BUILDING COMMUNITY THROUGH THE MEDIATION OF CITIZEN COMPLAINTS: THE MEDIATOR OF THE FRENCH REPUBLIC

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BUILDING COMMUNITY THROUGH THE MEDIATION OF CITIZEN COMPLAINTS: THE MEDIATOR OF THE FRENCH REPUBLIC

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Dissertation

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This study, grounded in the discourse of political philosophy, examines the effect of public mediation on community. The research questions were designed to examine this issue through the analysis of data from existing theories and research and new data collected from The Mediator of the French Republic.

The data analysis identifies the elements that define community and public mediation, compares the elements of mediation with the elements of community, and then checks the results of these comparisons by examining the community building potential of The Mediator of the French Republic. Specifically, this study addresses the following three research questions: 1) What are the key elements of community and effective public mediation programs? 2) Which elements of effective public mediation programs and community are mutually supportive, functionally neutral, or discordant? and, 3) Does the mission and functioning of The Mediator of the French Republic provide an example of a mediation program that builds community?

The findings in this study showed significant intersection between the elements of community and the elements of effective mediation programs, including the mission and functioning of The Mediator of the French Republic. Specifically, the French model includes important reform proposal powers that allow the Mediator to use information
gained during mediations to suggest changes to French law and administrative procedure that are intended to make them more responsive to changing community needs.

In sum, the review of existing theories and the analysis of the mission and functioning of The Mediator of the French Republic supports the conclusion that public mediation programs can help strengthen a sense of community – and even help define community – by reconciling individual and collective interests through fair, respectful, and inclusive processes. The data showed that when a mediation program is voluntary, widely available to all members of society, staffed by neutral, competent and independent mediators, and linked with mechanisms of policy reform, then relationships can be strengthened and collective interests can be advanced without unduly limiting personal rights and freedoms or impeding the resolution of individual complaints.
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CHAPTER I
PURPOSE OF STUDY AND IMPORTANCE OF TOPIC

Introduction

A sense of community can support inclusive, tolerant, and harmonious social relations among a diverse citizenry. Conflict between citizens and their governments can either create or destroy community, depending on how the conflicts are resolved. When citizens’ concerns are addressed by accessible and effective dispute resolution processes, then community and civility can be enhanced. If conflict is ignored or handled ineffectively, it can further damage already strained social bonds.

For purposes of this study, community is defined as an environment in which people relate to each other, both as individuals and in groups, in ways that protect both their individual and collective interests. The kind of community that is the focus of this study involves the relationships between individuals and their governments, though it is acknowledged that there are many other kinds of community because there are many types of social environments and sources of important and ongoing relationships, such as neighborhoods, workplaces, and churches.

The view advanced in this study is that community is affected by factors such as geographic boundaries, governmental structures, and social and political context, but defined by the nature of relationships and the successful protection of both individual and collective interests. Thus, to the extent that administrative or governmental actions, such
as the establishment of public mediation programs, build and reinforce positive relationships and resolve conflict in ways that enable the protection of both individual and collective interests, those actions support and help define that community.

This view of community differs from existing community theory. Specifically, the existing theories of community reviewed in this study define community and conflict resolution in ways that either emphasize the importance of the protection of collective interests by the resolution of conflict through judgments and enforcement by legitimate state authority or the importance of protecting individual interests and freedoms from the incursions of an over-reaching state or majoritarian excess. Existing theories presuppose that community is either a cohesive group protected from conflict by natural tendency or enforced consensus or, conversely, as a collection of individuals primarily concerned with the preservation of their individual rights and the advancement of their own interests.

The argument advanced in this study is that the elements of community are not predetermined by human nature or otherwise and should not, therefore, be examined separately from different types of governmental or other external interventions in community conflict. Instead, the theory presented is that the very nature of community is defined, in part, by the kinds of dispute resolution processes put into place and that effective public administration can help build community by mediating citizen disputes in ways that nurture open and honest dialogue and help reconcile individual and collective interests.

This view, grounded in the discourse of political philosophy, is that the collaborative process of mediation supports community by creating a forum for dialogues
that can strengthen interpersonal and group relationships. Further, if public mediators are empowered to use the information they collect during mediations to make recommendations for policy reform, then both individual and collective interests can be simultaneously advanced by the mediation process. In sum, the data reviewed in this study show that if a mediation program is voluntary, free of charge, widely available to all members of society, staffed by neutral, competent and independent mediators, and linked with mechanisms of policy reform, then relationships can be strengthened and collective interests can be advanced without unduly limiting personal rights and freedoms or impeding the resolution of individual complaints.

Purpose of the Study

The purpose of this study is to show that the effective mediation of citizen complaints can reconcile the conflict between the protection of personal interests and collective interests and, by so doing, can enlarge the definitions of community currently included within existing theoretical perspectives. This study explores, therefore, areas where existing perspectives on community and mediation differ and intersect, as well as areas where they leave important questions unanswered.

The review of existing theories and the analysis of the mission and functioning of The Mediator of the French Republic show that the effective mediation of citizen complaints can support community that tolerates difference, values creativity, demands fairness, and encourages open and respectful communication. This communication can reduce defensiveness and enhance mutual understanding among and between individuals and groups and can also help reconcile their individual and collective interests.
Theories from the disciplines of law, political science, and public administration provide key elements that can be identified in both public mediation and community. For this purpose, elements were distinguished from mere characteristics and represented a higher order within the hierarchy of descriptors used in this study. A comparison of these elements reveals significant areas of overlap between the elements of community and mediation. This is not surprising. Practitioners in mediation often explicitly identify strengthening community as a key goal and those seeking to strengthen community often speak of the importance of effective communication and conflict resolution. Therefore, the existing literature helps delineate the elements of effective mediation, including those shared with ombudsman programs, and the elements of community within the theories chosen for review. This review provides a picture of how these fields of study intersect and where existing theories do not go far enough in explaining the data collected from actual mediation programs, such as The Mediator of the French Republic. This French model of mediation was chosen because it is comprehensive, well-established, and its stated mission includes a commitment to build a stronger and more inclusive community through the effective resolution of citizen complaints against their government.

In sum, this study identifies the intersection of the elements of mediation and community within the theories chosen for review and identifies which elements of community and public mediation are mutually supportive, discordant or functionally neutral. Further, a new view of community is advanced that defines community by its ability to reconcile individual and collective interests and identifies public mediation as an important tool in achieving this reconciliation of interests. This new perspective is
then tested against the data collected from the actual mission and functioning of The Mediator of the French Republic.

Importance of the Topic

Effective conflict resolution within communities has never been more important. The connections between citizens and their governments have been challenged by increasing mobility, social fragmentation, economic pressures, and other realities of contemporary social life. Research to date has suggested that citizens are less engaged with each other, more exclusive in their social relationships, and more disconnected from their governments than they were a generation ago. If such increased disengagement and exclusion continue unabated, they may seriously compromise community and self-governance as envisioned within democratic philosophical and political traditions.

The French have faced new issues related to the question of what it means to belong to a community and even what it means to be French. Increased tensions around issues of immigration, inclusion, difference, and tolerance have been widely acknowledged, especially since rioting by largely immigrant youths in the suburbs of Paris and ongoing debates over Islamic dress in the strictly secular environments of French public schools. Additionally, economic pressures have caused a re-evaluation of the many publicly-funded social services that have been provided by the French government, such as housing support and generous health care and retirement benefits. These kinds of issues, as well as the more mundane wear and tear of ordinary social life that exist everywhere, have caused friction and conflict between French citizens and their government.
The Mediator of the French Republic is an example of a comprehensive and ambitious attempt to resolve these conflicts. Additionally, through the broad review and reform powers granted to the office, the citizen input gathered through the process of mediation is used to draft recommendations intended to inform French legislators and administrators about ways that they might improve public policy formation and administration in the future. The argument presented in this study is that this model, which combines individualized dispute resolution with a feedback loop to policy formulation, provides a model for reconciling the kinds of individual and collective interests which have been presented as irreconcilable by existing community theory. By doing so, mediation can provide critically important support for community both in France and in other similar social and political environments.

Theoretical Foundations

Since the goal of this study is to develop the most robust model possible for an evaluation of the community building potential of citizen complaint mediation programs, the dissimilarities among theoretical perspectives on community and mediation are noted but are not the primary focus of the analysis. Instead, the emphasis is on the identification of similarities among interrelated perspectives on community and conflict resolution drawn from legal, political, and public administration theories. An examination of these theoretical interrelationships, grounded in the discourse of political philosophy, formed the foundation for the evaluation of the community building potential of public mediation programs, including The Mediator of the French Republic.
Theories of Community

The recognition of the importance of citizenship, community, and civic engagement is certainly not new – ancient philosophers and the earliest writers on religion emphasized its importance to living peacefully in society. However, as cities have begun to suffer markedly negative effects from periods of prolonged and unprecedented civic disengagement, building community has received new levels of attention by both theorists and practitioners.

Research on the contemporary challenges to community includes work in interrelated topics and areas of inquiry divided by academics and other commentators into categories and subcategories that serve useful functions for the scholars attempting to understand and to build upon the work of others. It is important to identify theories that shared enough common ground with each other and that were based in similar political and social realities as the principal data source for this study, The Mediator of the French Republic. All the theories of community and mediation chosen for this study, therefore, originated in western democratic traditions and all are grounded in 20th and 21st century political science, legal, or public administration scholarship. While many other theories have been advanced over the millennia which dealt with the same issues, the theories discussed here are similar enough in definitional elements and political context to allow meaningful comparisons and to form a foundation for the new interpretations and theoretical perspectives presented in this study.

This study focuses, primarily, on four perspectives on community: communitarianism, social capital theory, civil society theory, and tolerance-based inclusivity. In order to facilitate comparisons, the work of several theorists in each field
of inquiry was combined within these four perspectives. Theories were included within these broader perspectives when the analysis of the elements within each theory revealed sufficient commonality with elements of other theories included within the perspective. In sum, the hierarchy of descriptors used to analyze perspectives on community was organized by characteristics defining elements and those elements defining the perspective within which a theory belonged.

Despite this complexity, the elements, theories, and perspectives on community share important contextual elements, such as a common focus on the prioritization of either individual or collective interests and an attention to identifying the kinds of individual and institutional activities that either strengthened or diminished a sense of community. Therefore, the perspectives can be compared and contrasted in ways that formed a basis for the development of the new theory of community presented in this study.

Four Theoretical Perspectives

The work of some researchers on the topic of community defied easy categorization. For example, the theoretical foundations developed by Glen Tinder are broad in scope and were influenced, according to Tinder, by many fields, including philosophy and theology. In fact, characterizations and alleged mischaracterizations of his work by other academicians have resulted in significant scholarly debate over the years (Tinder, Murphy, Baum, 1965).

Another leading scholar, Amitai Etzioni (1996), clearly identifies himself as a communitarian while Michael Walzer, who is often characterized as a communitarian,
describes himself as increasingly isolated from any political or ideological movement. Walzer describes his detachment as a writer for the journal, *Dissent*, which he describes as “now a magazine without the movement” (2000, p.1, 2). Further, Walzer describes communitarian critiques of liberalism as simply “communitarian corrections” of the instability and dissociation inherent in liberalism (1995, p.69).

Robert Putnam (2000) defines his area of inquiry as the study of community and social capital, while others, including Etzioni (2001), describe Putnam’s work as typifying a libertarian perspective which champions the value of voluntary associations and civil society. In this regard, it is interesting to note that Putnam’s latest work on the effects of diversity on community appear to be more similar to a communitarian approach in its discussions of “shared citizenship,” “overarching identities,” and advocacy for assistance to immigrants who want to “acculturate” (2007, p. 164). To add to the complexity, each of these fields has been further divided into categories such as neo-Tocquevillean, liberal, and neo-conservative.

For this study it is more important to focus on the basic definitional elements established by the research in these areas and to consider where they fall within the spectrum of political theory that has a libertarian emphasis on individual rights at one end and a communitarian emphasis on collective rights at the other, with liberalism balancing of those interests somewhere in between. While there are sometimes fine distinctions drawn within these fields and sub-fields of study either by the researchers or their colleagues, a review of their theories reveals both significant agreement about what actions can and do support community and interesting distinctions in the relative importance assigned to individualism and collectivism. Both these similarities and
differences are important in the consideration of the research questions posed in this study.

Tolerance-Based Inclusivity

Glen Tinder has written extensively about the importance of civility and tolerance in increasingly pluralistic societies (1980, 1995). For this study the concept of political community, one of three types of community identified by Tinder, is most relevant. Political community is the relationship between governments and governed and it can be positively or negatively affected by the work of legislators, judges, and public administrators.

In Tinder’s view, serious communication and inquiry, tolerance, and civility are the necessary antecedents to all forms of community. Tinder emphasizes, however, that behaving civilly and tolerantly is sometimes very difficult. In fact, the title of his book refers to the “tragic ideal” of community (1980). It is tragic because, while we are drawn to the ideal of community because of our basic need for connection with others, our own shortcomings and impermanence will prevent us from achieving anything other than very imperfect forms of the community ideal (1980).

Despite these challenges, Tinder clearly concludes that community can and should be a goal for human beings living together in society. Further, he explains that community must always exist between subjects – not between a subject and an object – and that objectifying community as a concept outside of actual human interaction can lead to inherently invalid attempts at universalizing the highly personal nature of social
relationships. Nonetheless, several essential elements of effective community building can be derived from his work. These include the following:

1. A willingness to enter into community;
2. A commitment to serious communication and inquiry;
3. Realizing that all personal judgment is subject to error;
4. Valuing and respecting all human beings, despite their limitations;
5. Allowing movement and freedom among citizens, even when it threatens unity;
6. Using social traditions to enhance present experience, not as sacred rites or methods of exclusion;
7. Expressing tolerance by allowing others to remain at a comfortable “distance;”
8. Encouraging creativity in human interactions;
9. Seeking truth by acknowledging and moving beyond selfishness and pride;
10. Exposing every social value to criticism and inquiry so that they don’t become dogma or command, including even core values such as justice, order, democracy, or happiness;
11. Acknowledging that all action, if imposed on others, is an objectifying use of power;
12. Respecting society and accepting its limitations on personal freedom;
13. Accepting personal responsibility for judgment and choice;
14. Being attentive to the needs of others, even if unexpressed, and remaining ready to respond to those needs;
15. Embracing plurality;
16. Creating opportunity for individualized experience by accepting that all members of a community need not experience formal equality (Tinder, 1980, 1995).

*Communitarianism*

The extensive writings on community by Amitai Etzioni (1996, 2001, 2004) complement Tinder’s work. Etzioni is founder and director of the Communitarian Network. He links the American experience with building community within other societies, including France, Germany, Britain, Belgium, and other western democracies. He urges that all need to sustain “society-wide integrity – a key element of social order – without suppressing subgroup autonomy (1996, p. 193).

Etzioni defines the goal of community as building a good society. He differentiates community from civil society because he claims that the latter values all voluntary associations as equally important in tempering an over-reaching state and enabling discourse among citizens. Good society, the aim of communitarians for community, requires not only democratic processes, discourse, and delimitation of the role of the state, but also a framework of constantly evolving but shared substantive values. The core elements of this framework, in Etzioni’s view, include the following:

1. An acknowledgement of shared values that defines the virtues society seeks to uphold;
2. Strong commitment to shared purposes;
3. A clear sense of social responsibility;
4. A strong commitment to mutual tolerance;
5. A high regard for minority and individual rights;
6. Society-wide dialogues;
7. A limitation of identity politics;

Social Capital Theory

The work of Robert Putnam both complements and contrasts with Etzioni’s theoretical perspectives. In fact Etzioni repeatedly references Putnam’s research when drawing comparisons between concepts of civil society, which he sees Putnam as advocating, and communitarianism (1996, 2001).

Since Putnam’s *Bowling Alone* (2000) brought the concept into clearer focus and catalyzed interdisciplinary interest, he and others have described “social capital” as the kinds of social connectedness and participation that build and strengthen community. They use the term social *capital* because, like money, they argue that it is a tangible asset that enables and promotes community development. In Putnam’s view activities which bring people together to talk, to solve problems, and to work together socially, politically, or otherwise, help build social capital. He and other social capital theorists urge public institutions to study their past activities and programs to assess how they have created or destroyed their communities’ social capital.

An aspect of social capital theory that warrants special attention is the concept of “bridging social capital.” Bridging social capital is one of the different kinds of social capital described in Putnam’s book *Better Together* (2003), and in a report of the same name from a collaborative effort led by Putnam (2000). *Better Together* contrasts the
“bonding social capital” created when people of similar characteristics and interests spend time together with the “bridging social capital” that is created when people of different backgrounds, races, ethnicities, ages, or socio-economic class come together in community. He explains that bridging social capital is much harder to create than bonding social capital, but both forms of connection are critically important. He urges, therefore, that the creation of bridging social capital is worth the investment of time and resources. Putnam’s writings reveal certain key elements necessary for the creation of bridging social capital and other types of social capital as well. They include the following:

1. Fostering opportunities for face-to-face contact, deliberation, compromise, and consensus-building;
2. Providing feedback mechanisms and credible opportunities for citizen participation, both individually and as organizations, so that legislators and administrators can learn from their mistakes;
3. Avoiding governmental actions that are shown to hurt neighborhood networks, community norms, and voluntary organizations;
4. Making special efforts to bring together people from different demographic groups for problem-solving;
5. Providing opportunities for meaningful interaction across ethnic lines;
6. Using national resources to strengthen and support locally based programs that are coping with the short-run costs of immigration and diversity. (Putnam, 2000, 2001, 2007).
Putnam’s emphasis on the importance of bridging differences between the many groups that constitute a pluralistic society is even more pronounced in his latest and somewhat controversial study titled “E Pluribus Unum: Diversity and Community in the Twenty-first Century” (2007). In this study Putnam reports that diversity within a society can produce defensive reactions. He describes that this phenomenon can “bring out the turtle” in all of us, causing members of society to withdraw from others and spend more time alone at home (2007, p. 149).

