

Synopsis of the Dispute Resolution/Deliberative Democracy Seminar  
MIT, Cambridge MA June 2005

## **Scenario 1: Municipal Decision-Making**

*Facilitator:* Judith Innes

*Panelists:* Josh Cohen, Archon Fung, David Laws, Carolyn Lukensmeyer, Jane Mansbridge, Nancy Roberts, Jay Rothman

*Scenario:* A local government decides that it wants to "consult" citizens more directly before a critical long-term development decision is made (regarding the investment of a substantial amount of public money). The dispute centers on the appropriateness of filling mapped wetlands so that a new highway spur connecting the city to the nearby interstate can be built. As usual the battle lines have been drawn between environmentalists who oppose filling the wetlands and development interests who say that the roadway is the key to revitalizing the declining city economy. Elected officials are deciding who to include in the consultation and how to include them. One faction wants the mayor to pick a blue ribbon advisory committee to formulate suggested city policies and priorities governing wetland protection (above and beyond federal and state laws). Another wants to run a set of public hearings once the experts selected by the city have prepared a detailed plan for the roadway. A third proposes a non-binding referendum. A fourth wants a consensus building process that would involve all relevant stakeholder groups (and let them nominate their own representatives). This consensus building process would involve a fairly large group of stakeholders in generating detailed plans for the site as well as local wetland protection polices.

Participants began by identifying current deficiencies of each field. Comments centered on the need for change, a need for representation of the common interest, the transformation by which individual opinion becomes collective judgment, institutional memory and process design.

### I. Need For Change

To help conceptualize the different kinds of citizen participation, A.Fung described it as a three-dimensional space. Along one axis are the participants: elected representatives, professional stakeholders, randomly or self-selected citizens. Along another axis is the process through which these participants interact: listening, deliberating, or bargaining. Along a third axis is the participants' level of decision-making power: none, some, or total. Each form of assembly has deficiencies, regarding the distribution of power.

J.Mansbridge cautioned that although the representative process should be critically analyzed, its merits should not be overlooked. If representatives have the trust of their respective groups, they may be able to forge a satisfactory compromise. However, since we are interested in reasonable and fair solutions, deliberation ought to illuminate common interests and conflicts among interests. Even when representation is not an issue, P.Adler warned, mediators often feel unable to raise support for crafting a resolution. This could be improved by thinking about consent, not just consensus, and trying to reach a centrist political position that can withstand centrifugal force. To illustrate this point, M.Elliott noted an example from the news. Fourteen centrist senators had just averted a filibuster of presidential judicial nominations by forging an agreement behind closed doors. Media coverage of this event has focused on how conservatives disapproved of the compromise centrist position.

C.Lukensmeyer was the first of many to note that representative democracy needs to be supplemented with more analysis of power relations and stronger links to decision-making. One way to help participants commit to decision-making and implementation is the creation of democratic spaces within which the polity and authorities can invest time and resources, and take a “leap of faith” — agree to implement whatever final decisions are produced within that democratic space. The call for such a space would be echoed during later sessions.

C.Menkel-Meadow asked the group to consider how we think about representativeness, specifically, demographics. The word “demographics” comes from the word “demos,” meaning “people.” She cautioned against making assumptions about people based on their demographic group, because it can lead to a formulaic approach to creating “representativeness”: “getting X people from column A and Y from column B to the discussion table in order to ensure ‘representativeness,’” such as in jury selection. Though politicians and the media exacerbate identity politics by filtering out points of view through use of demographics, we need to remember that we all belong to multiple identity groups.

Emphasizing another dimension of the consensus-building/deliberation processes, D.Kahane urged that before deciding on methodology, groups need to enumerate ideology by prioritizing normative ideals such as efficiency and justice.

## **II. Voice for the Common Interest**

Related to the recognition of a need for change, participants discussed a need for representation of the common interest. C.Lukensmeyer began this conversation by asking which voices can speak for the public good. J.Innes asked who would then be a representative of the common interest? How would we know that someone actually represents the common interests (and public good), and how would that be different from a consensus building process? J.Mansbridge answered that not just one person but a group of people would work to develop something that represented the public good. The group's conversation would follow, as closely as possible, the ideal elected representative process. C.Lukensmeyer added to this idea the qualification that participants would not have pre-formed positions about the issue. J.Innes wanted to know how such people would be selected, and N.Roberts answered by citing successful cases in which community members are invited to participate in whatever capacity they choose. One benefit of this method is that it encourages some people to participate who might otherwise abstain or lack representation. To help publicize the invitation the press should also be involved early in the process. Reminding the group that representation should not always be maximized, A.Fung cited cases in which there might be reasons to exclude the most interested stakeholders, such as bipartisan redistricting in the United States. In such cases, a random group of citizens might be less biased, and therefore more capable of deciding what is best.

However, regarding the process of random sampling and deliberative processes in general, S.Podziba warned against assuming that altruism, and not private interests, will characterize citizens' behavior. Citing Hobbes, she said there are always private interests. If we want to elevate ourselves above the "state of nature" by crafting and adhering to creative and community-building solutions, we need to test assumptions of altruism. D.Kahane noted that although people may start out with different and divisive private

interests, the right process can encourage a move towards consensus. “How much faith do we have that that can happen?” he asked, concerned that some people are inevitably excluded but that democratic agonism yields positive results.

