeveen as mediator has been given the good counsel of years of experience and political judgment: "There's no way there's gonna be an agreement."

The puzzle is set by Diepeveen's account of what happened in this "impossible" case:

> They ended up getting an agreement—but the fascinating thing is that I have heard from both these two guys, who now have said to us, "You know what? The fact that we got this deal, that was nice. But the thing that has been beneficial to us is the fact that we have now established a working relationship that has gone far beyond this little land issue to a whole bunch of other things."[18]
>
> He said, "That's been the amazing thing for me: the transformation that has come about—as a result of what was a small annexation—has translated into a lot more cooperation in a whole bunch of other areas."

We get our first glimpse into what might explain the shift in the administrators' comments to Diepeveen regarding their interdependence and connectedness. He continued:

> You see these municipalities have shared boundaries for years—there are long standing relationships. The parties aren't going away. So whatever the specific issue happens to be, it's always in the shadow of those relationships. The relationship building is critical. It really is.

The tie between substantive terms ("the specific issue") and relationships that Diepeveen highlights is described in more detail by Kelman (1996) in the interplay among three "central implications for what happens—or ought to happen—in the negotiating process" when it is understood as interactive problem solving (99). To approach a problem through negotiation means,

> treat[ing]... the conflict or disagreement between the parties at the table as a problem that they have in common... The problem the two parties share is that each side's pursuit of its own interests... undermines or threatens the interests, values, and needs of the other. As a result, each party is stymied in the pursuit of its interests. (Kelman, 1996, 100)

Negotiation involves moving from these conditions for stalemate (as predicted by the local experts in Diepeveen's case) by first,

> acknowledging that there is a shared problem, calling for a joint effort to identify ways in which both parties can pursue their interests and satisfy their needs without undermining or threatening each other. (ibid)

The stakeholders in Diepeveen's story eventually came to recognize, deeply and directly, just this interdependence—that the problem was a shared problem in the relationship between them, and that recognition opened the door to more productive negotiations. As one captured it vividly:

> One administrator... all of a sudden said to me, "Until I realized that I could divorce my wife easier than I could divorce my municipal neighbor, things weren't going that well. But when I realized that I had to have an ongoing relationship, all of a sudden the incentive to negotiate with the other side was there."

We take this comment to reveal more about the depth of the speaker's perception of his interdependence with his municipal neighbor than it reveals about his feelings for his wife. Such rec-

18. Other mediators describe such discovery of broader relationships. See H. Bellman in Harrington (1996 p. 132—133)

ognition of interdependence sets the stage for efforts to solve the problem, the second of Kelman's three "central implications" of treating negotiation as interactive problem solving. Once parties recognize their interdependence, integrative solutions help them to prove to themselves and each other that pursuing their own interests need not "undermine or threaten the interests, values, and needs of the other" (100).

Mediation practice in this final stage is directed at helping the parties to fashion these integrative solutions that respond to deep and persistent perceptions of interdependence by fashioning policy proposals that take account of the needs and interests of both parties and thereby "move from a mutually destructive to a cooperative, mutually enhancing relationship" (Kelman 101). This process usually starts with getting parties to "push behind [their] incompatible position[s] to identify the needs that underlie their position. Focusing on underlying needs—just like focusing on underlying interests rather than opposed positions—enables the parties to search for solutions that are unlikely to emerge from positional bargaining" (Kelman 1996, 111; Fisher et al. 1981).

The comments of Lawrence Susskind, an experienced public policy mediator, suggest how mediators can make the prospect of integrative, "mutual gains" outcomes practically accessible to stakeholders.

> I am modeling the process that I'm hoping they're going to use in dealing with each other. I'm taking this person's side when he says "No" and I'm saying, "You're saying, 'No' to him. I can see why you're saying, 'No,' but what else could he have said that would have satisfied you?" I'm getting him into the mode of making proposals in response to things that he doesn't like rather than negative statements, and the participants see that that's the way to deal with other they disagree with in this kind of process....
>
> At some point I see the light bulb go on. They next time something comes up that this person doesn't like, he or she says, "I don't like that as much as this and this. Could you live with that?" and the person looks over and smiles at me. You can just see it; it is a very obvious event. They get it, and it's very intriguing. (Susskind in Kolb 1994, 342–343)

In such work with the stakeholders we get to the "essence of the process" which works by,

> acknowledging the other's needs as well as your own, and making proposals that respond to both. Arguing that you don't like what the others want, and you want something else instead (which is the old model of bargaining), doesn't produce agreement. Remember, we're trying to get an agreement. We're not done until we get an agreement." (Susskind in Kolb 1994, 343)