Putnam urges, however, that this defensive reaction can be overcome by an acknowledgment of areas of commonality. This commonality should include an acknowledgment and reinforcement of certain core values, that will allow individuals in “previously separate ethnic groups to see themselves, in part, as members of a shared group with a shared identity (2007, p. 161). These views, more typical of a communitarian than a civil society perspective, are difficult to categorize. The elements of Putnam’s social capital theory are, therefore, analyzed separately from civil society and communitarian theories for the purposes of this study.

Civil Society Theory

Putnam’s work has invited debate, and some criticism, within current scholarship on community and social capital. In Beyond Tocqueville: Civil Society and the Social Capital Debate in Comparative Perspective, Robert Edwards and Michael Foley (2001) discuss the ways in which social capital theory builds on a body of work on civil society dating back to the eighteenth century.
Edwards and Foley contrast Putnam’s work on social capital, which they identify as a neo-Tocquevillean civil society perspective, with other civil society perspectives (2001, p. 5). Like Putnam, Foley and Edwards agree that “generalized social trust (trust in people in general), trust in government and public officials, tolerance and optimism…as integral components of social capital linked directly to its beneficial impact on participation and civic engagement and democracy in general” (2001, p. 7). But, Foley and Edwards refute the neo-Tocquevillean position that face-to-face contact and small-scale consensus can cut across factions.

Edwards and Foley describe civil society theory as being difficult to define with clarity or precision. They write: “As an analytical concept, the contemporary notion of civil society…suffers from acute definitional fuzziness” (2001, p. 4). They explain that several factors are at work, including variations across the actual societies that have been the empirical basis for conceptualizations of the term and the breadth of the “historical and even transnational sweep” of the use of the concept without enough regard for the lack of universality of related concepts like “state” and “market” that are typically held in juxtaposition to civil society (2001, p. 4).

Despite these limitations, Foley and Edwards describe basic definitional elements of civil society that are consistently described in the civil society literature. The most important is the socialization function. This socialization occurs when voluntary associations build citizenship skills, enhance social trust, and foster a desire among their membership to participate in democratic governance. Foley and Edwards describe the other functions of civil society as public or quasi-public, such as aiding those in need or providing educational opportunities, and representative or contestatory. This latter
function describes the ways that civil society stimulates debate among citizens and gives voice to those who may otherwise be without adequate representation. They describe that in some countries, this representative role of civil society has been seen as an important counterbalance to overly intrusive, ineffective or monolithic state action. Each of these elements has a part to play in building community, and each has identifiable characteristics that often transcend political or temporal boundaries. These elements can be summarized as follows:

1. Private associations aid others in the community;
2. Socialization in private groups builds citizenship skills, motivates civic participation;
3. Freedom of voluntary association;
4. Protection of social and group autonomy;
5. Achievement of public ends independent of state power or control;
6. Social organizations that are representative and contestatory; giving voice to citizens by fostering debate and pressing for governmental action (Edwards and Foley, 1996).

Whether or not some of these elements must precede others in the course of a society’s development is also a matter of some debate. Edwards and Foley reference the work of Michael Walzer and others who describe “the paradox of the civil society argument” as the fact that a democratic civil society seems to require a democratic state and a strong civil society seems to require a strong and responsive state (2001, p. 17-18). In other words, outside the context of a strong democratic tradition, these theorists conclude that social contacts or consensus will not be transformative. They argue that
civil society does not create democracy because an underlying democratic tradition is a necessary preceding condition to civil society.

Mark Warren (2001) questions the validity of the view that increased social capital or a strong civil society will yield wholly positive results for democratic societies. In addition Warren (2001) questions whether building social capital will necessarily help all citizens. He suggests that groups already marginalized may actually suffer increased isolation or disadvantage as cohesiveness increases within the majority group (2001).

Similarly, feminist and critical race theorists have defined community as requiring a new level of inclusion that cannot rely solely on democratic processes as they currently exist (Fineman, 1993; Minow, 1990). Using neutral processes, in their view, does not create neutral results. Therefore, when resolving disputes based on gender issues, it is the view of feminist legal scholars such as Martha Fineman (1993) and Martha Minow (1990) that gender-sensitive solutions must be crafted if the goal is to treat all members of the community equitably instead of relying on notions of formal equality. The work of Camilla Stivers (2004) complements feminist jurisprudence by emphasizing the need for a reevaluation of supposedly neutral concepts such as efficiency and objectivity to recognize the impact of gender on the application of these concepts in public administration.

The work of these scholars is helpful in relating the concepts of community, civil society, and social capital to the inevitability, and even desirability, of conflict. As Warren (2001) and Fineman (1993) point out, without conflict and fair and inclusive conflict resolution, a sense of community might come at the expense of equity because of the pre-existing privileges and advantages of some groups over others.
While these scholars acknowledge that participation in community life is needed to overcome the faction that Tocqueville warned about, they also stress that community building alone will not erase inequality. Effective resolution of inevitable conflict between various factions within society and between citizens and their government will be necessary to resolve institutionalized inequity. Thus, even from a theoretical perspective, it is important to integrate theories about conflict and conflict resolution with theories of social capital, civil society, and community. The interrelationships between these theories are even more apparent when theory meets practice, as evidenced in the principles and practice of public mediation programs.

Mediation Theory and Practice

Mediation is a process in which a neutral third party – a mediator – facilitates communication and negotiations between parties to a dispute (American Bar Association, 2005). While gaining the attention of the legal community only during the last twenty-five to thirty years, the literature on the theory of conflict and alternative dispute resolution has been developing since the turn of the 20th century. Today, model standards of conduct for mediators have been adopted by professional organizations in the United States and a significant body of practice-oriented materials describes and analyzes many aspects of the mediation process in the U.S. and throughout Europe (Bonafe-Schmitt, 1992, American Bar Association, 2005, Bouvier, 1997).

This study focuses on basic, international definitions and applications of mediation programs, particularly in the public sector, as well as the fairly straightforward elements of mediation practice. In addition, key elements and applications of
ombudsman functions will also be reviewed because there is clear intersection between
the work of ombudsmen and mediators who resolve citizen disputes against the
government.

The review of the literature on mediation will include the work of Mary Parker
The literature review on ombudsmen programs will include the work of Walter Gellhorn
(1967) and Larry Hill (1974, 1976, 1997). The key elements of mediation practice, public
mediation programs and ombudsmen programs, outlined below, will be discussed at
length in the literature review.

A significant body of work on mediation by theorists and commentators, a survey
of the services that they provide, and a review of standards of practice established by
professional groups enable a summary of the following key elements of mediation:

1. An impartial, competent, third party facilitates communication and negotiation
   and promotes voluntary decision-making by the parties to the dispute;
2. An opportunity is provided for parties to define and clarify issues, identify
   interests, generate alternatives, and reach mutually satisfactory agreements;
3. Confidentiality is maintained unless otherwise agreed to by the parties or
   required by applicable law;
4. Process quality is protected by the mediator to enhance procedural fairness
   and the safety of the parties and to promote mutual respect among all
   participants (Model Standards of Conduct for Mediators, 2005).

Mary Parker Follett (1920, 1925, 1995) described the potential benefits of
interest-based negotiations before mediation developed as a profession. Her work is
echoed in later works by Fisher and Ury (1981, 1991) and other mediation theorists and practitioners. For example, in a theme often found in contemporary theory, Follett urged leaders to think of conflict as an opportunity, rather than as an obstacle, because it could energize social and corporate environments. Further, by “integrating” the needs of parties to a dispute, effective conflict management could strengthen relationships. The following are ten essential elements of integrating two conflicting positions in a dispute that can be gleaned from Follett’s “Constructive Conflict” (1995):

1. “Bring differences out into the open;”
2. View the parties’ whole “field of desire” and then conduct a systematic “revaluation of desire;”
3. Encourage self-respect and the respect for the views and interests of others;
4. Break up the demands of both sides into their constituent parts;
5. “Find the whole-demand, the real demand, which is being obscured by miscellaneous minor claims or by ineffective presentation;”
6. Examine symbols used by the parties through the “careful scrutiny of the language used to see what it really means:”
7. Understand circular behavior;
8. Solve concrete problems instead of theorizing about the matter in dispute;
9. Do not focus on “fighting elements” through the use of terms like “grievance committees;”
10. Train students in the “art of cooperative thinking” (pp. 73-84).

Since Follett’s time the process of mediation has gained increasing acceptance as an effective way to accomplish an integration of parties’ needs and interests. In addition
to these benefits for relationships and organizational vitality, the legal community and others have also responded to public pressure to provide faster and less expensive alternatives to litigation by increasing access to both public and private mediation programs. While the fine details of these programs differ to respond to particular organizational or governmental needs, there is consensus on at least the fundamental elements of modern mediation programs. Robert Mnookin (1998) identifies these elements as including the following:

1. Identifying parties’ underlying interests and preferences through openness and disclosure without exposing either party to undo risk;

2. Overcoming conflicts of interest (i.e. When an administrator will not address an issue that may help the organization but hurt his/her career);

3. Fostering a problem-solving atmosphere;

4. Reducing strategic or positioning behavior that is caused by a perceived threat to self-esteem or public image;

5. Moving beyond posturing and recriminations about past wrongs so that parties can begin to consider possible future gains;

6. Reframing disputes to avoid blame and lessen the perception that concessions are sure losses in order to lessen the cognitive barrier of “loss aversion;”

7. Providing a neutral source for settlement proposals to avoid the automatic discounting of any proposal of settlement by an adverse party and the cognitive barrier of “reactive devaluation” (1993).
French and other European commentators describe the same basic elements of mediation, as expressed in a forum where Alain Lacabarats described the following characteristics of court-affiliated mediations:

1. The mediator controls the process and the parties control the outcome;
2. The participation of the parties is voluntary;
3. There is an absence of procedural formality;
4. The parties can keep their agreement confidential or can ask a court to confirm it through a court order (Lacabarats, 2003).

David Carnevale (1993, 2003, 2007) has conducted extensive studies of the use of mediation and ombuds functions in the public sector. He credits this type of dispute resolution with myriad benefits, including higher settlement rates, increased compliance with agreements, lower costs, quicker resolution times, and enhanced organizational communications and relationships. Carnevale considers the following elements essential to ideal public sector mediation programs:

1. Increasing process control by the parties (how decisions are made);
2. Increasing outcome control by the parties (the nature of the decisions themselves);
3. Reducing reliance on hierarchical power to resolve disputes;
4. Valuing “experiential wisdom,” rather than just the opinion of power “elites;”
5. Committing to interest-based, collaborative and consensus-based negotiations;
6. Committing to a “partnership approach;”
The literature reflects that the elements of effective dispute resolution identified by Mnookin, Follett, and Carnevale are fundamental and integral elements of the process of mediation and the design of mediation programs. Public mediation programs, however, sometimes include additional elements that are designed to enhance the public benefit of the resolution of individual disputes. When these new elements are introduced, the mediation provided can be similar to the services offered by an ombudsman program. Therefore, in order to understand the application of mediation theory to the resolution of public disputes between citizens and their governments, it is important to understand ways in which mediation has been influenced by the work of ombudsmen.

Ombudsmen Theory and Practice

A review of the literature on ombudsmen (hereafter “ombuds”) is helpful in understanding how mediation programs that are designed to resolve citizen complaints against their governments can reconcile public and private interests. Ombuds functions acknowledge that individual needs must be met in ways that will not harm other citizens and, optimally, in ways that will improve future administrative policy and practice.

The literature on ombuds tends to be somewhat limited in scope until the 1960s, as ombuds programs do not have a long tradition outside Scandinavia. The term, literally meaning “complaint man,” originated in Sweden in 1809 and then moved to Denmark and other Scandinavian countries. New Zealand was the first non-Scandinavian country to use the term for their new, national ombudsman in 1962 (Hill, 1976).

Since the 1960s the ombuds movement has benefited from a rich body of comparative public administration and legal analyses. A review of this literature helps in
understanding the French model of mediation and its similarities to ombuds programs. While not technically an ombuds office, France established The Mediator of the French Republic (hereafter the “Mediator”) in 1973, about a decade after the movement of ombuds offices to countries outside Scandinavia. It is not surprising, therefore, that the work of the Mediator addresses many of the same issues typically handled by an ombuds office. This influence makes an identification of key elements of ombuds principles and practices an important aspect of this study.

Gellhorn (1967) was the first to examine the European tradition of ombuds and to describe the differences between the use of ombuds and other alternative dispute resolution methods. In *Ombudsmen and Others* (1966) and *When Americans Complain* (1966) he used an historical analysis to describe the modern functions and characteristics of ombuds functions and their potential benefits. Gellhorn explained that ombuds were independent of the judicial, legislative, and executive branches and could use this independence and neutrality to resolve citizens’ grievances against their government. He emphasized that fairness and impartiality, both real and perceived, were key to ombuds success. Gellhorn emphasized that their role was complementary to traditional administrative and legal remedies, and also cautioned against any perceived attempts to punish or embarrass administrators. He mentioned the value of a certain “blurring” when ombuds reported on revisions or corrections of administrative actions so as to not unduly embarrass the administrators involved. Gellhorn’s work was persuasive to the American Bar Association, and his model ombuds law was closely mirrored by the model ombudsmen law adopted in 1969.
Many scholars and commentators would build on Gellhorn’s work over the next two decades, including Larry Hill, who addressed the American Bar Convention in 1997 with “American Ombudsmen and Others” – a direct reference to Gellhorn’s seminal work. Hill developed a rigorous methodology to study the first non-Scandinavian ombuds office in New Zealand. Hill describes this experience and the resulting internationalization of the ombuds model in *The Model Ombudsman* (1975). Other social scientists began to join in the dialogue as well during these early years of what would become characterized as “ombudsmania” by the early 1970s (Clark, 1984).

Herbert Kaufman (2004) connected these legal developments to the larger political context in his work on government decentralization and “representativeness.” Kaufman used an historical analysis to make sense of the push for ombuds offices in the 1960s and other efforts to create more decentralized and responsive government (1969, 1974). He posited that American politics followed a repeating cycle of differing emphases on three basic themes: executive leadership, politically neutral competence, and representative government. He described that ombudsmen were becoming more popular in during this period because of the distrust of the executive.

In addition to “politically neutral competence,” Kaufman also noted that, despite their emphasis on individualized problem-solving, most ombuds systems in Europe provided thoroughly --and appropriately—bureaucratic solutions. He concluded that if the missteps of administrators were to be corrected by ombuds, then the ombuds would need to speak the same language as public administrators and help forge solutions that would be acceptable within the bureaucratic system (1969, 2004 p. 287).
This issue of bureaucratization is, perhaps, the most interesting legacy for mediation programs fulfilling ombuds-like duties. Most traditional mediation programs have been relatively free of bureaucratic restraints because they emphasize creativity and small-scale consensus-building rather than uniformity or broad institutional change. Because there has been no expectation of precedent-setting or a wider application of the agreements reached between parties to mediations, there has been no need for a full integration of mediation with the government or its bureaucracy. Ombuds offices have not had the same freedom to function outside the norms of bureaucracy or without any regard to precedent-setting or to the circumstances of potentially similarly-situated individuals (Hill, 1976, Kaufman, 1969, 2004).

This significant body of work by theorists and commentators on ombuds offices, along with a survey of the ombuds services that they provide and a review of the standards of practices established by professional groups such as the International Ombudsman Association, enable a delineation of the following key elements of successful ombuds programs:

1. Independence from other branches of government;
2. Neutrality, fairness, and impartiality, both real and perceived;
3. Sensitivity to the political context, as evidenced by steps to avoid embarrassment to individual administrators;
4. Emphasis on individualized problem-solving with a secondary goal of using those solutions to improve procedures and policies in the future;
5. Ability to work within a bureaucracy and to provide solutions that are creative, but also consistent with basis administrative expectations;

The French Model: Elements of both Mediation and Ombudsman Programs

The French model of The Mediator of the French Republic is different from traditional mediation, but similar to ombuds offices, in its high degree of interaction with other branches of government. The Mediator works with administrators and politicians to craft resolutions and to recommend changes to French law and administrative procedures. Therefore, it is not surprising that the office of the Mediator, like the traditional ombuds offices described by Kaufman, is highly bureaucratic.

In fact, a review of the organizational structure and founding documents of the office of The Mediator of the French Republic reveals that all six of Max Weber’s characteristics of modern bureaucracy, as discussed in his seminal work *Economy and Society*, are present in the structure of the Mediator’s office. These characteristics include clear areas of jurisdiction, hierarchy, full-time staff, rules, maintenance of written files, and specialized training for staff members (Weber, 1968; Hummel, 1994). For example, an individual is appointed as Mediator by the President of France for a term of six years and cannot be removed during that tenure except for cases of criminal conduct or similar offenses. This person is typically of high personal and professional stature, often serving as a Cabinet Minister prior to appointment, and his staff is composed, typically, of graduates of the same elite administrative schools as attended by Members of Parliament (MPs) and administrative officials. There are hundreds of representatives of the Mediator throughout France, with the Mediator and a large central staff located in
Paris. There is a clear and hierarchical organizational chart that is published on the Mediator’s website and in all annual reports. The Mediator or his representatives (all Mediators to date have been men) take referrals of citizen complaints from MPs, typically by a series of letters of referrals and exchange of written documents. The results of the mediation are recorded and reported in an annual report delivered by the Mediator to the President of France (Mediateur de la Republique, 30th Anniversary report, 2003, hereinafter “MOR, 2003”).