### **III. Transformation: Individual Opinions to Collective Judgment**

D. Kahane’s comments led participants to raise specific comments about the transformation he described. D.Yankovitch commented that the dialogue that facilitates this transformation is just as important as who is chosen to participate. The shift from individual opinion to collective judgment requires that participants listen provisionally to each other. He lamented that our society is skewed towards advocating individual interests. The general public’s interest would be better balanced if the individual transformation he described could take place on a wider scale.

Regarding this transformation from “raw” to “informed” opinion, J.Cohen distinguished between individuals’ points of view (e.g., religious, sectarian), which they do represent, and their interests. People have points of view that do not necessarily represent their interests.

To avoid confusing the two, L.Susskind suggested that some kind of nomenclature other than “common interest” be used to represent other people’s needs and desires when discussing this transformation from raw to informed opinion. He went on to say that consensus can only be reached if participants consider both their own interests and the interests of others. Therefore, introducing to the dialogue the goal of consensus, and perhaps a decision rule that requires participants to reach an agreement, can help people take account of others. By doing so, it can shift the purpose of dialogue from developing understanding of opposing perspectives to consensus-building.

C.Lukensmeyer was concerned about the media’s role in the transition from individual or stakeholder identity to a collective identity. Can the media be part of public education, and thereby strengthen the democratic process, or are they only looking for errors and controversy?

#### **IV. Institutional Memory**

M.Elliott cited the need for more reflective practice and institutional memory, saying that we need the capacity to take what has happened in one situation and carry it over to another.

#### **V. Process Design**

Participants also raised a number of ideas about how to design processes to bring about change. N.Roberts emphasized the need for creative, open-ended, future-oriented solutions that invite exploration, emphasize positive results, and supplement representative democracy. J.Rothman suggested that the focus should first be on passion and vision, and then on specific processes to be used — what are the stakeholders’ passions and what do they envision? He continued, after these things have been accounted for and a process has been implemented, there must be an opportunity to reframe problems and redesign the resolution process. Otherwise, people will not see an opportunity to become involved and they will lose hope for the future. Participants’ goals and priorities should inform this redesign process. In this way we can incorporate input from the bottom up while policy-makers work to develop guidelines to help guide the discourse between the environment and development groups. Given the need for feedback and bottom-up input, Rothman also recognized the need for concrete action within time constraints.

J.Cohen cautioned that some people do not want to think in terms of vision. Deliberative democracy is about individuals exercising their power. Therefore, we must be careful about identifying deliberative democracy with a particular way of doing business and “vision.”

C.Lukensmeyer recognized the need to mix and integrate methods and apply them to appropriate processes.

L.Susskind shifted the focus from stakeholders to their representatives, reminding the group that elected representatives, not just stakeholders, need to be able to implement any decisions that are made. “We do not want to replace representative democracy with ad-hocracy,” he said. In order for elected officials to be interested in the decision-making process, there need to be certain minimum conditions met. First, representatives of stakeholder interests, including the common interest, need to be self-selected. “Blue ribbon” experts selected by the convening authority will lack credibility. Second, someone must be accountable for enforcing the agreed upon design process. A mediator is a good candidate for this role, but whoever it is must be perceived as legitimate by the public and elected officials. Third, there must be an opportunity for joint inquiry and problem-solving, such as joint fact-finding. Fourth, there must be a written agreement to which people can be held accountable. Participants should sign it after the final draft is circulated among those being represented.

D.Laws added that people who participate in such efforts become process designers. In his view, it is critical that people have the ability to reshape the agenda, the ground rules and the roster of participants. D.Kahane noted that some processes do not allow participants to reframe the process. He asked if that was a question of efficiency or if in some cases there were reasons why we might not want participants to be able to reframe the process.

C.Menkel-Meadow pointed out that deliberation and reasoned argument use particular political frames. Given this process pluralism, L.Susskind’s principles are important in many, but not all processes. There is no panacea, no process that fits all situations. “It depends.”

Reflecting on the idea of feedback, M.Hajer identified the risk of assuming that one decision-making moment exists. Instead, there is a chain of decisions, and many new and different considerations at each stage in any process.

## **Scenario 2: Metropolitan Policy-Making**

*Facilitator:* David Booher

*Panelists:* John Dryzek, Mike Elliott, Frank Fischer, Bill Isaacs, Susan Sherry

*Scenario:* A metropolitan agency wants to engage a wide range of stakeholders in a policy dialogue regarding regional “fair share” housing policy. State and metro agencies have agreed to hire a professional “mediator” to help manage a policy dialogue on a metropolitan scale. The question is, what should the mediator’s mandate include, especially with regard to the involvement of advocates of low income residents and residents of color who may or may not have the knowledge and skills needed to participate on an equal footing with real estate and municipal interests. The 15 suburban towns on the periphery of the region are trying to fend off litigation (and possibly state legislation) charging that their exclusive land use policies are excluding poor people from the jobs and housing available outside the central city.

Participants’ comments focused on the need for change, process design, the role of the mediator, individual learning, and time-scale.

### **I. Need For Change**

S.Sherry focused the conversation on how elected officials can address conflict resolution and expand it more into something like deliberative democracy. She asked how practitioners can take into account those who are underserved or disenfranchised.

Specifically, she asked how the disenfranchised could be included when there is either no organized interest to represent them or their representative is overstretched. C.Menkel-Meadow cautioned against thinking of ignored groups as homogenous. There are vastly different concerns at play.