When the parties "get" this insight at a practical level,

> [t]hey stop saying, 'That's crazy! We're not going to that. I'm opposed to that.' They realize that the way to get what they want is to offer the others something that, in fact, responds to their needs but also responds to the speaker's own needs... (Susskind in Kolb 1994, 342)

For the stakeholders to work together in this way, the negotiation process has to be "a joint effort, in which the parties work together to generate ideas for a solution that meets both of their needs." The "hallmark" of such negotiation—such social and political interaction—is "that each participant tries to enter into the other's perspective and take the other's role, thus gaining an understanding of the other's concerns, expectations, and intentions" (Kelman 1996, 101). This can generate the understanding needed to engage in the kind of reasoning Susskind describes above and opens the way for parties to influence one another, not by entrenching their commitments to their positions

and demands, but by enabling them to be "responsive to each other's needs" (Kelman 1996, 101).

These three steps—acknowledging interdependence with the recognition that the problem is a shared one in the relationship among the parties, trying to solve the problem by generating integrative solutions that respond to the needs and interests of all parties, and drawing on an understanding of each sides' "concerns, expectations, and intentions"—open the way for negotiations in which solving the problem inherently means changing the relationship between the parties. This is just what Diepeveen's municipal administrators were reporting above.[19]

The mediator's ability to sustain a hard-nosed and realistic sense of political possibility—in the face of well-entrenched nay-saying—represents, in a moment in practice, a deep challenge of democratic politics and policy analysis, a challenge of what Hannah Arendt called "natality," bringing new relationships into the world. In mediation, parties' perceptions of interdependence complement their hard-edged concerns with self-interest so typical of distributive politics. Mediation works because of—not in spite of—the tension that exists between "creating and claiming value" and between the distributive and relational elements of negotiation.[20]

The implication here is practical and institutional. Because the tie between interest and interdependence often offers more possibilities than initially meet the eye, mediators (and potentially policy analysts) can often uncover possibilities where stalemate seemed inevitable. Because processes like public hearings and adversarial science can harden positions by promoting exaggeration and corrupting "the facts" (as opposed to promoting mutual learning and joint inquiry), mediators know how to design and manage institutional alternatives that do not hold stakeholders hostage to defensiveness, fear, and mutual manipulation of information, but at the same time do not require them to give up their concern for their own needs and interests.

Notice that we see no talk here of compromise, giving in, betraying principle, no talk even of splitting differences. We see instead that the institutional process changed the nature of the discussions. Diepeveen implies not only that the agendas of deliberation were broadened from a narrower single issue problem-solving discussion, but that the interests of both parties, in his case one more urban and one more rural municipality, were considered by the convened representatives as equally legitimate, deserving of attention and respect.

So mediators not only may teach policy analysts about the dangers of narrow agendas set by powerful parties or the dangers of taking too narrow a problem-solving orientation, but the mediators are actually conducting policy focused deliberations themselves. These deliberations have been both participatory and practical and outcome oriented—so that Diepeveen's stakeholders quoted above spoke of these sessions as "amazing," noting a "transformation that... has translated into a lot more cooperation in... other areas."

Diepeveen extended his account to institutional analysis, comparing these mediated processes to the scope and character of the conventional institutional mechanism available to resolve such disputes:

> What was happening was something that wouldn't happen in front of a tribunal. The administrative tribunal looks at a proposal on the table, and everyone focuses on that. You're always attacking that annexation or that land use. It's an argument: you are trying to convince the board of the merit of your case and to destroy the case of the other.
>
> But what happened here was that, when the mediators came in and reframed the situation, it became a situation of, "Ok, so what's important to both sides here?"
>
> The rurals could tell their story, and all of a sudden there was—if I can use the term loosely—an "obligation" on the part of the urbans to respond to that, and to say, "In order for us to resolve this, you have concerns too, and we're going to have to address them."
>
> So that was a real transformation point, and I think that that, in itself, has been one of the real selling points of the whole mediation process—that it has legitimized both sides of the debate, both sides of the "argument."

19. Starting with the "problem" in negotiations parties are led to their "relationship." Starting with their "relationship," they are led to their "problem." Once parties perceive a problem as shared, and thereby in their relationship, solving that problem invariably involves changing that relationship.

20. Mnookin, Peppet, and Tulumello (2000) Lax and Sebenius (1987)

So Diepeveen helps us see how the institutional process of mediation itself shapes the process of policy analysis. In mediated negotiations, parties move from debate, from pro and con argument, to collaboration, a joint effort to generate proposals for action that respond to the question, "What's important to both sides here?" This process does not come at the expense of debate and argument, but it extends the process of inquiry to the creation of a self-generated process of mutual recognition, even a legitimation of the stakeholders' agreements upon action now that "both sides" may feel "legitimized," respected, taken seriously.