Some of the most interesting aspects of the intersection between public mediation, ombudsman functions and more traditional legal remedies, particularly in France, center on issues of jurisdiction and the rule of law. In all literature reviewed during this study, there is a common theme of ongoing and almost universal tension created when mediation is offered as a complement to traditional dispute resolution methods.

In the French model, the charge and mission of The Mediator of the French Republic reflects careful drafting intended to avoid undue controversy over perceived incursions into traditional French administration and administrative law. European commentators, especially British legal scholar David Clark (1984), wrote at length about the effect of the new office on the centuries-old tradition of the French Council of State and other administrative law functions. This study will review the work of John Rohr (1984, 1986, 1995, 2001, 2003), David Clark (1984), and members of the French government connected with the inception or ongoing functions of The Mediator of the French Republic. The key elements of work on the uniquely French perspective on public mediation, outlined below, will be discussed at length in the literature review.
In the original charge from the President in 1973, the Mediator was directed to use equity and fairness to resolve citizen complaints against administrative entities and any other entity providing public services. This was a very broad jurisdiction because in France most services are public, including health care, retirement systems, postal services, zoning, and subsidized housing. Further, even the administration of the court system was included in the jurisdiction of the Mediator to the extent that the issues centered not on the decisions of judges, but on the courts as a system of service delivery, such as the clerk of courts and docket management.

At first, there was significant controversy over what was perceived by legislators, administrators, and jurists to be an intrusion by the executive branch. Rather than responding to this criticism with a restriction of the office’s jurisdiction, the status of the mediator as an “independent authority” was clarified and incorporated into law in 1978. The Mediator’s charge, as embodied in statutory law, makes clear that it operates independent of the executive, legislative, or judicial branches of government (MOR, 2003).

Further, legislators and jurists were reassured by a good deal of rhetoric, both in the law and in commentary, about the limitations on the Mediator’s authority over this broad jurisdictional area. Specifically, it was clear the Mediator could only “recommend,” not direct any particular action. Further, the Mediator would only take complaints as referrals from the citizen’s parliamentary representative. This referral feature exists only in France and Great Britain. It has been greatly relaxed, in practice, especially in cases originating outside Paris in the regional offices. It has also been waived as a requirement in cases of emergency throughout France. It was explained,
during an interview with a high-ranking member of the Mediator’s central staff, that this filtering mechanism was accepted as a compromise to lessen the fears of Members of Parliament that the Mediator would come between them and their constituents. The MPs get considerable political capital from resolving small complaints for voters in their districts, and they have jealously guarded that exclusive relationship. The requirement of MP referral has proven unworkable and undesirable in the opinion of many, and MPs have been less strident about the strict application of this rule in recent years (Sironneau, 2006).

One of the most striking and unique aspects of the French model is that the Mediator can recommend changes to French law when it appears unfair in its application. The Mediator works with the Cabinet Ministers to bring proposed legislative changes to Parliament, consulting with legal experts as the complexity of the matters require.

While most traditional ombuds deal with misapplication of law or administrative missteps, the Mediator in France can also confront a lack of equity inherent in French laws that have been correctly interpreted and administered. In doing so, the Mediator can look to “equity,” rather than to strict legal authority, to recommend a course of action. Equity can demand, for example, that strict legal requirements be set aside in order to avoid fundamental unfairness in a particular case. For example, if the law requires certain documentation before providing a government payment to a building contractor for work on a public project and that documentation cannot be obtained, the Mediator can look to the nature of the work performed and recommend that the government waive the legal requirements and pay the contractor. In this way, it is like a traditional court of equity which can provide remedies that a court of law cannot. The explanation of this
function in the literature recognizes the practical dilemma that this might create for lawyers or administrators who need predictability in legal requirements in order to advise clients, as well as the theoretical dangers to the rule of law. The Mediator addresses this issue in commentary, reassuring critics that such a resort to equity will only occur in cases where the injustice is manifest, the harm to an individual is significant, and precedent will not be set by such action (MOR, 2003).

A fear that extra-judicial dispute resolution is a threat to the independence and jurisdiction of the courts has been a barrier to administrative dispute resolution in both France and the United States. Accordingly, the expressed goals and mission of The Mediator of the French Republic intentionally strike a balance between the expectations of citizens, politicians, lawyers, and administrators regarding the proper role of mediation and the administrative resolution of citizen complaints versus recourse to more traditional political or judicial remedies. This balance has been a subject of significant discussion in France, where commentators have debated the proper relationship between the office and the three branches of government since the inception of The Mediator of the French Republic in 1973.

The above discussion of the French model presupposes that there is enough commonality between French and other governmental, legal and organizational traditions to allow meaningful analysis based on theories and applications developed outside France. When making the determination about whether the body of literature on community and mediation, much of which was developed outside France, can help understand the effectiveness of the French mediation model, it must first be established that the French system is sufficiently similar to systems in other countries to allow for a
meaningful transfer of knowledge or sharing of experience. Issues of particular
importance include the French perspectives on citizenship, individual rights versus
collective responsibilities, diversity and cultural cohesion, and on the interrelationship
among French administration and the rule of law.

over several decades of research which compares the political antecedents and current
administration structures within France and other countries, including the United States.
In To Run a Constitution (1986) and Founding Republics in America and France (1995)
Rohr discusses how the separation of powers doctrine has developed in both the U.S. and
France. His work is useful in exploring the important issues raised by the more
innovative aspects of the Mediator’s work, including the issues of jurisdiction and the
rule of law. For example, Rohr points out that while both countries have rich
constitutional traditions that include the concept of separation of powers, the French
value a less rigid application that does not preclude an administrator from both
administering law and also participating in the making of laws.

Rohr (1995) explains that while both systems espouse an adherence to a
separation of powers doctrine, the French have always accepted more fluidity between
functions. For example the Conseil d’État, first put in place by Napoleon, blends
administrative and legislative functions. Further, the parliamentary system incorporates
members of the executive cabinet into the legislature. While Rohr points out that this
kind of increased fluidity of a parliamentary system was advocated by Woodrow Wilson
in his earliest writings (1885), it was never seriously considered by those in the political
mainstream as a viable alternative for the United States.
Rohr’s work illuminates some of today’s debates around the work of the Mediator and about the expansion of extra-legal processes like ombuds and mediation. Rohr (1995) points out that while France has a rich constitutional tradition, including an attention to separation of powers, French administration has always been held in very high regard. Rohr (1995) points out that French administration has been so important to stability because the French constitutions are not held sacrosanct. His research outlines how each new Republic has rewritten constitutions and that French administrators have maintained stability in face of sweeping constitutional reform. He discusses the French concept of l’état (the state) as being larger than a body of law or a written constitution. He points to DeGaulle’s appeals about “eternal France” as instantly understandable to the French people, who do not see their national identity as tied to any given government. Such a view would explain why there was not an immediate outcry against the use of concepts like the protection of “natural rights” and the application of standards of equity in the rhetoric describing the role of The Mediator of the French Republic.

Traditionally, the French people have called for an application of constitutional principles that will support the values of “égalité” and fraternité” espoused since the French Revolution. These values go beyond the more individualistic values evident in America’s motto of “life, liberty, and the pursuit of happiness.” It is not surprising, therefore, that resistance to ombuds and mediation as threats to the predictability of the rule of law is more pronounced among Americans than among the French.

Thus, while there are some unique aspects of French culture, government and jurisprudence which must be noted, Rohr and others provide ample evidence of significant commonality. Assuming, therefore, that there is enough similarity between
the French experience with mediation and the experiences of other countries, the challenges facing mediators and those designing mediation systems can be discussed in an international context.

One challenge facing mediators in the United States has been the issue of inherent process dangers arising from a lack of true neutrality. For example, American commentators, both from law and the social sciences, have discussed the impact of alternative dispute resolution, including ombuds and mediation, and the potential benefits and liabilities of these new approaches to conflict resolution. Trina Grillo (1991) wrote about certain process dangers inherent in mediation, especially for women (1991). She pointed out that mediation can disadvantage those without power because it does not have the equalizing factors of formal procedural and evidentiary safeguards present in traditional legal proceedings. She explained that it can be a “wolf in sheep’s clothing” because, while it appears less confrontational, it can produce unfair results.

Interestingly, a year after Grillo published her work on the process dangers of mediation in the U.S., a French legal commentator, Jean-Pierre Bonafe-Schmitt, wrote Mediation: Une Justice Douce (English: Mediation: A Gentle (or Soft) Justice, 1992). In general, French attorneys have embraced the idea of mediation and have not been overly concerned with its procedural informality. As a result, mediation programs have been used throughout France at every level of government (Chirac, 1998; Calazel, 2006).

However, it is interesting to note in this regard that the French, too, have more recently started to address the dangers of institutionalized power imbalances as they affect mediation and other governmental programs (HALDE, 2007). The 1990s were a time for the French to reassess the strengths and weaknesses of The Mediator of the
French Republic, as the 25th anniversary of the Mediator was celebrated in 1998. At a multi-day event at the Sorbonne University, the business model of efficiency was highlighted by President Chirac in his opening remarks. He called the Mediator a “facilitator,” while joking that such a word had not yet been endorsed by the French Academy as a legitimate French word. He downplayed any transformative aspects and did not mention the strict independence or broad jurisdiction of the Mediator. He deferred to French administration and Parliament, and discussed the Mediator in terms of easing their burdens. This is consistent with the characterization by David Clark that the Mediator handled the “small change” of administration (1984). Jacques Pelletier, the sitting Mediator at the time, took a much more activist stance. He discussed the reforms to laws accomplished by the Mediator and the ability to protect those without resources to pursue formal legal remedies. This theme of protecting the most vulnerable was strengthened over the next several years under the leadership of a new mediator, Bernard Stasi.

Stasi (2004) recommended the establishment of a High Authority to Fight Discrimination and For Equality (HALDE). He said that the French needed to protect those at the margins of society from discrimination and unfair application of laws, and that the current configuration of The Mediator of the French Republic was not adequate to perform this task. The HALDE was created and filed its first annual report in 2005. In 2006, the number of cases had dramatically increased, including the additional assistance offered for advocacy in the court if the parties chose not to mediate.
Theoretical Foundations: Conclusion

In sum, theories relating to the nature of community, the process and value of mediation and ombudsman programs, and the proper separation and balance of governmental, judicial, and administrative powers in protecting individual and collective rights, are all instructive in the evaluation of the community building potential of mediation and of The Mediator of the French Republic. While these theories have been primarily developed outside France, scholars in the comparative administration tradition provide adequate grounding for an international study of these issues. These theoretical foundations can help define key concepts, as well as the larger framework in which those concepts have relevance, so that we can develop useful analytical tools for evaluating the community-building potential of mediation and whether or not the mission and function of The Mediator of the French Republic provides an example of the realization of this potential.

The existing literature does not explain whether the key elements of mediation and community building interrelate and, if so, whether they are mutually supportive, functionally neutral, or discordant. This is important to determine because one of the expressed goals of many public mediation programs, including the The Mediator of the French Republic, is to build a stronger and more inclusive sense of community through the effective resolution of citizen complaints against their government. Without understanding how mediation and community are connected, it is impossible to evaluate whether a mediation program has the elements essential for community building.

An additional challenge exists in the integration of mediation theory and theories to the closely related work of ombudsman programs. When reviewing the literature to
determine the essential elements of mediation, it is clear that there is a great deal of research on what elements should and should not exist in mediation programs. However, often that research focuses primarily on the resolution of private disputes or the satisfaction of individual, rather than community, interests. Further, while the literature on ombudsmen provides more information about the resolution of citizen disputes with their governments, it tends to be very focused on particular contexts and on specific subject matter areas that are in dispute. Only a relatively few scholars have looked at the broader, more universal elements of good ombudsman programs and little if any research has centered on the identification of universal elements that exist in both mediation and ombudsman theory and practice. A review of the literature on both mediation and ombudsman programs, as well as a synthesis of the key programmatic elements gleaned from that literature, is a necessary prerequisite for a subsequent comparison with the essential elements of community.

While there is a significant body of literature on community, the relationship between those concepts and dispute resolution has not received much focused attention. While some scholars refer to the role of conflict in dividing communities, and others discuss the importance of the resolution of private disputes among individuals, there has been little if any research on whether the resolution of citizen complaints against the government can help build or enhance a widespread or generalized sense of community.

The argument presented here is that a new theoretical perspective is required that will more fully describe the interaction and interdependency of community and effective conflict resolution. Specifically, the data collected from The Mediator of the French Republic and existing theory show that the collaborative process of mediation supports
community through open and respectful dialogue that strengthens interpersonal and group relationships. Further, the data shows that when public mediators are empowered to use the information they collect during mediations to make recommendations for policy reform, then both individual and collective interests can be simultaneously advanced by the mediation process.

Research Questions

In order to evaluate the community building potential of public mediation, data were collected and analyzed to provide a basis for answering the following three questions: 1) What are the key elements of community and effective public mediation programs? 2) Which elements of effective public mediation programs and community are mutually supportive, functionally neutral, or discordant? and, 3) Does the office of The Mediator of the French Republic provide an example of a mediation program that builds community?

Research Approach

In order to answer these research questions, the existing theories and research on community and mediation included in the literature review were used as an instrument of analysis to identify the elements of both community and effective public mediation. A delimitation of this study is that the theories used to identify these elements are, by necessity, only a sample of an enormous body of literature on these topics. The theories included in this study were selected because they shared significant commonality in definitional and contextual elements which enabled meaningful comparisons between the
theories, and because those elements were particularly relevant to the research questions posed.

The elements of the mission and functions of the office of The Mediator of the French Republic were identified from a variety of data sources, including the annual reports prepared by The Mediator of the French Republic from 2004-2007, the office’s monthly electronic newsletters and other electronic materials on the office’s website, government-issued informational brochures, and materials from other secondary sources. Other important data were gathered from personal interviews with the functional leadership of both the central office in Paris and a regional representative of the office. Interviews of citizen participants were not conducted, both because their names were held in confidence under French procedural mandates and because their individual experiences with the program would not necessarily help reveal the program’s intended mission. Once the elements of The Mediator of the French Republic were identified, they were then compared with other mediation programs, both typical and ideal, and the key elements of community.

Finally, these data on community, mediation and The Mediator of the Republic were reviewed to determine whether public mediation programs have the capacity to build community and whether The Mediator of the French Republic is an example of a program with community-building potential. For the purposes of this study, the data collected on the mission and functioning of the French model are used to evaluate one example of a public mediation program as an exemplar for how a mediation program might help build community within a particular social and political context. Reviewing the French model teaches lessons about how public administrators might use mediation
effectively to help strengthen and redefine community in other contexts as well. The first of these lessons is that public mediation can help balance individual and collective interests if it is structured to attend to both the individual needs of the parties to disputes and, simultaneously, to the collective interests of the larger community. These collective interests are protected by the feedback loop to policy formulation that was institutionalized when The Mediator of the French Republic was established and strengthened over time.

Specifically, the individual needs and interests of the parties to disputes can be the focus of well-structured mediation sessions that allow the parties to speak openly, to identify and prioritize their interests, weigh alternatives, and reach consensus. The collective interests of the community can be protected if the results of such mediations are shared among a network of mediators who can work together to identify themes or trends in the causes of the conflicts brought to mediators and proposed policy or legal reforms that would help eliminate some of the sources of conflict in the future. For example, a facially neutral or fair law or policy may have unintended unfair consequences in application. Mediators can use the information gathered in mediations to address these deficiencies through legal or policy reform proposals.

More broadly, the model of The Mediator of the French Republic can also reinforce the value of the more transformative aspects of mediation that were included in early mediation theory, but have often been left behind in modern mediation practice. These aspects include the revaluing of needs or interests, both of self and others, based on the enhanced understanding or empathy created through the mediation process. The French emphasis on a sense of fraternity and collective good has been institutionalized in
their public mediation model and it has allowed that model to put into operation some of
the most potentially transformative aspects of mediation practice. It is an exemplar of an
approach to resolving conflict that does not assume that the collective good must be, by
definition, a threat to individual rights or freedoms. As such, lessons learned from the
French model can help eliminate unnecessarily dichotomous views of community and the
individual.

Significance of the Study

The French model of The Mediator of the French Republic was created to
strengthen community and to “re-establish harmonious relations” between citizens and
their government in order to build a responsive and inclusive relationship between the
government and the citizens which would “strengthen social harmony and national
solidarity” (Mediator of the Republic, 2003, 2007). Therefore, the goal of community
building has always been a primary focus of the office’s work. In addition, the office is
influential at both the local and national level, the scope of its work has consistently
increased, and it has been lauded and well-supported by French leadership throughout
over thirty years of continuous operation. If it is possible to enhance a sense of
community through mediation, then one could reasonably conclude that it would be most
likely to occur in such relatively favorable circumstances. Further, if community can be
enhanced or even redefined through this kind of work, and these enhancements can help
overcome contemporary challenges to meaningful connections among individuals and
groups, then public administrators might learn from this French model in ways that would
be useful in other social and political contexts.
CHAPTER II
LITERATURE REVIEW

Introduction

A review of the literature on mediation and community informed the subsequent analysis of their common and discordant elements and the implications of those elements for the model of The Mediator of the French Republic. A review of the literature on mediation required an examination of the closely related topics of ombudsmen and the relationship of mediation and ombudsmen programs to legislation and adjudication. Similarly, the review of literature on community also included the review of a substantial body of work on the interrelated topics of civil society, social capital, communitarianism, tolerance and inclusivity, and various aspects of citizen participation in governance. While each of the topics was, therefore, somewhat complex, there were essential elements that could be delineated within each field of study. Further, there were clear areas of intersection that could be identified between differing views of community and the definitions and applications of public mediation.