B. Isaacs asked, “Which problem are we trying to solve?” He reflected that the answer depends on the participants and their time constraints. He went on to say that in order to change the discourse at any level, it needs to be changed at every level. He challenged workshop participants to raise questions which could not be answered, to take risks and make themselves vulnerable. He suggested that the group think in terms of microcosms in which different dialogues can take place, and in terms of what we would do if we had ten years to develop a decision-making process and get movement. He commented that although we often get movement, we don’t know why. Therefore, there is a need to raise the level of inquiry by voicing our own uncertainties.

M. Elliott asked what it means to reconstitute communities, specifically in cases where we have not had community at the regional level and we are now creating it. Such ambiguity about the ends, D. Booher countered, actually reflects the real world. Part of the deliberative process is to deliberate about what the ends are. Subsequently, we can deliberate about the means. C.Lukensmeyer added that we need new governance mechanisms. Polling data show that the public supports a move toward regional government, but it is the existing government that is not interested in ceding power. This represents an institutional failure, said J. Innes. We don't view deliberative processes as being capable of changing institutions. She reminded the participants that we do not have to accept the boundaries as they are at the beginning. We can rethink goals. M.Elliott noted that people's identities and how they frame a problem may be more important to solving a problem like this (i.e. in the scenario) than the facts. In order to make progress, he said, we need to catalyze a level of commitment, learning and engagement through a long-term, sequenced process. This will require an interactive process of civic outreach involving the media, not an alternative dispute resolution process. We need to envision a different kind of future around first principles. Then, we can move forward to develop concrete actions and strategies that generate commitments from particular communities.

M.Sclavi returned to S.Sherry's question about how to include disenfranchised people. She suggested that we need to re-create a group spirit. Otherwise, civil and public servants will be tempted to just go back to their offices, and public citizens to return to their homes, and the community spirit will not be preserved. Policy-makers feel more comfortable in the living room of the disenfranchised than the disenfranchised do in policy-maker's board rooms. Civil servants must learn to meet in the neighborhoods where disenfranchised people live, drink coffee with them, and in general be their guests. This levels the playing field and can enhance trust. At every stage, she said, you must create a collaborative mood that will last after they go home. We will only work together if it is enjoyable, rewarding, and leads to creative solutions.

D.Booher noted that there are disincentives for deliberation. Some officials make a show of committing to a deliberative processes, but really just want to educate the public about the decisions they have already made. In light of this, he asked, “How do we design deliberative and representative institutions? or are we kidding ourselves that deliberative and democratic institutions can be up to the challenges of the modern age?”

## **II. Process**

J.Dryzek asked if, instead of connecting deliberative exercises to policy decisions, the key question might actually be the reconstitution of social relationships. In deeply divided societies, deliberation can be separate from decision-making. In these cases, the key function of deliberation is the process of dialogue itself. In the most problematic cases, such as those divided along ethnic, religious, or national lines, connecting that dialogue to decision-making may obstruct both. The focus should be on learning to live together rather than on any decision-making moment..

Picking up where M. Sclavi left off on the issue of location, J.Fishkin commented that we need to pay attention to the type of forum used and its design. Deliberative democracy is not just one thing. Reiterating the relativity of process design, he argued that everything depends on which design you employ, and this decision depends on the circumstances.

C.Lukensmeyer added an additional design principle to those mentioned, the principle of embeddedness. She said that we need to think not just microscopically, but macroscopically as well. The challenge is to think about the macroscopic implications of our microscopic decisions.

## **III. Role of mediator**

F.Fisher commented that deliberation and dispute resolution cannot do much outside of the current distribution of power. Mediators are politically constrained, and the bargains they broker benefit some communities more than others. One way to address this is to not use alternative dispute resolution at the outset. Instead, the mediator could focus on ways to reduce the communicative implications of power differentials, and find ways to build

social and political capital. Drawing on participatory action research methods, the mediator could organize community seminars in ways that build social capital, paying particular attention to disadvantaged and disenfranchised communities. Media coverage could also be used as a discursive resource to lend the deliberations some weight.

D.Fairman asked what mediators can do if they recognize that there is a governance problem and that it is impossible for the regulatory agency to do its job. Do you do your job and come back with the recommendation that a new institution is needed before we can address this? Or, do we suggest that we have to muddle through, knowing that it won't solve the governance problem at its core?

S.Sherry noted another practical dilemma. She described instances in which practitioners want to do what feels right in terms of the disenfranchised and underserved, but they know that this may not serve the common interest. She offered the example of curb-cuts in sidewalks that handicapped citizens request but which cost taxpayers an inordinate amount of money.

#### **IV. Learning: Individual**

Following up on the notion of learning, J.Forester commented that learning processes do not reduce simply to exchange or bargaining. Participants in a process listen to the others at the table. The challenge is to think about how people can learn in non-argumentative ways, such as breaking bread together. What happens during these social exchanges that is not reducible to rational exchange of goods and services? We do not give a good account of this, yet it can help us to reach agreement.

#### **V. Time-scale and Continuous Process**

M.Elliott asked how deliberative democracy handles complexity. Federal agencies have the capacity to carry things through for 10 years. However, is it possible for unpaid laypeople to do this meaningfully? He remarked that we do not have good models for how to do this over 10 years. Many of the problems that we face don't have solutions. Instead, they create corollary problems. This creates the need for an ongoing effort,

which we as a society are quite capable of confronting. However, the institutional base for doing this is critical.