Policy analysts can learn from mediators how to better to assess stakeholders' interests—especially those interests so far unarticulated and hardly made public. Policy analysts can learn from mediators to focus not only on stakeholders' passionately defended positions but also, more crucially, on the conditions of interdependence and on-going relationships between the parties. Policy analysts can learn from mediators that even in the face of well-established claims that there's "no way" a dispute can resolved, facilitated deliberative processes can generate surprising transformations of policy options as stakeholders glimpse new possibilities of relationships, new possibilities of recognizing and addressing issues heretofore ignored.

CONCLUSIONS

In the sections above we have tried to convey the grain and texture of mediation practice as well as its outlines and formal organization. This move into the details of institutional, and even micro-political, interaction matters because it is precisely at this level that public policy mediators build the relational ties, secure the commitments of stakeholders, develop shared perspectives on contentious issues, and design the policy options that make mediation a revealing practice from a policy perspective. We have tried to show here how these designs in action can open up new policy possibilities in situations that otherwise seem to promise only stalemate or escalating conflict.

Mediators' actions in these moments are practical, political moves. They have the immediate, tacit quality of the intuitive responses of experienced athletes who can anticipate the movement of a ball in play and a defender in a sequence of action likely to unfold, as David Halberstam has put it, "at the speed of thought" (Bourdieu 1977). Mediators' moves function at the margin of possibility to chip away at pre-established positions and to encourage subtle reframings of perspectives and claims that can, at any moment in the evolution of a policy discussion, open onto broader and deeper transformations of possibilities of action. A significant part of the effectiveness of mediation practice involves this persistent attention to actions that test and enact newly negotiated relationships, float new proposals, and try out emergent insights about policy options and implementation.

We have also tried to show that this procedural sophistication is not simply deal making in another form. The key feature of mediation practice is the way mediators' "designs in action" align with broader features of policy development and implementation. For example, the interactions between a mediator and stakeholders that take place in a conflict assessment constitute an applied form of network analysis that responds to the dynamic character of the institutional spaces in which contemporary public policy is made.[21] Unlike analysts relying on stable bureaucratic processes of policy-making, mediators map networks *in situ* and in relation to the policy controversies that frame

21. See Hajer and Wagenaar, 2003; Kickert, Klijn, and Koppenjan, 1997; Sabel, Fung, and Karkkainen, 2000.

both the interactions in a network at a given point in time and the stakes different actors have in the problem. This applied network strategy ties historical relationships to substantive interests and draws on the interdependence embodied in shared problems to open new possibilities for development. Mediators develop the potential that inheres in fluid institutional relationships by convening representative policy actors as stakeholders, creating a shared, public account of the issues, and framing initial questions about relationships, vulnerabilities and relevant facts in ways that make the exploration of interdependence practically accessible.

As de facto policy analysis, mediation strategies then help these practical stakeholders to integrate their self-interest in problems at hand with a recognition of their interdependence. In so doing, mediators enable parties to frame collective action problems together, as an interdependent group of negotiators, so that they can act on the problems that they could not deal with separately.[22] Mediators engage stakeholders in the assessment phase to recognize subsidiary as well as primary interests, differing priorities, opportunities to trade across differences, and areas of shared uncertainty and needs to learn. Then, as we showed, stakeholders can begin to confront and refine the expectations they have of one another, to rework agendas and barely explored relationships, and to begin to probe freshly imagined and negotiated possibilities together. As our example illustrated, a key feature is that mediators convene practical discussions in ways that uphold stakeholders' independence and capacities for critical reflection even as they ask the parties to respond to their perceptions of interdependence by generating practical policy proposals and options. In these ways mediators create the possibility of transforming a loosely connected network of actors with an unclear institutional pedigree into a group—a practical public even—that generates the conditions for its legitimacy directly via its representative character and its accountability to stakeholder constituencies.

Here the mediators are not working as substantive policy experts giving opinions or predictions about desirable policy outcomes, but they are creating the conditions and processes that enable the convened stakeholders to work together to take advantage of the best available information and expertise, to assess one another's interests and priorities, to learn about pressing uncertainties and vulnerabilities, and then to invent options that address their real, separate and shared, interests. In these ways, mediators turn reflection on the conditions of stakeholders' interdependence and vulnerability into designs for cooperative inquiry and invention that can be enacted in conversation to enable stakeholders to negotiate relationships that both satisfy their self-interests and respond to the broader democratic significance of the issues at hand.