Definitions and Applications of Mediation in the Public Sector

The most general and universal definition of mediation in France and elsewhere is the use of an impartial third party to assist two or more parties to reach a mutually
acceptable, consensual, and informed resolution to a conflict or controversy. In La Mediation: Une Justice Douce (1992), Jean Pierre Bonafe-Schmitt describes mediation as “douce,” which in English means nice, gentle, soft or mild. The French, like most industrialized countries, have sought an alternative to time-consuming, expensive, and polarizing litigation. Through mediation, a mutually acceptable resolution can be reached by a trained neutral leading the parties through a clearly defined set of prescribed steps that are understood and agreed to by the parties at the outset of the mediation. While the parties retain control over the outcome of the mediation, the mediator retains control of the process. The process is designed to maintain an environment which is conducive to effectively identifying and expressing the interests of each party. Once these interests are identified, the mediator can then help guide the parties through successful negotiations and resolution of their dispute (Carnevale, 1985). These characteristics, while not true of all mediations in every detail, are generally accepted as the essential components of mediation as opposed to arbitration or other alternative dispute resolutions.

The voluntariness and neutral stance of the mediator are particularly important in the mediation of citizen disputes, as there is an inherent power imbalance between individual citizens and the government. This type of citizen complaint mediation has its genesis in community justice movements that were very popular during the 1960s in the United States and in Western Europe. As described by law professors Alan Rau, Edward Sherman, and Scott Peppet:

…There was increased interest at the local level in establishing alternatives to courts, and community mediation centers were established with sponsorship from local governments, churches, charities and
community organizations. Specialized forms of mediation were developed by particular institutions and government agencies to attempt to resolve misunderstandings in such areas as community-police relations, race relations, [and] hospital and health care services…A central theme of the community mediation movement was that mediation was a way to empower disputants to build stronger community ties and resolve their disputes without having to rely on the power establishment of courts, police, and government agencies and to frame the issues and devise solutions of their own making (2001, p. 332).

This push for community justice oriented conflict resolutions systems was also evident in Europe during the same period. British law professor David Clark, in “The Citizen and the Administration in France – The Conseil d’Etat versus Ombudsman Debate Revisited,” discusses this phenomenon in France following the expansion of ombuds offices outside of Scandinavia (1984). It was this public pressure for more participatory and less formalistic resolution of citizen complaints that motivated the French and other European governments to put offices like The Mediator of the French Republic into operation (Clark, 1984, Cappelletti, 1993).

The participatory aspect of mediation is only one aspect of the process that makes it useful in the public sector. Also important is the value added by mediators who can help alleviate barriers to conflict resolution. Harvard law professor, Robert H. Mnookin, discusses these barriers in “Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict” (1993). Mnookin identifies different types of barriers, including “strategic barriers” and “cognitive barriers.” He writes that it is important that all parties share fully all relevant information about their interests in order to overcome a strategic disadvantage which can occur in the parties do not share information equally:

Because bargaining typically entails both efficiency issues (that is, how big the pie can be made) and distributive issues (that is, who gets what size slice), negotiation involves an inherent tension…in order to create
value, it is critically important that options be created in light of both parties’ underlying interests and preferences … However, when it comes to the distributive aspect of bargaining, full disclosure – particularly in unreciprocated by the other side – can often lead to outcomes in which the more open party receives [less] (p. 181).

Mnookin also urges that a skilled mediator can help overcoming cognitive barriers which may lead parties to act against their self-interest. He explains that these barriers are created when emotional aspects of conflict, such as the desire to win or the desire to appear infallible, impede rational dialogue. Mnookin writes:

[A] barrier to mediation is a by-product of the way the human mind processes information, deals with risks and uncertainties, and makes inferences and judgments. Research by cognitive psychologists during the last fifteen years suggests several ways in which human reasoning often departs from that suggested by theories of rational judgment and decision making (p.183).

Two types of cognitive barriers are described by Mnookin as "risk aversion and loss aversion.” He describes that parties are typically risk averse and prefer “a sure thing over a gamble, even where the gamble may have a somewhat higher ‘expected’ payoff (1996, p. 184).” If faced with a “sure loss,” most individuals will risk a bigger loss by gambling than accept the sure loss. He writes: “Loss aversion can act as a cognitive barrier to the negotiated resolution of conflict for a variety of reasons…both sides may fight on in a dispute in the hope that they may avoid any losses, even though the continuation of the dispute involves a gamble in which the loss may end up being far greater” (1996, p. 184). Mnookin further describes how a mediator can help overcome this cognitive barrier. He writes: “Concessions made during negotiations can sometimes seem like sure losses. A mediator can help alleviate this barrier by reframing concessions
as part of a long term plan for a favorable outcome for both parties. Whether or not an even is framed as a loss can affect behavior” (1996, p 185).

The notion of rights or entitlement may be associated with a more extreme form of loss aversion called “enhanced loss aversion.” As Mnookin points out, losses that are “compounded by outrage are much less acceptable than losses that are caused by misfortune or by legitimate actions of others” (1996, p. 185). Therefore, when one party feels truly aggrieved, they are much more likely to stand on their rights, even when it is not in their long term best interests.

According to Mnookin, there are frequently more than one cognitive barriers acting at once. Another common cognitive barrier to resolution of disputes he calls “reactive devaluation.” This occurs when a proposal for settlement “is rated less positively when proposed by someone on the other side than when proposed by a neutral or an ally” (1996, p.185). Mnookin explains that the intervention of a neutral mediator can help generate settlement alternatives that will not be devalued in this way.

Another commentator, Barry M. Staw, describes two other cognitive barriers to negotiated settlement in “The Escalation of Commitment to a Course of Action” (1981). Staw defines one barrier as “self-justification,” where a party will refuse to consider a valid settlement alternative because of a need to protect self-image and to avoid others thinking that they were wrong in an earlier decision (1981, p.110). Staw also identifies that “norms for consistency “interfere with the rational evaluation of settlement alternatives because “A lay theory may exist in our society, or at least within many organizational settings, that administrators who are consistent in their actions are better leaders than those who switch from one line of behavior to another” (1981, p. 111). The
work of Professor Ralph P. Hummel in *The Bureaucratic Experience* suggests that modern bureaucracies have been predicated on a need for consistency and uniformity that will further reinforce this kind of inflexibility (Hummel, 1994).

**Definition and Function of Ombudsmen**

The concept of ombudsman (hereafter “ombuds”) is relatively new to both France and the United States. The term, literally meaning “complaint man,” originated in Sweden in 1809 and then moved to Denmark and other Scandinavian countries. New Zealand was the first non-Scandinavian country to use the term for their new, national ombudsman in 1962, as chronicled by a detailed study by then doctoral student Larry Hill. As Hill pointed out in his analysis of over 18 months of data collection in New Zealand, public disputes often require a neutral facilitator to reduce barriers to the rational resolution of disputes by providing a highly structured process that helps the parties focus on their underlying interests rather than on entrenched positions based on irrational motivations. This re-focusing is important for both the citizens making complaints and the public administrators or government officials charged with serving their needs. Larry Hill describes the documented significant benefits to both citizens and the government in *The Model Ombudsman*, including: 1) expertise in subject areas, 2) investigatory powers and authority, 3) a good blend of “popular and administrative virtues” that allow ombudsmen to “bring humanity into administrative relationships and lessen alienation,” and 4) an ability to “improve administration both in particular instances and generally” by acting as a “watchdog” to prevent “bureaucratic abuses, and
[to] bolster administrative morale by demonstrating that civil servants often are unfairly accused” (1975, p. 13).

A legal scholar, Walter Gellhorn, was the first to examine the European tradition of ombuds and to describe the differences between the use of ombuds and other ADR methods. In *Ombudsmen and Others* (1966) and *When Americans Complain* (1966), he used an historical analysis to describe the modern functions and characteristics of ombuds and its potential benefits to legal and administrative systems. He described how ombuds were independent of the judicial, legislative, and executive branches, and could use this independence and neutrality to resolve citizens’ grievances against their government. He emphasized that fairness and impartiality, both real and perceived, were key to ombuds success. Gellhorn emphasized that their role was complementary to traditional administrative and legal remedies, and also cautioned against any perceived attempts to punish or embarrass administrators. He mentioned the value of a certain “blurring” when ombuds reported on revisions or corrections of administrative actions so as to not unduly embarrass the administrators involved.

Gellhorn’s work was persuasive to the American Bar Association, and his model ombuds law was closely mirrored by the ABA model law adopted in 1969. Many scholars and commentators would build on Gellhorn’s work over the next two decades, including Larry Hill who addressed the American Bar Convention in 1997 with “American Ombudsmen and Others” – a direct reference to Gellhorn’s seminal work, *Ombudsmen and Others* (1966).

Other social scientists began to join in the dialogue during these early years of what would become characterized as an international “ombudsmania” by the early 1970s.
(David Clark, 1984). Herbert Kaufman put this and related phenomena into context in his work on government decentralization and “representativeness.” Kaufman used an historical analysis to make sense of the push in the 1960s for more decentralized and responsive government. He posited that American politics followed a repeating cycle of differing emphases on three basic themes: executive leadership, politically neutral competence, and representative government. He described that ombuds were becoming more popular in the U.S. during this period because of the distrust of the executive.

David Clark describes a distrust of the traditional executive and legislative functions within France and other Western European countries as fueling the public’s desire for mediation and other interventions that were perceived as politically neutral.

Larry Hill has also done significant comparative research on these institutions. He concludes that these alternative dispute resolution opportunities in western democracies countries have increased a sense of empowerment among their citizenries, and that this benefit has driven the interest in these mechanisms. He states:

The interest in the Ombudsman was stimulated by a particular intellectual current: a widely shared concern about the future of democracy and the role of the citizen in what was seen as an increasingly bureaucratic age. Many observers felt that the growth of government and its attendant bureaucracies posed threats for citizens as they tried to preserve their humanity against the expanding bureaucratic Leviathan (1997, p. 2).

Despite this genesis in the public’s dissatisfaction with courts and bureaucracy, Herbert Kaufman noted that most ombuds systems in Europe were highly bureaucratic even though their emphasis was on creative and individualized problem-solving. He noted that U.S. forays into ombuds functions were also very bureaucratic in their organizational structure and their delivery of services. He concluded that if the missteps
of administrators were to be corrected by ombuds, then the ombuds would need to speak
the same language as public administrators and help forge solutions that would be
acceptable within the bureaucratic system. He concluded that perhaps “It takes a
bureaucrat to control a bureaucrat” (1969).

Importance of Conflict Resolution in the Public Sector

A significant and substantial body of research explores the effectiveness of
alternative dispute resolution in the public sector. Mary Parker Follett was a ground-
breaking theorist and consultant to government and industry about the potential benefits
of interest-based negotiations. Her work is echoed in later works by Fisher and Ury
(*Getting to Yes*, 1981, 1991) and other mediation theorists and practitioners. In a theme
often repeated by contemporary theorists, Follett urged leaders to think of conflict as an
opportunity for energizing social and corporate environments. She writes in

“Constructive Conflict:”

At the outset I should like to ask you to agree for the moment to think of
conflict as neither good nor bad; to consider it without ethical
prejudgment; to think of it not as warfare, but as the appearance of
difference, differenced of opinions, of interests. For that is what conflict
means – difference…As conflict – difference is here in the world, as we
cannot avoid it, we should, I think, use it. Instead of condemning it, we
should set it to work for us. Why not: What does the mechanical engineer
do with friction? Of course his chief job is to eliminate friction, but it is
true that he also capitalizes friction…That is what I wish to consider here,
whether we can set conflict to work and make it do something for us

Follett is innovative in her comparisons of negotiated compromise and interest-based

“integration.” She defines the terms as follows:

Compromise does not create, it deals with what already exists; integration
creates something new…I call this setting friction to work, making it do
something. Thus we see that while conflict as continued unintegrated 
difference is pathological, difference itself is not pathological…What I 
think we should do…is try to find the machinery best suited for the normal 
appearing and uniting of diversity so that the difference does not stay too 
long crystallized, so that the pathological state shall not be reached (1925, 
1995, p. 72).

Follett then urges leaders to look at effective conflict resolution as a sign of 
individual, social, and organizational maturity. Conflict becomes a way to define and 
operationalize shared values. She states:

We can often measure our progress by watching the nature of our 
conflicts. Social progress is in this respect like individual progress: we 
become spiritually more and more developed as our conflicts rise to higher 
levels. If a man should tell you that his chief daily conflict within himself is – Shall I steal or not steal?—you would know what to think of his stage 
of development. As someone has said, “A man is known by the dilemmas 
he keeps.” In the same way, one test of your …organization is not how 
many conflicts you have, for conflicts are the essence of life, but what are 
your conflicts? And how do you deal with them? It is to be hoped that 
we…shall always have conflict, the kind which leads to invention, to the 
emergence of new values (1925, 1995, p. 72).

Follett describes the interaction between individuals and their environment, 
including conflicts in which they become enmeshed. She stresses that a person in never 
an object acting on a subject when in conflict, but is always affecting his or her 
environment in a complex web if interaction. She writes:

The conception of circular behavior throws much light on conflict, for I 
now realize that I can never fight you, I am always fighting you plus me I 
have put it this way: that response if always to a relation. I respond, not 
only to you but to the relation between you and me…We saw in our 
consideration of circular response that my behaviour helps create the 
situation to which I am responding. That implies (what we have daily to 
take into account) that my behaviour is helping to develop the situation to 
which I am responding…We should work always with the evolving 
situation, and note what part our own activities have in that evolving 
situation” (1925, 1995, p. 81, 85).
Follett also states that human beings should not be passive in their interaction with others, but should affect their environment in constructive ways. She urges that those who will be most effective in their relationships and most valuable in their contributions will be adaptive, but not overly so. She states:

This is the most important word, not only for business relations but for all human relations: not to adapt ourselves to a situation – we are all more necessary to the world than that; neither to mould a situation to our liking – we are all, or rather each, of too little importance to the world for that; but to take account of that reciprocal adjustment, that interactive behaviour between the situation and ourselves which means a change in both the situation and ourselves (1925, 1995, p.86).

Follett describes the essential elements to integrating individual positions in a dispute in ways that will make the conflict most constructive for disputants and for the organization or society of which they are a part. When describing the propensity of humans to oversimplify and deal in generalizations, as well as the importance of systematically approaching the distinct elements of a conflict in order to understand and address it, she urged the reader “…To remember the southern girl who said, “Why I always thought damned Yankee was one word until I came north.” (1925, 1995, p. 77).

Recent research concurs with the conclusions of Follett. For example, the work of David Carnevale, as described in “Root Dynamics of Alternative Dispute Resolution,” documents that ADR “leads to (1) higher grievance settlement rates…(2) lower cost, (3) reductions in the time it takes to get complaints decided, (4) achievement of better overall results because the parties themselves have a greater hand in working out their own problems, (5) appreciative attitudes toward collaboration, and (6) positive spillover effects in other areas of the relationship between participants (1993, p. 163).
Further, Carnevale’s research, including his study of the U.S. Postal Service, revealed that “…participatory schemes suggest that people feel greater ownership of their problems and magnified commitment to implementation of agreements when they have a voice in working them out…the greater the process control (how decisions are made) and outcome control (the nature of the decisions themselves) that individuals have in deciding controversies, the more likely they will judge both the procedures and outcomes as fair. A companion befit of increasing participation is that inclusive practices provoke better communication…” (1993, p. 170). These benefits are contrasted with less positive outcomes derived from lawsuits and other more traditional ways of resolving disputes: “Sustaining communication reduces stereotyping, reliance on power, distorted perceptions, militant hostility, and the sharpening of positions, all of which obstruct opportunities for settlement and sustain the spiral of destructive conflict” (1993, p. 171).

Carnevale points out that most administrators have embraced the concept of ADR in the public sector, as evidenced by several key legislative enactments. He also points the related development of ombudsmen to investigate “questions and complaints from the public, serving as neutral investigators, and making suggestions about improving government procedures” (1993, p. 160). He emphasizes that while efficient resolution of otherwise destructive conflict is a near term goal and rational for ADR, it is the long term benefits, such as “interest-based, collaborative, and consensus-based negotiations, and partnership approaches aimed at improving performance,” that really justify the adoption of ADR in the public sector (1993, p. 160).

Similarly, David Carnevale emphasizes the benefits of individualized solutions for organizational development in the public sector. His research reflects that when
parties play a part in the crafting of solutions for themselves, they also can further broader organizational change. Carnevale states this about how individualized and participant-driven conflict resolution furthers organizational development:

Organizational development is underscored by a belief that organizational members own their own problems and are responsible finding solutions to them...[it is] underpinned by a set of optimistic values and assumptions about human capacities...[it] pays particular attention to organizational processes or the way things are done, not just what is done...At bottom, organizational development epitomizes democratic values. It gives [an] opportunity to participate in organizational decision-making and reduces reliance on hierarchical power as the sole arbiter of the correctness of decisions (2003, p. 1).

Carnevale stresses that over-reliance on experts disempowers those who are dependent upon expert advice for the resolution of all issues. He urges organization to value the intuition gained from “experimental wisdom” and to “shift away from the idea that elites ensconced at the top of the bureaucratic pyramids possess superior knowledge for all situations” (2003, p. 2).

Similarly, political scientist John Rohr concludes, after decades of study of both the French and American political systems, when administrative systems are designed to enhance the public interest, they should enhance the variety of choices people can make regarding the best ways to pursue their own personal interests (Rohr, 1984). Systems of individualized conflict resolution, such as mediation, can maximize the alternatives that are considered by freeing the visioning of those alternatives from the constraints of a legal rights analysis and from the potential burden of following – or creating—legal precedent.