### **Session 3: National-level Consensus Building**

*Facilitator:* John Forester

*Panelists:* Peter Adler, David Fairman, Jim Fishkin, Susan Collin Marks, Susan Podziba

*Scenario:* A federal agency has decided to involve the public in a negotiated rule making process (i.e. drafting regulations pursuant to federal legislation). Many questions regarding the role and structure of government advisory bodies in this context are answered by federal legislation (i.e. the Federal Advisory Committee Act). Some questions, however, remain open. For example, what kind of fact-finding or technical studies can and should the advisory group commission on its own (separate from the sponsoring agency)? What approach to joint fact-finding is most likely to ensure an effective balance between science and politics in the development of proposed regulations? And, is it reasonable to seek such a balance through the engagement of ad hoc representatives of various non-elected constituencies? Who should pay for whatever studies the group decides to commission? How might peer-review of the technical work fit into this process? And, what if the regulations in question concern actions or policies that could create serious risks to human health and safety? When fear, anger and emotion run high, what can and should be expected of joint fact-finding or efforts to balance science and politics?

#### **I. Process**

In his response to the questions posed by this scenario, J.Fishkin conveyed his interest in including the public in such discussions. He said that it is important to probe the political will to “clarify tradeoffs” and make “causal connections.” Furthermore, he added, the public is “disempowered” when discussing issues about which experts already agree. Therefore, it is important that elites disagree so the public is empowered to think for themselves. However, we need a consensus on which experts should field the public’s questions. We need neutral moderates. Then, of course, there’s the question of who participates, and random sampling is a good way to include people who do not have pre-formed opinions.

D.Fairman suggested that there might be mechanisms for public engagement that can supplement the work of the people at the table. He suggested joint fact-finding as a

powerful way to answer analysis-based questions, but not interest-based questions. J.Layzer agreed, saying that scientists cannot answer all questions. When a collaborative process gives a group of scientists a charge, the group is constrained by what is feasible and legitimate. Although the result is not necessarily biologically defensible, it becomes the template from which the collaborative process proceeds. It is not too difficult to reach a technical consensus. The question that remains is what are the bounds of uncertainty about that agreement, what were the scientists asked to agree about in the first place, and what are they going to do about that. Since science will not take us to the policy conclusion, P. Adler commented, our goal should be to turn uninformed argument into a better-informed search for solutions. By themselves, joint fact-finding and scientific advisory groups are a “midpoint.” We need to establish relationships and set up a culture of inquiry, he said. We first jointly frame the question as a joint search. We then conduct an inventory of the information relevant to the topic, jointly interpret it, and then grapple with all the uncertainty and limits on our knowledge. This process is not just about scientific knowledge. There is also legal, economic and cultural expertise. D.Kahane asked if there is a reason why the selection of experts tends to involve elites rather than being democratic and why such processes are usually closed. S.Podziba answered that this is dependent on the context.

S.Podziba went on to reflect on the huge challenge for exchanging information during negotiated rulemaking. Uncertainty and power imbalances prevent the government from taking action on its own and compel people to engage with one another. Everyone around the table has something to learn and something to teach. Often, there is not enough time for joint fact-finding because that would involve initiating new studies. Like visioning, it also runs the risk of raising the level of abstraction to too high a level. How, then, do we exchange information? We should use a deliberative process to synthesize and learn from new information. We want to challenge ourselves and advance. We can then fill in what we do know and what we can create. We have to meet the group’s needs in terms of how they get them the information they require and how they process that information so they can make informed decisions together. J.Fishkin cautioned that there are many defects with public discourse, such as lack of information, misinformation, contested

information, and strategically incomplete information. S.Podziba replied that a criterion for selecting participants in negotiated rulemaking is that they be prepared to negotiate with good faith in good will. With the public watching, discussions about bad arguments are not sustainable and usually get filtered out.

## **II. Criteria for Deliberative Democracy**

L.Susskind commented that the USA and other countries have institutionalized a mechanisms for scientific inquiry, like environmental impact assessment. An EIA requires transparency of decisions that might otherwise be made behind closed doors. It requires the gathering of information, it engages experts and non-experts in dialogue, and it requires accountability and reason giving by decision makers. It requires that scientists consider alternatives to what has been proposed, that proposals be clear to laypeople, and that a written record of the discussion be published for public scrutiny. He asked whether this process “meets all the requirements for enhancing deliberative democracy.”

J.Forester responded that EIA appears too static and does not provide sufficient opportunity to question the project being proposed, and is therefore not deliberative. J.Innes concurred, saying that although it does invite some stakeholder feedback and generate some public knowledge, it is too structured and discourages participation. M.Elliott added that while EIA was a procedural intervention that added voices to the public dialogue, it is not deliberative. C.Lukensmeyer noted that EIA does create a structural framework. However, within that structure there is a need to figure out how to guarantee equity of voice and access while remaining “authentic.” D.Booher clarified that institutions such as EIA were not designed with deliberation in mind— they were designed to protect people from the government. If we assume that voters are engaged, we need an alternative to EIA because research indicates that these institutions are resistant to deliberation.

F.Fisher cautioned that deliberative democracy, and political theory in general, cannot justify a particular technique. Deliberative democracy is a utopian ideal, a counterfactual that serves as a basis for continual critique of society. There is no fixed body of principles

of deliberative theory. In this respect, Fisher opined, deliberative democracy may be more interested in asking questions and testing assumptions, whereas dispute resolution may be more interested in answering questions. J.Dryzek added that deliberative democracy is more like a contextually specific critique that can help with institutional design.