But mediators' work of conflict assessment and convening stakeholders opens, more than exhausts, the effort to plumb the possibilities of interdependence. Joint fact-finding reframes disputes and debates about who is right into questions about how to act and learn together in light of disagreements and in the face of persistent uncertainties. Reframing variations on the theme, "How can I convince you that you're wrong?" into versions of "What do we do about our disagreement?" opens new ways forward. As in the assessment and convening stages, mediators helping parties to confront, but not dissolve, differences in perspectives, interests, and priorities adds to the experience and growing confidence that makes it a bit easier and more plausible that, having negotiated cooperative ways of addressing their differences once, the group can do it again.

The turn to a kind of joint problem solving in negotiation makes this process even more practical and specific, without devolving into simple deal making. As we showed, this move to negotiation heightens perceptions of interdependence, underscoring the need for mutual recognition, reciprocity and cooperation across differences. The fashioning of agreements gains in momentum when stakeholders acknowledge that to get what they want separately they have to design terms that meet the interests of others as well.

22. Charles Sabel describes this as the "pragmatic trick" of framing "a collective action problem such that a collective actor emerges that has a natural interest in solving it" (1994).

Lawrence Susskind describes how this modulation of difference and understanding occurs through the stakeholders' emerging sense of facts, interests, and possibilities:

> "People start this process with needs, desires, want, concerns, ideology, uncertainty, and interests—all of them. And I expect people to change—to alter their sense of what they would or wouldn't like to have happen by listening to what other people say... Learning and inventing goes on, reconsideration goes on, and argument matters. People discover something about their own interests along the way... People are not just collection of preset interests; they also have all kinds of tacit wants and needs that come into play." (Susskind in Kolb 1994, 348)

So stakeholders' practical contemplation of their interdependence in negotiation forces acceptance of the possibility that "their views of themselves, of the work, and the interests arising from both—their identities, in short—will be changed unexpectedly by [their] explorations." (Sabel, 1994 pp. 247-248.)[23] Negotiated agreement on policy designs or plans for implementation then occasion shifting boundaries between the self, the other, and the common in the face of innovative policy designs—and so, too, new associative ties that constitute an element of democratic renewal.[24] Here again we see the resonance in which particular moments in mediation practice, moments of dawning and transformative recognition of new relationships of self and other—newly appreciated interdependence and newly engaged cooperative inquiry and design as a result—become focal points in processes of political and institutional development that can produce new policy measures and extend to renew the available forms of democratic practice.

BIBLIOGRAPHY

Austin, John. 1962. *How To Do Things With Words*. Cambridge, MA: Harvard University Press.

Bohman, J. and W. Rehg, Eds. 1997. *Deliberative Democracy*. Cambridge, MA: MIT Press.

Bourdieu, P. 1977. *Outline of a Theory of Practice*. Cambridge

Carlson, Chris. 1999. "Convening," in L. Susskind, S. McKearnan, and J. Thomas Larmer, Eds. *The Consensus Building Handbook*. Thousand Oaks, CA: Sage.

Chambers, Simone. 1996. *Reasonable Democracy*. Ithaca, NY Cornell University Press.

Cohen, J. and J. Rogers, Eds. 1995. *Associations and Democracy*. London: Verso.

Cohen, J. and C. Sabel. 1997. "Directly-Deliberative Polyarchy." *European Law Journal*, 3(4):313–340.

Dryzek, J. S. 1987. "Discursive Designs: Critical Theory and Political Institutions." *American Journal of Political Science,* 31: 656–679.

———. 2000. *Deliberative Democracy and Beyond*. Oxford: Oxford University Press.

Fischer, Frank. 2000. *Citizens, Experts, and the Environment: The Politics of Local Knowledge*. Durham, NC: Duke University Press.

Forester, J. 1999. *The Deliberative Practitioner*. Cambridge, MA: MIT Press.

———. 2005a. "From Environmental to Urban to Inter-Municipal Disputes: A Profile of Bill Diepeveen's Mediation Practice." Cornell University Department of City and Regional Planning. May.

———. 2005b. "If Parties Often Misrepresent Their Interests, How Can We Evaluate Negotiated Policy Agreements?" in John Scholz and Bruce Stiftel, Eds. *Adaptive Governance and Florida's Water Conflicts*, Washington, D.C.: Resources for the Future.

23. These modulations are of a family with what a moment that is referred to in the institutional and public lawyering literature of pragmatism as bootstrapping. See Simon, 2003 p. 56ff.