Another theorist on this topic, Lisa Bingham, concurs with Rohr’s conclusions in her work in “Negotiating for the Public Good.” There, she points out that there are a
number of reasons why administrators should make every effort to use principled negotiations that are based on interests and equity rather than positional negotiations that are based on rights: “First public agencies potentially face a continuing relationship with every regulated entity and every …member of the public the agency serves. In public service, very often the ‘how’ of what you do is as important as what you accomplish” (Bingham, 1996, 655). In short, Bingham proposes that equitable, accessible, and interest-based conflict resolution processes will better serve ongoing relationships, such as those between governments and citizens, than confrontational approaches. Similarly, David Carnevale (1993) conducted studies of alternative dispute resolution (ADR) innovations in public sector labor negotiations and described how these innovations can promote ongoing relationships through interest-based, rather than rights-based, approaches to conflict resolution.

Another organizational benefit of the effective resolution of citizens’ complaints is increased autonomy of administrators, according to the research of Nancy Manring. Professor Manring’s research reflects that allowing citizen involvement in the resolution of conflict, instead of resolving it in a hierarchical, expert-driven manner, does not reduce the power of those in official positions as is feared by some opponents of such participatory processes. Instead, it increases administrator autonomy because citizens are less likely to oppose policy that they have been able to affect through the offering of feedback.

Manring concludes that the increasing interest in alternative dispute resolution “stems from the observation that dispute resolution techniques can eliminate delays, reduce demands on no government, and produce more cost-effective and more satisfying
results than traditional administrative procedures or litigation” (1994, p. 176). She acknowledges that, despite this growth in ADR use and the documentation of its benefits, public officials fear usurpation of expert opinion and a loss of decision making authority (1994, p. 177). These fears, however, are unfounded in Manring’s opinion. She writes that rather than restricting autonomy of public administrators, alternative dispute resolution programs actually enhance their independence and effectiveness by removing roadblocks caused by unaddressed public disapproval. She writes:

The autonomy of the agency as well as individual…officials is inextricably linked with obtaining public consent for policies and management programs…unresolved conflict can thwart the implementation of management activities…Thus, the conventional assertion that responsiveness through authentic public involvement in decision making will inhibit government officials; professional autonomy rests on a limited view of the managerial situation that excludes consideration of the nature of the organization’s external environment. Under circumstances of condition autonomy where policy making is often characterized by conflict and gridlock, direct negotiations with stakeholders can enhance public officials’ professional autonomy (1994, p. 182).

Manring’s analysis suggests that agency officials who can reconcile their own needs for autonomy with good faith responsiveness will be more effective, and will invite less unwelcome intervention in the long run, than those administrators conducting business without due regard for the participation of stakeholders. When dissenting opinions are not addressed in a timely fashion, the results can be delay and frustration of legitimate governmental goals and objectives (Manring, 1994, p. 199).

There is a need to find a balance between the legal certainty, continuity, and cohesiveness of laws and the flexibility and decentralization of decision-making provided
by mediation. The literature reflects that this balance has been difficult to reach for many
governments, as discussed in the following study of comparative law:

Should a legal system that wishes both to maintain order and to dispense justice disperse power or organize it for the sake of efficiency? Techniques such as federalism and pluralism created multiple power centers in order to meet the dangers of too great a concentration of power. But how far can decentralization be pursued without the law losing its cohesive force? How can the law be enabled to accommodate contradictory demands for scarce goods? All of these questions show the intimate and truly dialectic relationship between law and power: Law is always part principle and part power. If law must be backed by power, unchecked power will easily ignore the demands of justice and security (Ehrmann, 1976, p. 48).

This same tension was noted by David Clark in his analysis of the French model of The Mediator of the French Republic. He writes:

…There is a less acceptable face to the Médiateur’s distinctive concern with securing equitable remedies and to the institution’s political style. The policy of reviewing the fairness of discretionary administrative decisions is a valuable and necessary supplement to judicial review of the legality of administrative action; yet results are likely to depend far more on the personal authority of the Médiateur than if the objective facts of “maladministration” are allowed to speak for themselves. In a sense the Médiateur, interceding on behalf the humble administré to plead for administrative mercy, symbolizes the resurgence of a more primitive type of grievance machinery…Moreover, this strategy of influential intercession is calculated to accentuate the element of arbitrariness or capriciousness in the administrative process in that it detracts from the administrative values of impartiality, equality of treatment and detachment (1984, p. 175).

These potential weaknesses were also pointed out by Zhiyong Lan, a professor of public administration at Arizona State University, in his study of comparative law. He cautions that alternative dispute resolution methods can result in flexibility and creativity at the expense of predictability, uniformity, and fairness. While Lan acknowledges that
effective conflict management can provide opportunities for better management, he also warns against the potentially negative unintended consequences of ADR:

Methods such as arbitration and mediation require a third party’s participation. In many cases, such third parties are independent contractors, consulting firms, or law firms. This is what is known as the privatization of public functions. The decisions concerning public affairs will no longer be made by trained experts, who are supposed to be responsible for the public welfare, or by the court, which is supposed to uphold the principles of law and justice, but by negotiation experts whose primary interest is to make a deal and get compensated for the work (1997, p. 197).

Despite these tensions, both the French model of public mediation and other public sector dispute resolution techniques have proven to be effective (Clark, 1984). For example, Mauro Cappelletti has provided a detailed and comprehensive analysis, spanning several decades, regarding the important benefits, both individual and collective, of the use of public advocates for private interests in his work in France, the United States, and many other countries (Cappelletti, 1975, 1993).

Further, the work of Stephen Frantzich, professor of political science at the U.S. Naval Academy, stresses that democracy and community is enhanced when governmental actions take into account citizens’ special needs. He states: “Concrete policy options with a personal face have a greater likelihood of success than abstract goals, no matter how worthy. Proposals…that are linked to particular individuals humanize the policy process and add pathos (feelings) to logos (rationality)…Doing the right thing for an identifiable someone has more potency than simply doing the right thing” (2005, p. 207).

Barbara Crosby and John Bryson also relate the individualized resolution of complaints with positive organizational outcomes for the public sector and the
development of better public policy. In *Leadership for the Common Good: Tackling Public Problems in a Shared Power World*, they emphasize the need for multiple feedback loops to inform policy-making. The resolution of individual problems can provide this useful feedback. They state: “To help constituents craft the most promising solutions…insist on thinking about systems and institutions…tap stakeholders’ self-interest to ease the institutionalization of change (2005, p. 251). In this they warn administrators to “Be sure that the voices of all knowledgeable people are heard, not just those of respected professional experts or political figures.” (2005, p. 254).

Michael Spicer, a professor of public administration at Cleveland State University, concurs about the importance of effective conflict resolution for effective public administration. He writes:

> …Administrators have the potential either to exacerbate or to help resolve…the massive collisions which our manner of living is apt to generate and to release us from the massive frustrations in which we are apt to become locked…Law is central to the resolution of conflict by government and public administration…[because] the citizens of a state, conceived in the terms of a civil association, have no use for an referee who does not govern the game according to the rules (2001, p. 136).

Similarly, Zhiyong Lan writes: “In a post-industrial age in which cultures clash, political groups contend, gender and ethnic awareness awaken, and citizens’ expectations of the government rise while willingness to pay for its services declines, a conflict resolution perspective gives us a conceptual tool to help with the task of ‘reconciling the irreconcilable’”(1997, p.27).

As the literature clearly reflects, the use of publicly provided conflict resolution processes is not a new concept and there is, accordingly, an international body of work on the efficacy of ombudsmen, mediators, attorney generals, and other publicly appointed
advocates for either conflict resolution processes or individual outcomes. The United States has not been a strong contributor to this field because, as American commentators have pointed out, there are relatively few dispute resolution processes that are available to citizens who are unhappy with governmental action within the United States (Kovach, 2000). There have been some successes, but these have been fragmented and uneven in application (Snyder). Further, those that continue to expand in their application are reported to be fraught with process dangers (Grillo, 1991).

The kinds of process dangers inherent in some types of alternative dispute resolution processes include those that magnify existing power imbalances or do not provide appropriate neutrality. Mauro Cappelletti notes in his study of the access-to-justice movement that a body of literature by feminist legal scholars criticizes mediation because of the danger of those in more powerful positions abusing that power because of the lack of procedural safeguards. He cites the work of professors Carrie Menkel-Meadow and Trina Grillo in this context (1993, p. 290).

The criticism of a lack of neutrality is based on the contention that agency alternative resolution programs are not typically independent from the agencies that are involved in the complaint. In mediations involving the legitimacy of governmental action, either court-affiliated mediation programs or internal neutrals are provided by agencies. The fact that agencies typically hear complaints against themselves, using intra-agency mediators or other designated conflict management personnel, gives rise to significant concerns regarding impartiality and procedural fairness (Tonkin and Swanson, 1998).
Internal ombuds functions are judged to be similarly impaired by some commentators. For example, Larry Hill emphasizes that independence and neutrality are key to ombuds effectiveness and warns that internal ombuds offices cannot act with the independence required. In an address to the American Bar Association in 1997, Professor Hill called these types of internal ombudsmen “Ombudsmen Wannabes” and said that they should not be even referred to as ombudsmen because of the limited scope of their authority and their lack of true neutrality.

Significant research has been sponsored by The Republic of France to evaluate the effectiveness, as measured by utilization rates and other measures, of the office of The Mediator of the French Republic. A discussion of the implications of this citizen input into policy-making occurred at a two-day conference at the Sorbonne in Paris to celebrate the 25th Anniversary of the founding of the office. This conference was attended by academics, politicians, and administrators who evaluated the merit of publicly offered mediation services to address citizen complaints.

Jacques Pelletier, then holding the office of Mediator of the Republic, began his remarks at the Sorbonne conference by emphasizing the numerous recommendations for changes in the text of laws that are made to Parliament each year by the Mediator. He conceded that sometimes those recommended changes are modest, but also stressed that they are sometimes substantial. He also emphasized the importance of the Mediator’s participation in the national Commission on Human Rights and the role of the office in seeking “equity” in all relationships between the public and the state. He closed his remarks by expressing hope that mediation would help provide new paths to truth, equity and solidarity. At the same conference, Mme. Michèle Gendreau-Massaloux, a
Chancellor of the University of Paris, reminded those in attendance that the government’s power lie entirely with the citizens, not with the government itself (Mediator of the Republic, 1998).

An extensive report was released to the public in 2003, marking the thirty year anniversary of the office’s inception in 1973. The report included commentary by administrators and others which stressed that the legislative reforms recommended as a result of the work of The Mediator of the French Republic have been very beneficial to the public. Further, the analysis concludes that the work of the many field officers has been very useful to both citizens and the French government because it has provided valuable information about how French administrative rules and procedures are perceived by French citizens (Minister of Justice, 2003). In sum, the report concludes that the review of French laws, as they impact individuals, has allowed both the law and administrative actions to become more responsive to the needs of those served. This better fit of laws to needs increases citizen satisfaction and participation in governance, and will ultimately reduce the number of citizen complaints in the future.

In addition to the French use of mediation, other European countries have long records of effective use of ADR to redress citizen complaints. This is especially evident in the development of sophisticated and powerful ombudsmen offices. David Clark describes that there is significant variability among ombuds models throughout Europe, but summarizes the following attributes as key to creating the most useful alternatives to traditional administrative remedies:

Thus there is considerable variation amongst Ombudsman schemes …both as regards the mechanics of the schemes (access arrangements, jurisdiction and powers, and notably the extent to which the Ombudsman is able to
review the exercise of discretionary administrative powers) and actual performance…[in a] strong Ombudsman variant…the Ombudsman can instigate an investigation as well as respond to a complaint from an individual, and is competent to scrutinize the work of the courts, including judicial decisions…(1984, p. 177).

Despite the clear benefits of alternative dispute resolution in redressing public sector complaints, Clark and other commentators also emphasize the need to balance the flexibility and creativity provided by mediation and ombudsmen with equally important needs for legal certainty, continuity, uniformity and fairness in the application of laws. The literature reflects that this balance has been difficult to achieve for many governments.

Definitions and Key Elements of Community

Research on contemporary definitions of community includes work in the interrelated but separate fields of community and communitarianism, social capital, and civil society. Each of these areas of inquiry has been further divided, either by the scholars themselves or by those critiquing their work, with labels such as neo-Tocquevillean, liberal, libertarian, socially conservative, and neo-conservative (Etzioni, 2004, Sabl, 2002).

These categories reflect differing views of human nature and the best ways to balance individual liberty and collective security. The procedural values of democratic process and individual liberties are more typically included in view of community held by libertarians, social capitalists and civil society theorists (Walzer, 1995, Etzioni, 2004). In contrast, the importance of substantive core values – not just procedural fairness -- is emphasized by conservatives and communitarians (Fowler, 1995, Etzioni, 2004).
Sometimes commentators describe these theories as organized according to the extent to which they reflect a Hobbesian view of the world, where safety must be enhanced by a strong state, and a Lockean one, where individual liberty and rights are protected above other values (Spragens, 1995; Etzioni, 2004).

The neo-Tocquevillean school of thought within civil society theory puts forth the importance of voluntary, non-political associations as a way to delimit overreaching by the government and providing a time and place for private discourse. In contrast, other civil society and communitarian theorists stress the importance of shared commitment to an inclusive political process and participatory governance because full participation in the political process is seen as the key to building community (Wolin, 1994; Warren, 2001; Edwards and Foley, 1996).

Further complexity in defining community is introduced by post-modernists, pluralists, and others who argue that the concept of community, when they concede that such a universal concept makes any sense at all, can only be arrived at within a specific context that is affected by different cultural and other factors such as gender, class, race or national identity (Miller, 2002; Marcil-Lacoste, 1992). Similarly, some feminist and critical race theorists have emphasized the special challenges faced by women and minorities as they strive for full participation within their communities and define community as existing primarily among homogenous groups of individuals with shared group identities (Littleton, 1993; Dietz, 1992).

Despite this complexity, a careful reading of these interrelated bodies of literature reveals some key themes that are commonly viewed as supportive of community and community-building. This review of community theory will start with the more
comprehensive definitions provided by leading theorists and will draw together these key themes and common elements from those definitions. Criticisms and expansions of these approaches will then be reviewed topically, including both contemporary and classic writings on both the political and sociological context in which community can exist and identity-based and other barriers to public participation and engagement with community.

Differing Views of Community

Glen Tinder, Professor Emeritus of Political Science at the University of Massachusetts, has spent the last several decades researching and writing on various aspects of community. He sets out the definitional elements of community in several of his books, including *Community: Reflections on a Tragic Ideal* (1980) and *Tolerance and Community* (1995). He identifies the essential elements required for community and differentiates community from a “unified society.” He discards any notions of unity or sameness as a prerequisite to community and replaces them with a call for a dynamic society in which civility and discourse help individuals move beyond difference in respectful ways. He stresses that while community is liberating and inclusive, a unified society is confining and exclusionary. He writes:

> Community should not be equated with a unified society. Desires for mere social unity make rationality and freedom threatening…[Since] human beings are unsettled and searching creatures… [Community] must be quite different from a tribe or an artifact of revolutionary despotism…it must be more impermanent, personal, and elusive. It must be a reality partaking of movement and freedom (1980, p. 17).

Tinder acknowledges the difficulty that people have with approaching an ideal state of community. He summarizes this by calling community a “tragic ideal” that is
worth striving for but impossible to fully realize: “Acknowledging that community is a tragic ideal involves a strain…Consciously bearing this strain is the heart of civility” (1980, p. 12).

Tinder also acknowledges that this strain of striving for community and the human longing for deep connection with others is chronicled by a long philosophical tradition, including the work of Plato and Rousseau. He explains the connection of early thinkers to his conceptualization as follows:

…When Rousseau discussed the “general will,” he was trying to formulate the concept of a social will that would be identical with the innermost will of every member of society. Obeying such a will, the citizen would be simultaneously at one with others and wholly free. Both Plato and Rousseau envisaged societies that would join people as full and authentic human beings, not as parts trimmed and shaped to fit into an external order. The perfect harmony of the whole and part is the key to the ideal of community (1980, p. 2).

Because of the difficulties inherent in reconciling the general will with individual needs and desires, Tinder concludes that societies resort to proxies for real community. He describes how this tendency has manifested itself throughout history:

Every major historical period has responded to the lure of community by creating… a myth of community – in ancient time, the polis; in the Middle Ages, the universal church; in the modern world, the nation-state. The present revolutionary era has joined this historical procession with its own dream of ideal unity – communism (1980. p. 2).

Tinder differentiates real community from myths of community by enumerating certain characteristics. Foremost of these characteristics is the element of respect for all individuals without a conditioning of that respect on their perfect goodness or worthiness. Tinder sees this not as an acceptance of human flaws but as a recognition of the
universality of human shortcomings and frailty. He writes this about human shortcomings:

Willingness to enter into community depends on respect for other potential participants, and respect depends on a perception of value…people are drastically unequal in the degree to which they command respect…[And] man is spatial, temporal, and mortal…the natural values he embodies are limited both by degree and duration. No one is more than relatively and temporarily intelligent, or skillful, or handsome. Likewise no one is more than relatively and temporarily good…In sum, no one commands more than qualified respect. The communal impulse, capable of fulfillment only with those one respects and only in proportion to one’s respect for them, is correspondingly inhibited (1980, p.3).

Tinder defines different types of community and enumerates their essential elements. He identifies the three primary types of community as political, cultural, and private. According to Tinder, political community exists “where power is reliably subordinate to common inquiry” (1980, p. 38). Because history, past dealings with each other, and a need to act within any society contributes to the realities of those societies, any communication that ignores this reality is false. Therefore, Tinder urges that we can “prove our strength and truthfulness as communal beings only by confronting our practical responsibilities, and this we do only as members of a political community” (1980, p. 53).