J. Dryzek went on to talk about preferences. He said that reflection on the part of deliberators means changing preferences. Stakeholders have less capacity to change preferences than lay citizens, but there are good reasons to bring both groups to the table and help them examine their preferences together. He asked how we can do this, how to combine lay person deliberations with stakeholder deliberations. J.Fishkin noted that this kind of thinking—recognizing that deliberative democracy is utopian— is a good way to think about democratic reform. We can do social science experiments, he said, to see what people might think under different sets of circumstances.

### **III. Bias in Mediation**

M.Hajer pointed out that the processes under discussion are essentially tools for communication, and that tools are always specialized—they have “biases.” (For example, a screwdriver is specialized to twist screws. This is its bias.) Since no discursive form is without bias, mediation must have its biases. If we want to rethink deliberative democracy, we should try to identify the bias of mediation. D.Fairman responded that mediation is biased in favor of agreement and consensus. J.Forester added that organization is “the mobilization of bias”—“it organizes some things in and some things out.” He noted another bias of public dispute mediation in favor of public knowledge.

## **Session 4: Implementation of Informally Negotiated Agreements or Settlements**

*Facilitator:* Carrie Menkel-Meadow

*Panelists:* Maarten Hajer, David Kahane, Richard Reuben, Marianella Sclavi, Dan Yankelovich

*Scenario:* A neighborhood effort to involve local residents in overseeing a "brownfields redevelopment" program is just wrapping up. Federal and state funds, as well as substantial private investment, will be allocated to help clean up an abandoned contaminated site based on the clean-up agreement reached through a mediated dialogue. The plan answers the question "How clean is clean?" and spells out the proposed design of new housing, commercial and recreational facilities to be developed on the site. A consensus building process -- preceded by a credible conflict assessment -- generated a written consensus among the more than 30 participants in the process. Right before the group presents its final recommendations to the city council, however, a new neighborhood group appears claiming that it has been left out, that it had tried unsuccessfully to convince the advisory group to modify its proposals, and it is seeking a promise from the city council that the advisory group's proposal will not be accepted.

### **I. Unjust Process**

D.Kahane asked what it would mean to create a process, no matter how good, if we knew from the start that it would unjustly exclude some people who would be harmed by exclusion. What effect would this have? He suggested that it might make participants and organizers more attentive to issues of exclusion and to what kind of exclusion should delegitimize a process. In his view, we should be concerned about excluding groups that are also excluded from other democratic processes, who lack organizational capacity, and who may lack a sense of shared identity and shared interest. He noted that there seem to be varying degrees of confidence about how well even good facilitation and reflection by deliberators can circumvent this problem. The challenge is to make these issues of exclusion part of a systematic process rather an unexpected challenge. When we arrive at the process' "punctuation" —its outcomes and decisions—we ought to reflect on who was excluded, and ask what claims we can make about representing the public will.

J.Forester continued that if every consultation excludes unjustly, then we need some criteria for what constitutes justness. His own just criteria would have to do with group representation and power dynamics. Random sampling helps meet a criterion of fairness. However, problems may arise if a group is not numerous enough to be properly represented. Procedural fairness, R. Reuben suggested, leads people to judge a process as legitimate. This is because process drives the outcome more than content. This squares nicely with democratic values: participation needs to be broadly based, reciprocal rather

than the dominated by special interests, all participants should be treated alike, the result should be rational, and the processes should be transparent. However, the hard part is applying these principles in a particular context. He reflected on the need for a mechanism to ensure some kind of accountability.

M.Sclavi commented that legitimacy can be enhanced by listening. (She also advocated a “humoristic” approach.) Listening creates opposing yet more legitimate positions. By accepting the paradox (i.e. that really listening may generate mutually exclusive explanations or proposals), groups can work through a problem. In order to do this, one must suspend disbelief, visit others’ locales, drink and eat together and ask people to explain their positions.

S.Sherry noted that people who have gone through deliberative processes are different than people who have not. They are more open to the deliberation process, and perhaps even better at it. However, these groups, or citizen assemblies, do not have the same kind of legitimacy as elected officials. As a result, people don’t trust them as much. We have not yet figured out how to build ad hoc representative legitimacy so that people feel adequately represented in deliberative dialogues.

## **II. Continual Process**

M.Hajer noted that when an informal agreement is reached, it is more of an artistic representation than an actual plan. A good deliberative process is meandering and does rarely takes a consistent form. Regarding the scenario, he reflected that we know we will probably not stick to the proposal currently under discussion because we will encounter unexpected obstacles, prompting us to deliberate and reconsider. While politicians should be upfront about their goals, parties need to understand that this is a long process that they cannot control entirely. The process should involve fracture and conflict, in terms of changing the ways in which people are involved. Meandering through multiple decisions should cancel out the parties’ respective discursive biases. D. Kahane added that the process should also be self-consciously recursive, moving through multiple iterations. It

might then actually produce recommendations and proposals for public scrutiny before the process is over. This should help mitigate some issues of exclusion.

P.Adler asked how one can conclude any specific process if the theory of deliberative democracy prescribes iterations and recursiveness? Given what F. Fisher said earlier that this is a utopian concept and very process-oriented, how does deliberative democracy expect to reach conclusions in practice? “When people get persuaded,” M.Hajer replied, and when those who are in a position to make a decision in this process are included. But, there is no “cookbook recipe.” The fact that we put more emphasis on more rounds and “meandering” does not mean that the process has to take longer.