24. The potential of policy processes to develop associative environments features prominently in theories of institutional and legal pragmatism. See Sabel (1992, 1993, 1994, 1995), Fung and Wright (2001, 2003), and Cohen and Sabel (1997). Cohen and Rogers (1995) develop this insight explicitly in terms of a theory of associative democracy.

———. 2006a. "Rationality and Surprise: The Drama of Mediation in Rebuilding Civil Society," in Penny Gurstein and Nora Angeles, Eds. *Engaging Civil Societies in Democratic Planning and Governance*. U. Toronto Press.
———. 2006b. "Making Participation Work When Interests Conflict: From Fostering Dialogue and Moderating Debate To Mediating Disputes." *Journal of the American Planning Association* (Fall), 73: 4.
Fung, Archon. 2001. "Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing." Politics and Society 29.
Fung, Archon and E. O. Wright. 2001. "Deepening Democracy: Innovations in Empowered Participatory Governance." *Politics and Society* 29(1): 5–41.
———. 2003. *"Deepening Democracy: Institutional Innovations" in Empowered Participatory Governance*. London: Verso.
Gomart, Emilie and Maarten Hajer. 2002. "Is That Politics? For an Inquiry into Forms in Contemporary Politics," in Joerges, B., Nowotny, H. (Eds), *Looking Back Ahead: The 2002 Yearbook of the Sociology of the Sciences*, Kluwer Publishers, Dordrecht.
Hajer, Maarten and Hendrik Wagenarr, Eds. 2003. *Deliberative Policy Analysis*. Cambridge: Cambridge University Press.
Heclo, H. 1978. "Issue networks and the executive establishment" in A. Kind, Ed. *The New American Political System* (87–124). Washington D.C.: American Enterprise Institute for Public Policy Research..
Kelman, H.C. 1996. "Negotiation as Interactive Problem Solving." *International Negotiation* 1:9987–124123.
Kickert, Walter J. M., Erik-Hans Klijn, and Joop F.M. Koopenjan. 1997. *Managing Complex Networks. Strategies for the Public Sector*. London, Sage.
Kolb, Deborah. 1994. *When Talk Works*. San Francisco: Jossey Bass.
Laws, David. 1989. Transcripts of the Citizen's Advisory Committee to the Maine Low Level Radioactive Work Authority, June 8–22. Transcribed by and on file with D. Laws.
Laws, David and Maarten Hajer. 2006. "Policy in Practice," in Michael Moran, Robert Goodin, and Martin Rein, Eds. *The Oxford Handbook of Public Policy*. New York: Oxford University Press.
Lax, D. A. and J. K. Sebenius. 1987. *The Manager as Negotiator*. New York: The Free Press.
Mnookin, R. H., S. R. Peppet, and A.S. Tulumello. 2000. *Beyond Winning: Negotiating to Create Value in Deals and Disputes*. Cambridge, MA: Belknap Press.
Podziba, Susan. 1998. "Social Capital Formation, Public Building and Public Mediation: The Chelsea Charter Consensus Process." Dayton, OH: Kettering Foundation Press.
Sabel, Charles. 1992. "Studied trust: Building new forms of co-operation in a volatile economy," in F. Pyke and W. Singenberger, Eds. *Industrial Districts and Local Regeneration* (215–250). Geneva: Institute for Labour Studies..
———. 1993. Constitutional Orderings in Historical Context. *Games in Hierarchies and Networks*. F. W. Scharf. Boulder, CO: Westview, 65–123.
———. 1994. "Learning by Monitoring: The Institutions of Economic Development," in N.J. Smelser and R. Swedberg, Eds., *The Handbook of Economic Sociology* (137–165). Princeton: Princeton University Press..
———. 1995. "On the New Pragmatism of Firms and Public Institutions," Paper presented to the conference on Liberal Institutions, Economic Constitutional Rights, and the Role of Organizations, European University Institute, Florence, December 15–16.
Sabel, Charles, Archon Fung, and Bradley Karkkanien. 2000. *Beyond Backyard Environmentalism*. Boston: Beacon Press.
Schwarz, Michael and M. Thompson. 1990. *Divided We Stand: Redefining Politics, Technology and Social Choice*. London: Harvester Wheatsheaf.
Simon, William H. 2003. "Solving Problems v. Claiming Rights: The Pragmatist Challenge to Legal Liberalism" Columbia Law School, Pub. Law Research Paper No. 03-58. Available on online at http://ssrn.com/abstract=459325.
Susskind, Lawrence and Jennifer Thomas-Larmer. 1999. "Conducting a Conflict Assessment," in L. Susskind, S. McKearnan, and J. Thomas Larmer, Eds. *The Consensus Building Handbook*. Sage.

Part X

Country Perspectives