Next, Tinder describes cultural community. This kind of community is created through “scientific, historical, artistic, and philosophical inquiry” and, like political community, is a public phenomenon. However, unlike political community, cultural community is “pure community” because it is unconditional and demands absolute truthfulness (1980, p. 39). Tinder explains that cultural community is an inadequate model for community action because of its unconditional nature. Tinder explains the
unsuitability of unconditional community as based in the inescapable fact that human life requires responsible action, not just contemplation. Further, the humans who must act are “immersed in conditions” and any notion of unconditional honesty and pure community are, therefore, unrealistic (1980, p. 39). For example, Tinder contrasts the need for a poet to share even the most “inconvenient truths” with the constraints on the speech of a politician, who may need to temper truthfulness in order to respond to practical considerations. Moreover, Tinder suggest that politicians can be excused, ethically, for a lack of complete truthfulness if they do not even pretend absolute candor (1980, p. 39).

He contrasts political and cultural community with private community. He explains that private community is “not defined by content…but simply by not being public…privacy is a right of excluding all persons and all forms of contact and is therefore a right of eschewing community. But the justification for privacy is communal” (1980, p. 39). He suggests that the need for private community is legitimate and is based on the fact that there are drawbacks to being in community within large, public groups. Further, he suggests that humans can approach the ideal of a community that is public and inclusive if they are given the freedom to take steps toward that through private connections with others. Tinder summarizes these concepts as follows:

We must be able to choose our relationships and shape our communities. The purpose of the private sphere is to facilitate partial and preparatory realizations of the all-inclusive community that is the human goal (1980, p. 39).

In addition to describing the types of community, Tinder discusses how they are achieved. First, and perhaps most important, is the process of inquiry. He describes inquiry as “…Nothing but serious communication, and it may be that understanding
community depends above all on rejoining two concepts that have become strangely dissociated in our thinking – community and communication” (1980, p. 18).

An important aspect of the kind of inquiry that builds community is that it is universal. No one can be excluded from the dialogue if the community being sought is to be public and inclusive. Tinder states: “If there are people to whom I am unwilling to speak or to listen, then I am in some measure and way either indifferent to the truth or else absolutely sure that I already possess it. I cannot care for the truth and be cognizant of my own fallibility without listening to all voices” (1980, p. 44).

Tinder explains that inquiry that builds community does so because there is attention and value given to inquiring with other people in order to elicit their viewpoints and ideas. In order to do this, we must remove “legal, economic, social and educational barriers” to meaningful dialogue (p. 24). He describes this process in the following:

We inquire…in two different ways. We inquire about, and we inquire with fellow inquirers. In the former way we seek theoretical of aesthetic contemplation; in the latter way community. One is individualist inquiry and the other is dialogical inquiry. The latter… is in itself community (1980, p. 24).

Tinder explains that inquiring with others requires a willingness to set aside pride and reluctance to reveal a need of others. He writes:

Individualistic inquiry…stems from a desire to avoid the humbling and dependent status implicit in dialogical inquiry. In pride, I try to master reality through my own independent mind. Only by overcoming pride…do I recognize the inescapably dialogical character of inquiry – and thus prepare for entry into community (1980, p.24).

Further, Tinder emphasizes that others should be involved in the inquiry at the earliest possible stage. Otherwise, there will be inadequate recognition of the intersubjective
elements of inquiry and its value to building community. Tinder describes this important aspect in the following:

It may be asked at what stage in the process of inquiry others enter in. When does the inquirer come under the necessity of leaving the sphere of his own mind in order to inquire in common with other minds? At the very outset…The inquirer may persist indefinitely in the proud effort to master reality alone, without engaging in the humble act of consulting others. It is an illusion, however, to think that even organizing experience is a solitary activity. The simplest object observation – taking note, for example, of the weather – is implicitly communal, for the concept of objectivity is equivalent to that of absolutely reliable intersubjectivity. To suppose that valid inquiry is solitary in its initial, or objective, stages, and that it is necessarily communal only in other stages, it tacitly to accept an individualist premise that is bound to inhibit understanding of the full identity of inquiry and community (1980, p. 29).

Moving beyond the element of inquiry, Tinder identifies tolerance as another essential prerequisite of building community. He explains that the ideal of community requires moving beyond tribalism or blind acceptance of a social status quo among a longstanding social group. For tradition to be valuable, it must be actively evaluated and accepted. He writes that in community, individuals must move “Beyond tradition and society as the “collective past” and “to relate to it, if only by consciously accepting it, to the living present…nothing in tradition is sacred or inviolable. There are sacred traditions but not things that are sacred because they are traditions. People joined by uncriticized traditions are not joined in community (1980, p.33). Tinder includes even the most sacred and fundamental beliefs as fair topics of re-evaluation, criticism and inquiry. He writes that we must move beyond adherence to values such as “justice, order, democracy, and happiness” if those values become “mere dogma or command” (1980, p. 88).

Tinder urges that the important goal of this inquiry is to create, even at some risk, “A possibility that the good will be a matter of communication and common
understanding, adhered to freely” (1980, p. 88). He acknowledges that there are costs of this inquiry, but that these must be borne if even greater dangers are to be avoided. He writes: “This [inquiry] cannot be done without risks; something of worth may be attacked or defeated. But if it is not done at all, then values lose their moral significance. They become grounds and pretexts for despotism rather than genuine human needs”(1980, p. 88). Tinder reiterates these points in his later work with the following endorsement of the risk that must accompany true inclusive and tolerant dialogue: “Tolerance, then...if it means anything, it must mean liberating people – so far as possible all people – for communication. That process entails risk” (1995, p. 210).

Tinder differentiates between tolerance and indifference. He argues that community-building inquiry is “Not based on indifference to the thoughts of others as espoused by liberals who argue that “each one has a right to his own thoughts and his own mode of life” (1980, p. 79). Similarly, he rejects conservative and radical viewpoints that either fear tolerance or individuality. He writes that in this kind of community-building tolerance and communication is “…different than opposing tolerance as a threat to solidarity, as is typical of conservatives or by radicals who reject individualism as antithetical to community (1980, p. 79).

In addition to the importance of inquiry and tolerance, Tinder adds a third element of building community – creativity. He explains why it is dependent upon serious and tolerant inquiry: “…While often treated as individualistic, it [creativity] is communal because it produces something that is shared with others (1980, p. 35). A related issue is the need for constant and creative reevaluation of positions and viewpoints. To Tinder, these are prerequisites for the kind of communication that builds community. He writes:
“Serious communication…probes and inquires. It is not merely a transfer of experience from one mind to another” (1980, p. 129). This creative exchange is what prevents tradition from being restrictive because it allows connection with ideas from the past without regression or a reliance on pure dogma. This creative exchange gives humans a chance to “enter into being in its depth and mystery and [to] gain a sense of ourselves in our restless, reflective, and companionable essence” (1980, p. 36).

In Tinder’s view, another essential element of community is truth-seeking. To seek the truth is a fundamental aspect of serious communication and tolerance. He writes the following about truth:

Truth is that which links human beings when they rise above confusion and dishonesty, and in that way it is the substance of community (1980, p. 35). Human beings are united only by the truth and that the truth is something we search for and do not securely possess. We remind ourselves of these things …when we say that community is that which comes to pass through serious communication (1980, p. 81).

Tinder acknowledges that it is reassuring to never have one’s opinions opposed, as it appeals to one’s need to be correct. He warns, however, that such unanimity is usually a fiction that must be enforced by intimidation or simply by remaining ignorant of opposition. He states: “Selfishness and pride …enhance the difficulty of seeing reality as others see it; they cause one to recoil before the humbling experience of admitting error, they lend power greater charm than truth”(1980, p. 47).

On the topic of power, Tinder acknowledges that it is always a subject-object relationship and such a relationship always exists when action is unilateral. He writes that political solutions, to the extent they empower some to act “on” others, are not supportive of true community.
Tinder writes:

...Objectivification [is] inherent in all political action. No government can devise political ends that benefit and command the voluntary allegiance of every member of society. Hence to act politically is to use others as means; this is what creates the chasm between political action and community. While civility does not mean wholly abstaining from action, it does mean acting with an awareness the action is inherently depersonalizing and thus provides no direct access to the kind of unity that man seeks (1980, p.186).

While Tinder does not suggest that a subject-object relationship between distinct individuals can be overcome, he suggests that collaborative inquiry can help bridge the gap. He describes tolerance as creating a “communal space” where communication is possible between distinct beings who are “allowed to remain at a distance, but not at a distance that is untraversable” (1980, p. 84). In this regard, he cites the philosophy of Martin Buber who wrote that “Man, as man, sets man at a distance and makes him independent; he lets the life of men like himself go on round about him, and so he, and he alone, is able to enter into relation, in his own individual status, with those like himself” (1980, p. 84).

Tinder does not see Buber’s perspective as exclusionary or clannish, as he sees all individuals are fundamentally alike. Tinder explains further that, in community, “tolerance must be envisioned...as a recognition that the other is a being like oneself, who can speak and listen, and who needs freedom to do either one authentically”(1980, p. 84). Tinder also cites the work of Immanuel Kant, stating that only through dialogue can we overcome the limitations of our own understanding and perceptions:

It is a major theme of the Critique of Pure Reason that while a great deal of objectively certain knowledge can be gained, such knowledge is not and cannot be all-inclusive. The objective knowledge we possess is not just accidentally or temporarily incomplete. It is essentially incomplete, for
being cannot be exhaustively objectified. …We are, so to speak, encircled by uncertainty (1980, p. 92).

The practical import of this approach to inquiry is to allow individuals to acknowledge the possibility that they may be wrong in their conclusions. Tinder urges that “We can be subjectively certain in our beliefs, while accepting that objective uncertainty is required by the fact that we may be wrong in our strongly held beliefs (1980, p. 95).

In addition to the way individuals communicate with each other, Tinder also emphasizes the need for a respect for society. Without society, communication cannot occur. He writes: “Society is necessary for meeting basic physical needs; it is necessary for assuring the order without which there are few opportunities for speaking and listening; it is necessary for developing and maintaining the cultural sophistication on which communication depends”(1980, p.108).

With this consent to live in society, in Tinder’s view, is an implicit acceptance of the limitations on individualism that society requires and an acceptance of the fact that it confines and shapes us (1980, p.103). He does not, however, suggest an unquestioning allegiance to any given power structure imposed within society. In fact, he cautions that patriotism can devolve into “idolatry” if loyalty begins to be unquestioning and absolute (1980, p 102).

Related to Tinder’s cautions about the dangers of unchecked patriotism is his attention to the “principle of plurality.” Tinder defines it as the following: “It…is the mark of a deep misunderstanding that the ideal of community has been so often set in opposition to the principle of plurality….[and the] condemnation of separate powers,
parties and groups within the state. The source of this misunderstanding…is that of making far too mundane and ordinary thing out of community” (1980, p. 64). Tinder elaborates that community should be bigger and better, both conceptually and in practice, than the contrived unity of blind allegiance to any social or political structure such as a government, a political party, or branch of government.

One of the most difficult philosophical questions that Tinder contemplates is the ideal of equality and how it relates to the ideal of community. His discussion of plurality as superior to false unity is grounded in his call for respect for every individual’s viewpoint and sensitivity to their unique needs and circumstances. Consistent with this ideal of equality and respect for pluralism, Tinder urges that ideal community requires attentiveness to the needs of all individuals and a readiness to respond to those needs (1980, p. 190). This kind of attentiveness requires that one “not only be attuned to man’s voice wherever it can be heard, but to search out unvoiced experiences (1980, p. 188). [It] is intersubjective and consequently looks for something more than explanation” (1980, p. 189). Therefore, this attentiveness must also go beyond mere observation, for “Observation, like action, objectifies, and it comes to rest in explanation” (1980, p. 189).

Tinder acknowledges, however, that the practicalities of taking political or legal action will have inherent anti-communitarian consequences. He describes this tension and suggests that there must be an acceptance of the tension between desire for equality and inequality and, therefore, an acceptance of less than universal experiences of community. He writes:

Egalitarianism is dangerous because it has a moral authority that makes for fanaticism. It is dangerous because it is right. Hence, one should not try to face radicals and their egalitarian demands with an easy conscience
or an invariable rule of conduct. What right have we to delay in rectifying wrongs suffered by others? None that can be found in pure moral doctrine. But along with morals, circumstances also count for something, and these repeatedly create a burden of uneasiness and indecision. To accept this burden, and with it the guilt of temporizing with injustice, is the destiny of a communal being in a universe that offers only fragmentary and ephemeral experiences of community (1980, p. 77).

Tinder is not resigned, however, to a hopeless acceptance of anti-egalitarian action. Instead, he urges that we can aspire to group action that is exemplary. This reference to the work of Immanuel Kant can be best understood by reviewing Kant’s description of the Categorical Imperative; that is to “Act only according to that maxim whereby you can at the same time will that it should become a universal law” (Kant, 1785, 1993, p. 30).

Tinder takes the position that exemplary action is both possible and correct if a society aspires to true community. He writes that action is exemplary if it is “fitted to serve as a statement of principle” and “expresses man’s communal nature and at the same time gives significance to what is done by a single individual” (1980, p. 191). Further, Tinder emphasizes that each individual must accept personal responsibility for his or her judgment, choices, and actions and whether or not they constitute the kind of attentiveness that rises to a level of “personal communality” (1980, p. 189). This is important because, to Tinder, “The only adequate definition of civility is one incarnate in the life of a civil person, a definition irreducible to detailed principles claiming universal validity” (1980, p. 186).

Tinder’s analysis leads to the conclusion that if the ideal of community is to be approached, then difficult and risky communications must occur between individuals who treat each other, again using Kantian terms, as ends in themselves and not merely as
means to an end. Tinder suggests that the process of each individual choosing to live this way is the best definition of civility. Because it depends on individual action, civility will always be dependent the particular time and circumstances in which action occurs. One generalization about civility that Tinder is willing to make is that it will always be difficult. He concludes as follows:

> It is difficult because … it is the burden of sharing existence with billions of beings who are infinitely mysterious, who are sometimes kindly and sometimes cruel, each of whom has a claim to be treated as an end and not merely as a means. There is no way in which that situation can be made easy and pleasant…tolerance derives from Latin words meaning to “to lift up” or “to bear”… This suggests that civility is the stance in which one consciously bears, in the sense both of enduring and of supporting, the existence of multitudes of unpredictable and troublesome human beings (1980, p. 199).

Tinder’s writings on the importance of individual action in building community are complemented by the work of Adam Seligman, professor of religion and researcher in economics at Boston University. In Seligman’s analysis of the key elements of civil society, he adds the fundamental element of trust between autonomous individuals. He explains his thesis as follows:

> The argument presented here is that both civil society and trust rest on a very particular conception of the individual, on an idea of the private person, imbued with moral agency and autonomy, whose civil interaction is mediated or negotiated by something we call trust (2000, p. 13).

Like Tinder, Seligman explains that this trust can provide the basis for a sense of community that is deeper and more freeing than a parochial sense of unity enforced by a social order. He urges that this conception of community is not only more sound, but also more practical in modern society where individuals are surrounded by strangers. He writes: “For trust to make sense, to be necessary, what is required is the free and
autonomous, hence the unknowable individual. The same self-regarding self who stands at the fount of the new terms of civility and of friendship that define the modern age (2000, p.18).

Also, like Tinder, Seligman contrasts this modern conception of community with traditional communities based on geographic and economic constraints which created a homogenous and static society. He writes:

For it is precisely the terms of friendship and of civility that now mediate between individuals no longer tied by long-standing, traditional and ascribed sets of obligations and responsibilities. It was this very breakup of local territorial and primordial ties that accompanied Europe’s entry into the modern era, and it was this very destruction of the bonds of local and often primordial attachment to kith and kin, to territorial and local habitus, that forced the establishment of new terms of generalized trust in Western Europe and which – we should note– made the idea of the “promise” so central to early modern political theory and the revival of modern natural law theory with Puffendorf, Grotius, and later the thought of John Locke, David Hume, and Immanuel Kant (2000, p. 19).

In Seligman’s view, the importance of promise-keeping is a key element in creating the trust that is a prerequisite to creating community among diverse and autonomous individuals. He writes:

For what else is a promise but an act of will that invites trust among strangers; that is among those who share no ties of affinity, kinship or even shared belief? It is, as has been attested to by many, a “speech act whereby one alters the moral situation” by incurring new obligations. The social ties predicated on these obligations and the moral force of one’s commitment to them thus serve to forge a new model of and for the political community – one based on a shared belief in the very act of promise keeping (2000, p. 19).

The promises are not always directly entered into between the affected individuals, as sometimes individuals alter their behavior because of a more generalized trust that all members of the community will follow the rules established by social
convention or legal doctrine. In these cases, Seligman explains that “Symbolic credit” is created by voluntarily “circumscribing individual will in favour of the interest of a stranger” with the expectation that the credit is “to be redeemed at an unspecified time by a third unspecified party” (2000, p. 16). Further, it is this web of promises and trust that allows modern city dwellers, living among strangers, to have any sense of safety. He writes:

It is the mutual recognition of individuals, no longer embedded in collective groups, no longer viewing the stranger as necessarily dangerous, no longer hostage to traditionally defined terms of membership and participation, who meet in the confines of the nation-state and, paradigmatically, of the city -- that urban universe of life among strangers; among those one does not know and those who do not know you; among those who, if unknown, are nevertheless not dangerous (2000, p.17).

Seligman contrasts a community based on promise-keeping with communities based on the traditional model of homogenous and highly regulated societies. When modern societies rely on traditional notions of social unity instead of the more modern model of community based on promise-keeping, they will have a high level of trust-based predictability. Seligman explains this phenomenon as follows:

Traditional societies organized around kinship bonds were societies with very high levels of prediction, and consequently high levels of confidence based on a combination of familiarity and sanctions. Hence, to say that traditional societies (or even contemporary Japan) are societies with high levels of trust is, it could be argued, a misnomer. They are rather societies with high levels of confidence based on well-known and mutually reinforced kinship obligations. Predictability is high, variability low (2000, p. 20).