P. Adler responded that he actually practices this kind of recursive process, but he still wanted to know how we can reconcile the need for finality and certainty with the need for legitimacy and new knowledge. D.Fairman added that in general if you tell a public official that a decision-making process will be deliberative and recursive, the official will “never call you back.” Our culture prefers solutions and finality, so we need to be careful about setting a precedent by organizing processes that can be restarted at any time. We should not unjustly prolong a legitimate process. J.Innes agreed, saying that “You cannot sell your services if you tell people that consensus-building is forever,” even though it is. Some people have the misconception that when you reach a consensus, the process stops and everyone moves on. However, people often say “this is the best we can do today, but I am going to interact with these people during the implementation phase. Therefore, we are going to set up a representative group for the next phase.” These “spin-offs” encourage others to participate in and improve democracy.

### **III. Time Scale**

D.Yankelovich noted that the time required for these processes is orders of magnitude greater than the time people want to give to them. C.Menkel-Meadow echoed this concern about the time and resources that deliberative processes require, because they exclude those without the time and resources to participate. This is a structural problem. One response is to invent more open processes. But this makes it harder for us to be

experts on what is going to happen and to sell such process to elected officials who want predictable outcomes.

#### **IV. Learning: Individual Opinion to Collective Judgment**

D.Yankelovich cautioned that we are confounding decision-making and deliberation. “Deliberative democracy has two words in it.” It calls for a democratic process, but also for an *informed* process that generates judgment and wisdom. He noted that one difference between deliberative democracy and dispute resolution is that deliberative democracy groups distinguish between dialogue for the purpose of reaching mutual understanding and dialogue for the purpose of decision-making. In order for democracy to work, we need to bring the public into a state of judgment beyond raw opinion, which is clouded by emotional content and resistance, wishful thinking, identity, pride, prejudice, cognitive dissonance, and denial. B.Isaacs added that we do not know enough about the journey from raw opinion to informed judgment, and the creation of more balanced structural conditions does not guarantee a better result. It takes work to be informed, and people need to develop the capacity to participate. This contrasts with the fast-paced world in which we do not have sufficient time and energy to become informed. He observed that we all have different ideas about what the process is. In his experience, the challenge is to transform patterns of collective identity.

#### **V. Differences between Dispute Resolution and Deliberative Democracy**

D.Yankelovich further observed that the word “deliberation” may obscure another important difference between the two fields. “Deliberation” in dispute resolution refers to negotiation among stakeholders to find consensus within a group. “Deliberation” in deliberative democracy focuses more on changes that happen within the individual. There is an important difference between the two. Reiterating his earlier question, A. Fung asked what the differences are in how conflict resolution and deliberative democracy experts look at the world.

In addressing L.Susskind’s question as to whether certain criteria were sufficient to meet the needs of deliberative democracy, J.Cohen noted that deliberative democracy is not

just about solving discrete problems. In the field of dispute resolution, mediators and stakeholders want to make progress solving particular problems. Deliberative democracy is a way of thinking about the larger whole of democracy. If we talk about one piece of democracy, such as the EIA, deliberative democracy needs to be able to talk about how to improve that piece as well. As it stands, the two fields may operate in different intellectual spaces. C.Menkell-Meadow disagreed with the contention that deliberative democracy is more systematic and dispute resolution more problem-oriented. She described dispute resolution as more than tools and techniques—“It is a way of life.” However, she agreed that practitioners of deliberative democracy are utopian. She noted that we are trying to pin down its utopian ideals and open up the conversation.

## **VI. Location and Bias**

J.Cohen remarked on the lack of discussion of the political setting in which choices are made, the venues in which decisions are made, and the concomitant outcomes. He suggested that the outcome one wants affects the kinds of forums one likes. When someone proposes that an issue be decided through the courts or the legislature or regulatory negotiation, it has something to do with what they want the result to be. Forum choices have to do with mobilization of bias based on the kind of outcome you desire. We can analyze what peoples’ biases are based on why they want one kind of forum instead of another.

## **VII. Resistance**

D.Yankelovich voiced his concern about the depth of resistance among elected officials, which D.Booher had mentioned previously. He described it as profound, deeply ingrained in the nature of the process, emotional, and positional. Unless the field finds a way of dealing with this resistance, we are never going to make real headway. C.Lukensmeyer echoed the need for a shared diagnosis about what promotes progress. She described the depth of resistance, not just among elected officials, but also within broader institutional structures. She reflected on the need for governance mechanisms that reconnect deliberative democracy to the collective will of the public.

## **VIII. Remaining Questions**

D.Kahane asked how arguments about efficiency and implementability push against making deliberative processes transformative and complex enough to achieve social reform. M.Elliott noted the lack of discussion about social capital and capacity building, and asked whether it is not as relevant as we thought or whether this was an oversight.

## **IX. Take Away**

S.Sherry asked what practitioners can take away and use from the workshop. D.Kahane said that if we wish to transform society, deliberative democracy can help make the practice of dispute resolution more legible and increase the uptake of such practices. Deliberative democracy can offer a generalizable account of what is going on and help us acknowledge what underlies practice, such as social justice commitments. J.Cohen noted with pleasure that the notion of deliberative democracy has spread and is being discussed. This helps its practitioners explain to themselves why they do what they do.

## **Closing**

*Closing remarks:* L.Susskind

### **I. Relationship between Dispute Resolution and Deliberative Democracy**

L. Susskind reflected that deliberative democracy might be upstream of dispute resolution. Dispute resolution focuses on problems in the moment, when people need to make a decision and want input to break a deadlock. They need supplementary activity or an “additional” process of some kind to generate an informed agreement. On the other hand, dispute resolution practitioners seem to be worrying and wondering, “How many times are these people going to go through the same thing?” In order to prevent the same disputes from arising again and again, we ought to be thinking institutionally about changes, adaptations, and advances needed in the governance system. Therefore, in practice, we need to think about the system that produces each conflict and try to fold what we learn from one occasion into the long-term development of new institutional capacity. We are always reflecting on what we can suggest to those disputants with respect to the larger system they are part of. As a result of this Workshop, I think the

practitioner involved will be more likely to think about whether the participants in any dispute resolution effort can be asked to work harder to understand why they believe what they believe. Deliberative democracy mandates that they deliberate at the individual level. Can they then engage in a process of deliberation with other representatives (who are doing what they can to speak for a group and not just their own concerns) to think more clearly, to wrestle with their underlying interests, so that they benefit fully from the possibility of reconceptualizing what is going on?

## **II. Criteria for Deliberative Democracy**

Deliberative democracy is a framework, a utopian ideal and not something that has to be achieved tomorrow. It does change what we think about, because in the dispute resolution profession I do not think we have stressed enough the quality of deliberation, systematic polling of more people with whom we do not communicate sufficiently, and the integration of multiple tools. When I asked whether the attributes of EIA were sufficient to meet the criteria for effective deliberation, I was asking if they met some minimal threshold for moving people into a better deliberative and more democratic process. Although it adds a deliberative quality, it has many flaws. It breaks my heart that this was all we could come up to help us make more environmentally responsible decisions. The fact that it has been copied all over the world with little attention to whether it improve the quality of democratic decision-making is distressing.

## **III. Bias in Mediation**

In response to M. Hajer's question about biases, I think that dispute resolution has a bias towards inclusiveness. We want every process to include as many affected parties as possible. We can disagree on the best way of identifying who they are, but inclusiveness is an important ideal in our practice.

We also have a bias towards reaching agreement (not just understanding, clarifying differences, or laying out options). We reach agreement by helping people understand how they can best meet their own interests (by meeting the interests of others) and by helping them be realistic about what no agreement means for them. The option of dispute

resolution or consensus building should be taken seriously because it might produce a better outcome (for all participants) than no agreement. We then work to produce a package with enough in it for all stakeholders to be able to agree. This is what we mean by “value creation.”

We have a third bias towards meeting the needs of decision-makers. We put a premium on implementability. Therefore, we work within financial and time constraints, and we need a convener (with legitimacy) to authorize our activities.

We are biased towards tailored results that are situational and do not set precedents. We do not want other people in other situations to be bound by any dispute resolution results we happen to produce.

Finally, we are biased in terms of favoring a way of working that will leave improved interpersonal and inter-jurisdictional relationships in place.

#### **IV. Unjust Process**

I am struck by the notion that every time we make choices in the context of our work, we are inevitably unjust. One outcome of these discussions is that concerns about justice in deciding who is at the table, the opportunities they are given to speak, learn and reconsider, and the impact they have on decisions are more prominent than ever.

## **SYNTHESIS**

This is based on comments from J.Forester and J.Innes and their summaries of comments from other participants.

### **I. Need for Change**

J.Forester noted the need to move high-quality deliberation from the periphery to the core of political decision-making. There is a lack of collective attention to creating new governance mechanisms that remain authentic. We also have to be more concerned about embedding high-quality deliberation in the institutional structure of decision-making.

### **II. Continuous Process**

J.Innes remarked that a well-run consensus-building process often continues in various forms long beyond the time a “final” decision is made. Participants come to realize that implementation involves ongoing negotiations and that multiple voices and a forum are needed to address emergent problems and new information.

### **III. Location**

J.Innes highlighted J.Dryzek’s explanation of the different locations in which deliberative democracy might be situated. J. Forester noted that there is no single site, actor, or location where decisions can be made.

### **IV. Unjust Process**

J.Forester suggested that the question about inevitable or necessary injustice should be understood as deeply ambiguous, or as a matter of inevitable incompleteness. Although an effective dispute resolution process may not promise complete justice, it does create sufficient justification for public action. Practitioners and theorists need to be humble about the limits of dispute resolution processes.

### **V. Bias in Mediation**

J. Forester noted additional dispute resolution practitioners’ biases: that interdependence produces opportunities to negotiate and a space of possibilities to explore; that we should

consider inappropriate the inequalities that are typically present in complex public policy disputes (but do not yet involve sufficient legal or constitutional inequities or violations of rights); that conversation matters even when parties distrust, dislike, disbelieve and are disinclined to talk to each other; that disputants bring partial information and judgments ("raw opinion" as D. Yankelovich put it) and can and will learn; and, that disputants can create workable options and proposals under supportive conversational conditions that protect them from escalating arguments about blame.

J.Innes asked for more discussion about what the biases in stakeholder processes are or might be. It is a serious concern that needs to be addressed directly. Perhaps consensus building is biased toward people who are better deliberators, or favors interests that are by their nature better able to organize. Perhaps it has a bias towards representativeness, towards empowering the less empowered or challenging the status quo and existing authority. Perhaps it is biased against the people who are not there.