Seligman warns, however, that such a system is maladapted to modern, diverse societies because this trust will not extend to anyone perceived as outside the group. This is explained in the following:
A system (of obligations, responsibilities and mutuality) is clear and visible, and therefore confidence in behaviour is remarkably high. The corollary to this is that whatever is outside of system is totally unknown and hence dangerous. Boundaries are clear and relatively well marked and when situations arise that do not fit into system categories…these are immediately translated into terms the system can accommodate – as in the phenomena of blood-brotherhood where friendship is symbolically transmuted in to a primordial tie (2000, p. 20).

Seligman, citing the work of economists, explains the process of moving beyond traditional bonds to a new reliance on promises and trust is a shift to the use of a type of social capital. In contrast, he sees legal constraints, which rely on external authority instead of trust among equals, as “in their very nature, inimical to the development of trust” (2000, p. 14). He elaborates on this theme which might be described as a contrast between community built on trust versus mere order built on law. He concludes that modern Western societies have relied heavily on the rule of law to the detriment of trust levels among members of the society. He suggests that for true community to develop there must be room for individualized negotiation of differences, or at least for a reliance on promise-keeping and the symbolic credit created when members of a community constrain themselves in order to benefit others. He urges that reliance on law, instead of trust, creates a self-perpetuating barrier to community. Seligman writes:

…The more the relations between individuals are defined by abstract, legalistic and formal criteria…the less the public realm can be defined by a shared solidarity based on concrete ties of history, ideas, love, care and friendship. The very multitude of private realms, each a value in itself can, it would seem, no longer be negotiated without the imposition of public, normatively standardized role definitions. Without a shared universe of expectations, histories, memories or affective commitments no basis of trust can exist. In a situation of radically incommensurate life-worlds – which is what so much of post-modern culture implies- that trust necessary to negotiate diverse expectations is lacking. What is beginning to emerge in its place is the increasingly public definitions or roles and role expectations (defined, most saliently, through the legal culture). In
the absence of trust, indeterminacy becomes intolerable; hence the daily promulgation of “speech codes”, housing association regulations, smoking laws and other forms of formal regulation (and sanction) of interpersonal behavior (2000, p. 2).

Seligman adds another interesting point on a kind of continuum that he creates with perfect community and trust at one end and distrust and legal constraints at the other. He suggests that identity politics are closely related to legal constraints because they, too, work to diminish the role of trust between individuals. He writes: “Community or communality is always particular… [Use of] collective identities (ethnic, gender or of sexual preference)… is, it could be argued, indicative of the fragility of collective representation based solely on the private. It is a return to collective identities rather than individual selves as modes of representing public culture (2000, p. 24).

The fear of both identity politics and other manifestations of faction and imposed creeds or regulations as threats to community is echoed in the work of Amitai Etzioni, professor of sociology, former advisor to President Carter, and the founder and director of the Communitarian Network. In *The Monochrome Society*, Etzioni adds two important elements to the definition of community: 1) All communities share values and, 2) all community is not good, per se, if the moral standing of the values they share are not good. It is interesting to note that his criticisms of a liberal or libertarian view of community as lacking substantive content is conceded to by Glen Tinder, as evidenced by this passage from Tinder’s Tolerance and Community:

Obviously intolerance would not have been so widespread and continuous if every good argument had been against it. We should remember that for the most part intolerance has been practiced by peopled who felt morally bound to be intolerant. People have usually been intolerant not because they defected from their principles but because they adhered to them. Defending tolerance thus is not merely a matter of calling to mind a few
propositions so obviously true that no reasonable person could dispute them. It may well be that the value of tolerance is more open to doubt than is the value of peace, economic security for all, or any other widely accepted ideal of our time (1995, p. 7).

Tinder differs fundamentally from Etzioni by concluding that there are dangers inherent in deciding for others what ideals should be accepted that we should, therefore, have the discipline to commit to tolerance even when it is “troublesome or painful” (1995, p. 8). Etzioni concludes that the determination of what is good does not need to depend on, or be subjected to the inherent dangers of, mere consensus. He suggests that we must instead draw on “external and substantive criteria to evaluate the values communities come to share as a result of dialogues judging the moral standing of values handed down from previous generations (2001, p. 159). He suggests that the following sources should be consulted in the “quest of the values of a good society:” “Local consensus, worldwide parallelism, formal and informal criteria, as well as the sense that certain values are self-evident. One may follow different considerations, but without some such combination of ethics and sociology a good society cannot be characterized” (2001, p. 161).

While Etzioni cites research on the effect of race as an example of a demographic characteristic that can impact these considerations of what is “good,” he concludes that “a communitarian view seems to be one in which those who seek to uphold their separate group identities will do so (hopefully viewing themselves and being viewed a subgroups of a more encompassing community rather than as separate nations), but those who seek to redefine themselves will be enabled to do so, leading to an ever larger group that is free from racial categorization” (2001, p. 35).
Etzioni urges that we have rich ethical, legal, and other traditions upon which to draw for identification of commonly held community values. He writes that “The social, cultural, and legal elements that constitute the framework that holds together the diverse mosaic are well known.” In the United States, for example, they include a commitment by all the parties to the democratic way of life, to the Constitution and its Bill of Rights, and to mutual tolerance (2001, p. 36).

Similar key elements of a good society underlie other systems as well, and Etzioni identifies these more general characteristics in the following: “A society is held together best when it commands a set of shared values that defines the virtue society seeks to uphold, as strong commitment to shared purposes, and a clear sense of social responsibility; it must also have a strong commitment to mutual tolerance and a high regard for minority and individual rights” (1993, p. 2).

Etzioni summarizes that, in all good societies, a balance must be struck between individual rights and collective enterprise: “The sociological trick is to leave some room for the enriching particulars while sustaining the shared values, habits of the heart, institutions, and public policies that keep the various communities as members in the more encompassing community…”(1993, p. 2). One way in which this balance can be maintained between divergent elements within a community, in Etzioni’s view, is through “reconciliation.” Etzioni characterizes reconciliation among community members as including the following elements:

…Recognized willingness to acknowledge past injustices; to make some amends; to ensure that we overcome such unacceptable practices a racial discrimination, sexual harassment, and bashing of homosexuals in our present and future. But more is involved. We need to learn to accept people from other backgrounds as persons rather than merely as members
of sociological or statistical categories. We cannot recognize them if identify politics is incessantly promoted. We need rituals of forgiveness, closeness, and closure (1996, p. 5).

While acknowledging some similarities, Etzioni explains how communitarian reliance on past generations or external moral authority for definitions of “good” differs from conservatism. He writes:

To point to the importance of core values, however, is not to suggest that these compose a strict and rigid creed, a given canon, immutably handed down from one generation to another. On the contrary, historical experience shows that, to maintain its own continuity, the framework must continuously adapt to changing balances within society and to geopolitical changes” (1996, p. 3).

Etzioni also writes that a “good society” relies not on laws, but on “the moral voice – the informal controls members of communities exert on one another” (2001, p. 155). When these values are less heeded, communities then “require more laws, more regulations, stronger sanctions, more law enforcement resources and powers, and more severe punishments for those who violate the laws. Indeed, in most Western societies one can observe over the last decades that as social order has deteriorated, there has been a constant demand for more and harsher punishments, more police, and more powers to the various public authorities” (2001, p. 156).

Etzioni contrasts the communitarian view with a reliance on civil society as a key aspect of community. He states that civil society is not sufficient because it gives equal validity to all voluntary associations and all exercise of democratic rights. He summarizes:

The concept of good society differs from that of the civil one in that while the former also strongly favors voluntary associations – a rich and strong social fabric, and civility of discourse – it formulates and seeks to uphold some particular social conceptions of the good…Thus, while from the
perspective of a civil society a voluntary association is a voluntary association, from the view of a good society, no two voluntary associations are equivalent. The regard in which voluntary associations are held ranges from those that are celebrated (because they foster the social virtues the good society seeks to cultivate) to those that are neutral, to those that – while voluntary -- sustain values divergent from or even contradictory to those the society seeks to foster (2001, p. 200).

Etzioni acknowledges that while some liberals argue that they do not, in fact, espouse this type of relativism, he uses Robert Putnam’s work on social capital of an example of this liberal tradition of valuing of voluntary association without judgment of their goals or mission (2001).

Robert Putnam, professor of political science at Harvard University, is cited often because he has made a significant impact on recent thinking about the best ways to foster a greater sense of community in modern and diverse societies. He has written extensively on these topics, with his best known works including Bowling Alone: The Collapse and Revival of American Community (2000) and Better Together: Restoring the American Community (2003). More recently, Putnam has completed a study which he describes in “E Pluribus Unum: Diversity and Community in the Twenty-first Century (2007), which has become somewhat controversial because of its finding regarding at least short term challenges to community caused by diversity.

Putnam acknowledges the difficulty in defining community. In Bowling Alone, he writes:

“Community” means different thing to different people…each of us derives some sense of belonging from among the various communities to which me might, in principle, belong. For most of us, our deepest sense of belonging is to our most intimate social networks, especially family and friends. Beyond that perimeter lie work, church, neighborhood, civic life, and the assortment of other “weak ties” that constitute our personal stock of social capital (2000, p. 271).
Putnam proposes that the research also reflects that definitions of community differ across generations. The man thesis of *Bowling Alone* is that World War II, because of the trauma that it caused and the clarity of its mission, created an “unusually civic generation” that has been replaced by “several generations much less embedded in community life” (2000, p. 275). He cites survey results from the 1990’s to support his thesis, including the following:

…The community embeddedness of the generations differs markedly. Compared with Gen X’ers, men and women born before 1946 are nearly twice as likely to feel a sense of belonging to their neighborhood, to their church, to their local community, and to the various groups and organizations to which they belong. (Baby boomers fall midway between the two in every case.) Among the younger generations, these residential, religious, and organizational ties are more frayed. Not surprisingly, electronic ties are more important to Gen X’ers than to the older generation, but even among the younger cohort, kith and kin are twenty times more important the cyberfriends as a source of community….For the younger cohort, strong ties still count, but they are no longer complemented and reinforced by ties to the wider community (2000, p. 274)

In *Bowling Alone* and later work, Putnam proposes that social capital is the key to renewed community connections, especially among the younger generations. He defines the term as follows:

In recent years social scientists have [used] the term “social capital.” By analogy with notions of physical capital and human capital – tools and training that enhance individual productivity - -the core idea of social capital theory is that the social networks have value. Just as a screwdriver (physical capital) or a college education (human capital) can increase productivity (both individual and collective), so too social contacts affect the productivity of individuals and groups. …Social capital refers to connections among individuals – social networks and the norms of reciprocity and trustworthiness that arise from them (2000, p. 18).

In his later book, Better Together, Putnam acknowledges that some forms of voluntary associations and social networks may be inclusive and supportive of
community, while others may be negative or even “morally repugnant (2003, p. 2).

Further, he suggest that, unlike some views of community building, building social capital does not always have the “warm and fuzzy feeling, a kind of “kumbaya” cuddliness about it” (2003, p. 3). He acknowledges the following realities of building social capital, and stresses that it is “not free of conflict or controversy:”

First, some of our protagonists are building social capital precisely because it can empower disadvantaged groups… in their struggle for greater influence. Social capital represents not a comfortable alternative to social conflict but a way of making controversy productive. Second, by organizing some people in and others out, social capital can sometimes have negative effects on “outsiders.” …third, even when the effects of community ties are wholly admirable, the means by which they work can be unsettling. Social capital relies on informal sanctions and gossip and even ostracism, not just on fellowship and emulation and altruism. In short, the concept of social capital is not treacly sweet but has a certain tartness (2003, p. 3).

Putnam acknowledges that creating social capital will not be easy. When discussing possible strategies, he refers the work of The Saguaro Seminar which, as he says: “…Brought together thinkers and doers from many diverse American communities to shape questions and seek answers.” Better Together also provided suggested means to accomplish the end of social capital and these suggestions are discussed in the Saguaro Seminar’s report, “Better Together: Civic Engagement in America,”(2000) discussed at length below. He cautions, however, that “Figuring out in detail how to renew our stock of social capital is a task for a nation and a decade, not a single scholar, a single book, or even a single group (2003, p 204).

In an interesting mix of the practical and theoretical, the Knight Foundation has worked closely with Putnam and The Saguaro Seminar to link the concept of social capital to the goals and missions of the Knight Foundation. For example, using Putnam’s
theories of social capital and its decline in contemporary American society, the Knight Foundation recently included a multi-page essay on social capital and its relevance to community development on their foundation’s website. Here is the definition of social capital that they use:

Social capital is a term used to describe the energy that comes from networks. When there is trust and a willingness to look out for one another's interests, citizens can accomplish tasks that would be impossible for any single individual to pull off alone. Therefore, social capital is a resource for collective action in communities (John S. and James L. Knight Foundation, 2006).

The essay goes on to describe the relevance of social capital, as follows:

Why is social capital important? Social capital can help citizens coordinate their activities, enhance cooperation and smooth the way for collective action. All of this helps local residents solve complex problems and, ultimately, govern their communities more effectively. Social capital helps citizens keep their democracy running… For communities, research shows social capital is associated with the following: A stable and prosperous economy, efficient government agencies, lower rates of suicide, cancer, strokes and heart attacks and increased resilience in fighting illness, less juvenile delinquency, substance abuse, crime, teenage pregnancy, child abuse and welfare dependency, beneficial outcomes for children such as higher test scores, graduation rates and overall school performance, greater success of community initiatives such as neighborhood watch and community policing projects, [and] a longer life span (John S. and James L. Knight Foundation, 2006).

One important aspect of Putnam’s theory that is explored more thoroughly in the Knight Foundation materials is the idea of “vertical social capital.” This describes, for example, the relationships among representatives and their constituents. The following summarizes this point:

… An example of vertical social capital is the opportunity for local political leaders to hear from community members through letters, local
meetings or other means. Residents’ ability to connect with their leaders and policy makers is crucial in making the best use of social capital and improving community life…Enabling residents to help set the agenda for community leaders is a key to local problem-solving (Knight Foundation, 2006).

Finally, suggestions are made on the website for ways that administrators of community-building projects can increase the level of social capital in their communities. These suggestions range from the mundane, such as providing residents with contact information for decision-makers and teaching basic skills about how to approach local school boards, city council, and municipal leaders with their problems, to potentially more radical suggestions, such as “…teach residents about the rights and recourse available when community problems go unsolved” (Knight Foundation, 2006).

The literature also reveals conclusions about the utility of civil society and social capital in raising satisfaction levels of ordinary citizens about their government. Research reflects a general deterioration of the level of trust most citizens have for government as a whole, as cited in the report put out by the Saguaro Seminar, titled report: “…Generalized trust in government has plunged to previously unimaginable lows. In the late 1950’s and early 1960’s, about three-quarters of Americans agreed that you can trust the government in Washington to do what is right always or most of the time, but by the 1990’s, that fraction had dropped to less than a third” (Saguaro Report, 2000, p. 45, citing American National Election Studies).

The distrust of government is understandable, in the views of these researchers, who cite projects where governments did not act to support civil society or to build social capital. “The urban renewal projects of the 1960’s are one of the examples of this negative impact of public policy…Government, with its vast resources and coercive
powers, at times can threaten social capital. The 1950’s slum clearing projects are a regrettable memorial to the damage that government can inflict on our stocks of social capital” (Saguaro Report, 2000, p. 45).

However, while most citizens fear governmental interference in their lives and do not trust the political actors on the national scene as a group, citizens are more trusting and satisfied with those governmental services and public servants with whom they have personal dealings. In fact, researchers have found that the aspects of our government that have direct interaction with citizens receive very high ratings from citizens. For example, the Saguaro report cites social science research that showed the following:

[Americans] express high levels of confidence in our system of government, and we are surprisingly satisfied with specific components of the system. The vast majority of us like our member of Congress and solid majorities express confidence in the military and the police…in a recent ‘customer satisfaction survey,’ Americans gave high ratings to the service they received from scores of government offices, ranging from the Women, Infants and Children (WIC) food program to the Social Security Administration to the National Park Service (2000, p. 45).

Because connection appears to build trust and public confidence in their government, the Saguaro report suggests that there are general principles to better connect politics, government, and the citizenry. One of these principles is “View government and civil society as complements.” The authors suggest that current debates about the proper role of government versus voluntary associations and citizen action are misguided:

We believe it is erroneous to see politics/government and civil society as pure substitutes for each other, or to see public action as a choice between these two venues. Politics, the collective deliberation over how to allocate resources for the public good, may rely on social capital, but social networks and groups lack the authority that is sometimes necessary to achieve publicly desirable ends. Likewise, social capital and government are complementary. Social-capital-rich communities may accomplish
more than can social-capital-poor communities, but there are certain functions (law enforcement, for example) that only government should fulfill (Saguaro Report, 2000, p. 46).

The authors also stress that it is the process of government, as well as the products or services offered, that has value in building connections among citizens and between citizens and their government. They emphasize the need for greater democratic deliberation:

Especially in light of technological changes that allow political communication and civic activities to take place without face-to-face contact, we are concerned that Americans are at risk of losing their ability to deliberate together, to compromise, and to reach consensus. Any efforts to …enhance trust and citizen participation must themselves be guided by, and emphasize, deliberative democracy (Saguaro Report, 2000, p. 47).