## **VI. Resistance**

### Public

In reference to D.Yankelovich's comment about public resistance to dispute resolution processes, practitioners around the country find themselves disabusing people all the time about various myths regarding what dispute resolution and consensus building actually involve. People need to know that it is not about replacing regulatory agencies, it is about supplementing them; it is not about compromising on principles, it is about reaching mutually satisfying (rather than lose-lose) outcomes; it is not about giving up on expertise and letting anyone's technical information dominate, it is about taking advantage of the best available information and avoiding my expert versus your expert. We need to work to unravel the enormous resistance to these processes.

### Decision-makers

J.Forester noted that P.Adler's comment that decision-makers have problems getting what they need to make decisions actually reflects a huge challenge for all of us to develop a better understanding of the culture, function, and structure of administrative

systems in which dispute resolution processes can be helpful and might be welcomed by decision-makers.

## **VII. Time Scale**

J.Forester noted that concerns about time linger. It's terribly important to find out if, in opposition to common stereotypes, dispute resolution processes might in fact be more efficient, time-wise, than regulatory processes held hostage to “blue ribbon committees” and the courts.

## **VIII. Learning and Opinion to Judgment**

J.Forester reiterated D.Yankelovich's desire for a better understanding of the ways in which "raw opinion" evolves into "considered public judgment." This evolution, typical of dispute resolution processes, underscores the importance of respecting those who are pounding their fists on the table and asserting their demands. The processes we are talking about should not involve making compromises or betraying one's principles.

J.Forester would also have liked to see more attention paid to how we think that parties learn, to strategies that would promote that learning, and to what that implies for institutional design. Specifically, we need further discussion about how dispute resolution processes encourage learning about others' and one's own interests, "value," what is at stake, and the "facts that matter" in particular cases that haven't yet been recognized by any party. Other participants noted a lack of discussion about the institutional basis for reflective learning and continuity between decisions, as well as learning about values and interests.

## **IX. Linking the Two Fields**

J.Innes drew attention to the late exchange initiated by S.Sherry asking for take-home lessons from the deliberative democracy theorists. F.Fisher had suggested that the benefit of the discussion would actually accrue more to the theorists than the practitioners. However, theorists can help practitioners who want to think about and talk about what they are doing.

J.Innes reflected that the two fields may be engaged in very different kinds of enterprises. The theorists are looking to frame, discuss and refine ideas about deliberation and democracy and build a conceptual framework for a field. Some do it using logic and disciplined argument and some do it through a type of grounded theorizing based on actual cases. They are working on developing their own discipline and judging by our difficulties in getting some well-known theorists to come, somewhat uninterested in talking with others or building cross-disciplinary links. It should be noted that the theorists who did attend were mostly people who do empirical research.

The practitioners are trying to produce societally beneficial outcomes through dialogue. They are interested in how best to do this and are caught up in a very real world of politics, conflict and specific problems they work to solve. Although they would love help from the world of political theory, they do not really relate to the enterprise that the theorists are engaged in. They think that theory is more easily translatable to action than it typically is, particularly theory that comes through logical argumentation rather than grounded theorizing. Their time horizon is much shorter than the theorists', since the tasks they work on are pressing and immediate. Yet, it seems that they hold similar values and goals regarding fair, informed and just decision-making. They differ perhaps in being more focused on decision-making, but their concerns intersect with the deliberative democracy group in that they know that stakeholder-based dialogues are not necessarily representative of the unorganized citizenry. They know that whatever is decided by these largely elite and skilled stakeholders may meet most interests, but still has to face a less-informed and less-interested public when it comes up for formal governmental approval. They want to be able to link stakeholder decision-making to the public-at-large, but they lack the methods and skills to do so.

J.Forester noted that C. Menkel-Meadow's comment that many of us "are trained to argue," is fundamental. We have cultural models, institutions, training, and familiarity with argument and debate, with images of neutral moderating, with argumentative styles of attack and counterattack, even with ground rules, and we are all too familiar with the

ways that vigorous argument can become ad-hominem and personal. This matters all the more when we contrast that to the public ignorance – lack of models, institutions, training, and familiarity – with the basic creative moves of joint inquiry, mediated negotiation, and consensus building.

## **X. What was Missing from the Workshop Discussion**

J.Innes noted that there was little discussion of capacity—the capacity of a community to govern itself and to engage in dialogue or dispute-resolution. If dispute resolution and public dialogue processes both build capacity, how do we look at the issues differently? It may be a gradual and iterative process to build the type of citizenry we need.

J.Forester highlighted the relatively large amount of time devoted to discussion of process design and representation, and the small amount of time we spent discussing “third party” roles and actual practice. This and a similar lack of attention to mediator behavior in the theoretical literature reveals a structural and procedural—rather than a pragmatic—bias in the literature. Perhaps it is indicative of an implicit search for a system that will be abstractly sufficient and legitimate instead of a search for an informed sense of practical judgment that reflects and might inform what practitioners do.

Additional issues that participants identified as missing from the discussion were: the precise design of deliberative institutions, cases where the population of potential stakeholders is unbounded (e.g. transnational, transgenerational), strategies for addressing resource constraints at local, regional, national, and global levels, the fact that power in political contexts is dynamic not static, and what our role might be as change agents.