The Saguaro project focuses on the basic premise that answering questions of procedural and process issues are just as important as developing good substantive law. These important procedural questions focus on “how government should be constituted (i.e., highly centralized, or highly decentralized), what the responsibilities of different levels of government should be, and what processes should govern political decision-making” (Saguaro Report, 2000, p. 48). The Saguaro report concluded that government must be vigilant and objective in its evaluation of public policy. Policies, however well-intended, can either fail to build or can even destroy social capital. The report states: “Because government has the potential both to deplete and to build our stock of social capital, the challenge for government in this new century is to increase the ratio of building to depleting” (Saguaro Report, 2000, p.45). More specifically, the following recommendations are made by the drafters of the report:

We urge government agencies, elected officials, non-profit groups, and other public institutions to study their past activities and programs to
assess how they helped or hurt community social capital. In addition, we urge government and non-profit leaders to put pending decisions under the social-capital lens. Such analysis should attempt to understand the decisions and processes that drive the creation and destruction of social capital...Policy recommendations always have hidden costs and unanticipated consequences. Therefore, the goal becomes to craft recommendations whose benefits outweigh the costs and to anticipate as best as is humanly possible the perverse effects that might flow from well-meaning reforms (Saguaro Report, 2000, p. 49).

Putnam and his coauthors of the Saguaro reports stress that effective policy-making requires ongoing feedback and refinements to address unanticipated needs. This feedback is best provided by individual citizens and their constituency groups, as they are the ones most directly affected by government. They stress that “Fixing democracy will require that we create new, meaningful opportunities for participation and that we give citizens reason to believe, once again, that their participation counts” (Saguaro Report, 2000, p. 48).

Today, however, some theorists argue that political parties and political campaigns have lost their connection to the average citizen and even do harm. For example, one group reports: “modern political campaigns often seek to depress participation, rather than increase it….political elites no longer seek to exert influence the democratic way – by mobilizing citizens – but instead seek to win by smearing and investigating and prosecuting the opponent...the average citizen becomes an irrelevant bystander as leaders wage nasty wars...”(Saguaro Report, 2000, pgs 42-3). This movement of politics from grassroots to elitism in current American culture is also noted by Robert Putnam, who states: “The bottom line in the political industry is this: financial capital -- the wherewithal for mass marketing – has steady replaced social capital – that is, grassroots citizen networks – as the coin of the realm.” And as long as money is in
greater demand than volunteer time, politics will be biased toward the elite” (Saguaro, 43, citing Putnam, 2000).

Putnam’s work has invited debate, and some criticism, within current scholarship on community and social capital. In *Beyond Tocqueville: Civil Society and the Social Capital Debate in Comparative Perspective*, Robert Edwards and Michael Foley, professors of sociology and politics, discuss the ways in which social capital theory builds on a body of work dating back to the eighteenth century:

The concept of social capital has gained increasing popularity …since being introduced by Pierre Bourdieu and James Coleman in the 1980’s. Robert Putnam’s work on Italy (1993) and his provocative claim that social capital is somehow in decline in the United States (1995) stimulated a flurry of research and writing, including efforts to apply the notion of social capital in disciplines as disparate as criminology, epidemiology, and economics, not to mention sociology and political science. The World Bank has recently institutionalized the concept in its evaluation criteria by requiring social capital assessments for current and future projects. In the United States, major foundations…have implemented funding criteria related to social capital (2001, p.1).

Like Putnam, Foley and Edwards see “generalized social trust (trust in people in general), trust in government and public officials, tolerance and optimism…as integral components of social capital linked directly to its beneficial impact on participation and civic engagement and democracy in general” (2001, p. 7). They write:

    The predominant refrain in the debate, following Alexis de Tocqueville’s 160-year-old analysis of democracy in America, attached tremendous significance to the role of voluntary associations in society. Participation in such groups is said to produce social capital, sometimes linked to high levels of social trust. Social capital is in turn conceived as a crucial national resource for promoting collective actions for the common good (2001, p.1).

But, as Foley and Edwards point out, the neo-Toquevillean position that face-to-face contact and small-scale consensus can cut across factions has not gone uncontested.
They reference the work of Michael Walzer and others who describe “the paradox of the civil society argument” as the fact that a democratic civil society seems to require a democratic state, and a strong civil society seems to require a strong and responsive state (2001, p. 17-18). In other words, outside the context of a strong democratic tradition, social contacts or consensus will produce transformative social capital.

When reviewing the literature on social capital, it is clear that there a lack of consensus about the legitimacy of even the term “social capital.” For example, in Social Capital: Critical Perspectives on Community and Bowling Alone, the authors critique the term in the context of the rhetoric of Tocqueville and the French Revolution. They make a case that commerce and notions of capital were abhorrent to the revolutionaries and repudiate Putnam’s claim that “Fraternity, as the French democrats intended it, was another name for …social capital” (Smith and Kulynych, 2002, p. 351). Smith and Kulynych write:

Although Bowling Alone is replete with statements about the wondrous qualities of social capital, few are as grandiose as the claim linking it to one of the most famous, lofty, and inspiring slogans in Western political history. Given the grandiosity of the claim, it is made with surprising nonchalance. No evidence, historical or otherwise, is offered for the putative equivalence of social capital and fraternity (2002, p. 351).

They propose that the word capital is irretrievably linked to capitalism, individualism, competition, the market, and the acquisition of wealth, things that most political discourse views as opposed to those aspects of community that discussions of social capital typically value. They go on to point out what they believe is a fundamental and irreconcilable tensions and even contradictions between capital and community.

Mark Warren, professor of sociology at Fordham University, also questions the
validity of the view that increased social capital will yield wholly positive results.

Specifically, in “Power and Social Capital,” while Warren concurs with Putnam about the importance of trust and cooperation to community and democracy, he questions whether building social capital will necessarily help all citizens. He suggests that groups already marginalized may actually suffer increased isolation or disadvantage as cohesiveness increases within the majority group (2001). Warren writes:

…In the context of the fragmentation and atomization of our political life, communitarians and scholars of social capital (Putnam 1993,1995) make an essential point: community must underpin democracy because it provides the relationships of trust and the habits of cooperation essential for members of society to work together to solve our common problems. [But] communitarians’ version of democracy is insufficient because it fails to appreciate politics as the realm of conflict and power as well as collaboration...Strengthening the bonds of one group in civil society may come at the expense of another...For communities historically excluded from political power, and suffering from social and economic inequality as well, the health of their communities cannot be reclaimed solely by mobilizing their own internal communal resources. They have to exert political power to demand a greater share, if not a restructuring, of societal resources (2001, p. 172).

Warren directly relates the concepts of participation, inclusion, and exclusion to the potentially therapeutic role of conflict within democratic governance. He explains that identity politics and special interests will result in destructive faction and conflict without a strong sense of community and inclusive participation in that community. In this regard, Warren sees the current concern with community important, but does not want the need for positive confrontation of inequity to be lost in a false sense of unity. He writes:

…By avoiding conflict, the communitarian strategy limits the boundaries of community and cooperation to those already in, or to those who can come to forge unity through discussion alone. In as society structured by profound inequalities along race, class, and many other lines, good faith
discussion represents only part of the process necessary to rebuild a conception of the common good. In the end, communitarianism does not provide an adequate strategy for overcoming the divisions that prevent broad based cooperation for the improvement of our common society. Conflict [is] a necessary part of the establishment of new forms of cooperation…Confrontation is sometimes required to open up institutions and to push groups or individuals to reformulate their conceptions of self-interest (2001, p. 182).

Hugh Miller, in Postmodern Public Policy (2002), also discusses the value of conflict in creating dialogue to confront inequity. He cites, among other, Hannah Arendt’s work in On Revolution (1963) for his proposition that there are “possibly healthy consequences of conflict and instability to the polity (2002, p. 98). Miller suggests that “Adversarial relations help us…understand who we are. If all that exited in the public realm were agreement there would be no energy for movement and engagement” (2002, p. 102).

A less positive view of the role of factions in civil society, including the potential perpetuation or strengthening of group hatred, is presented by professor of government Ariel Armony in The Dubious Link: Civic Engagement and Democracy (2004). Armony reacts to Putnam’s work on civil society and social capital, stating that his initial research goal was motivated by his own belief that civil society was key in building democracy, and wanted to prove “that Putnam and others were right” (2004, p. 1). What he found, however, was that civic participation could work to make a society less democratic and more fragmented. Armony writes:

Social ties do not necessarily produce democratic norms and behaviors. Indeed, civil society is likely to intensify characteristics of the broader socio-political context. This applies to contextual traits that both support and are inimical to democracy. There is a critical difference between arguing that some organizations may be adverse to democracy (which Putnam admits in Bowling Alone) and claiming that more civic activity
necessarily strengthens democracy (or, vice versa, that the decline of associational activity harms democracy)... Neo-Tocquevilleans have argued that the creation of associational ties generate pro-democratic social capital across different contexts. This claim, however, comes into question when we consider “crucial cases” that confound the civil society-democracy thesis. How do we account for the circumstances in which civil society blossomed before the collapse of the democratic regime – as in pre-Nazi Germany? (2004, p. 56).

While Putnam and others have reignited interest in community building, citizen participation, and civil society, there are many classics of public administration that considered these topics and a review of this literature is helpful in putting into context the work of contemporary theorists. The literature reflects a constant tension, both theoretical and practical, between working within the system and in opposition to the system to achieve political goals.

The interest in “participatory democracy” during the mid to late 1960s was an example of a period when “power to the people” seemed the best way to achieve just and inclusive forms of community (Putnam, 2000, p. 18). The recognition of the ability and the right of citizens to voice concerns, as a fundamental precondition to the idea of democracy, as well as the need for them to align with other citizens, was also a theme of the late nineteenth and early twentieth centuries. Community and civil society, as defined by these early theorists, explain the evolution of autonomous alignment of interests within voluntary associations in order to speak with a unified and more politically effective voice. Mary Parker Follett discussed the human desire for meaningful social connections and “true community” in “The Individual in the Group.” She states:

From the analysis of the group must come an understanding of collective thought and collective feeling, of the common will and concerted activity, of the true nature of freedom, the illusion of self-and-others, the essential unity of men, the real meaning of patriotism, and the whole secret of
progress and of life as a genuine interpenetration which produces true community (1920, p. 231).

Follett also emphasizes that freely chosen group affiliations are the basis for our concept of society, stating:

We have long been trying to understand the relation of the individual to society; we are only just beginning to see that there is no “individual,” that there is no “society”…there is no society thought of vaguely as the mass of the people we see around us. I am always in relation not to “society” but to some concrete group. When do we ever as a matter of fact think of “society”? Are we not always thinking of our part in our board of directors or college faculty, in the dinner party last night, in our football team, our club, our political party, our trade union, our church? Practically, “society” is for every one of us a number of groups… The craving we have for union is satisfied by group life, groups and groups, groups ever widening, every unifying, but always groups (1920, p. 230).

Group dynamics and links to the political process was discussed by Graeme Gill, professor of comparative government and politics at the University of Sydney, In *The Dynamics of Democratization: Elites, Civil Society and the Transition Process*, Graeme Gill defines human interaction as motivated less by a need to connect than to achieve pragmatic goals.

A civil society may be defined as a society in which there are autonomous groups which aggregate the views and activities of individuals and which act to promote and defend the interests of those people, including against the state. This implies that there is the public discussion of issues, with questions of public policy being debated widely within the community rather than being decided solely by regime elites. It is through this public discussion of issues in part that autonomous groups act to defend the interests of their respective constituencies (2000, p. 5).

In order to be effective in achieving commonly held goals, it is not, however, sufficient that citizens align themselves with others who share the same interests. Theorists discussing the communal action emphasize that this action must be given a meaningful link to the political process.
Gill writes:

Crucial for the existence of a civil society is that both state and civil society recognized the legitimacy of the other, and acknowledge the right of the other to act unimpeded within certain defined spheres of competence. These spheres of competence must include the political. For a civil society to exist, autonomous groups must be able to defend the interests they embody in the political sphere, as well as more generally in society as a whole. The existence of a network of groups which structures individuals’ private lives and their pursuit of their interests in the public sphere does not constitute a civil society unless groups are able to pursue those interests in the public sphere (2000, p.6).

Gill describes how political campaigns have, historically, strengthened citizens’ connections to their government by encouraging grassroots participation. Gill writes that these connections enhance a sense of citizenship and community.

Central to Gill’s work is the concept of an interrelationship between citizen participation in governance and civil society. This concept, according to Gill, can only be analyzed and understood in the contexts of specific nations at specific times. These themes are reiterated by Robert Edwards and Michael Foley in their extensive work on civil society. For example, in “The Paradox of Civil Society” (1996), Edwards and Foley emphasize that the concepts of civil society and social capital cannot be separated from a time and place-sensitive political analysis. Later, in a conceptually related piece, they outline how civil society has interacted with the political environment in various countries at certain critical points in their development. For example, they write:

In Western Europe during the 1970’s and 1980’s, proponents of civil society developed their thinking against the backdrop of the neocorporatist arrangements that had incorporated organized labor and business into institutionalized patterns of governance, but afforded little access for other constituencies. Civil society was conceptualized in opposition to the status quo of the …political settlement. By establishing “action spaces” within civil society in which to created new social and cultural organizations and institutions…[they] embody alternative ways of
achieving collective goods and a conceptualization of democracy that was at least implicitly critical of traditional forms of representation. Similar notions...made inroads in the United States beginning with the “new left” of the 1960s and continuing with advocates of local citizen organizing (2001, p. 3).

...Because of the special circumstances in which the notion of civil society emerged for Eastern and European and Latin American writers, an of these stress the oppositional character of this role, seeing in civil society a bulwark against the state...(2001, p.6). Generalized social trust (trust in people in general, trust in government and public officials, tolerance and optimism are all seen, in...as integral components of social capital linked directly to its beneficial impact on participation and civic engagement and democracy in general (2001, p. 7).

According to Edwards and Foley, because Putnam and other social capital theorists see social capital and civil society as working outside the political system to support its eventual growth and development, they are neo-Tocquevillian. They write:

The expectation, best captured in Robert Putnam’s revival of Alexis de Tocqueville’s observations on the contributions of associational life to the health of democracies, is that social and cultural factors, rather than political or economic ones, are keys to strong democracy and effective governances. A strong and vibrant civil society characterized by a social infrastructure of dense networks of face-to-face relationships that cross-cut existing social cleavages such as race, ethnicity, class, sexual orientation, and gender will underpin strong and responsive democratic governance. According to the new-Tocquevillian argument, a chief benefit of participation in secondary associations is their capacity to foster norms of reciprocity, citizenship, and social trust and provide networks of social relations that can be mobilized to pursue shared goals for the common good. In other words, civil associations are the major sources of social capital in the neo-Tocquevillian view (2001 p. 17, 18).

Edwards and Foley also discuss how Putnam’s theories are Weberian in that they support the juxtaposition of private action to political organization. They assert that Weberian assumptions put externally generated “attitudes and norms such as trust and reciprocity stand alongside social networks as ingredients enabling a society to undertake collective action” (2001, p. 17). They also claim that, while Putnam followed this
tradition in *Bowling Alone* and *Making Democracy Work*, he has since revised his social capital theory to reflect an “understanding of social capital that focuses on networks and has argued the social trust must be understood endogenously, that is, as a reflection of the experiences and social setting in which individuals find themselves and not as an independent variable (2001, p.17).

The interplay of community and participatory politics has received the attention of some of the most prominent public administration theorists for decades. For example, in the public administration classic, *Citizens as Sovereigns*, Paul Appleby identifies four basic problems that interfere with effective democratic citizenship and effective community organizing and identification. Appleby identifies the first problem as public hostility toward government. He blames this on the fact that, after the Constitutional Convention, there were 100 years of “political theory by thinkers temperamentally remote from operating responsibility of insight…This theory was individualistic, anti-institutional, and largely negative (1962, p. 2).

Appleby identifies other barriers to effective citizen participation such as the “preoccupation of citizens with other matters,” and mistaken belief that “individual notions [are] valid judgments of what is generally acceptable” (1962, p. 3). He expresses concern that participation without adequate training is dangerous to a free society. He writes: “Freedom is not the fruit of disorganization and it is not the absence of discipline or restraint” (1962, p. 27). He suggests that freedom comes from valid restraint – not from a total lack of restraint: “Freedom, then, depends upon the design of social structures and their management” (1962, p. 28). Appleby proposes that better citizen education is important to removing barriers to democratic citizenship. He concludes that
a better-educated populace would be more disciplined in their consideration of public
problems and would show greater respect for valid governmental authority. As he states:
“One with a large vocabulary can develop mental concepts beyond the grasp of one with
less verbal equipment, and can express himself more fully and effectively. But skill in
language is developed through discipline (1962, p. 27).

Appleby does not believe innate intelligence is sufficient to ensure wise
participation in governmental affairs. The discipline to learn all necessary facts and to
test those facts against administrative reality in a systematic way are the ways in which
disciplined policy-making occurs. He states: “…the wisest person not deeply immersed
in the affairs of a given organization and not actually responsible to it is not at all likely
to be able to produce a judgment directly acceptable and wise…”(1962, p. 74).

Appleby does not exclude, however, average citizens from becoming sufficiently
invested in decisions to make valuable contributions to community welfare. In fact, he
warns against a presumption by citizens that the requisite knowledge and, therefore,
power, must only reside in administrators:

The good citizen is not only impressed with the great number of public
problems. The better equipped the citizen is, the more sensitive he is to
the highly complicated characters of many public issues and the
complexity of them in relationship to each other. Feeling rather helpless
before the issues and the candidates, he is made to doubt that democracy is
real, and to feel that a few high officials, or even some persons wholly
unknown to him, are actually making all the important decisions (1962, p.
62).

Appleby suggests that this sense of individual powerlessness is understandable
but can be overcome. In sum, when citizens can be motivated to stay engaged long
enough to learn the issues, invested enough to feel accountable for decisions made, and
then heeded by administrators or politicians so that they feel their time has not been wasted, they will be valuable contributors to community affairs. Appleby criticizes the false dichotomy that pits the governors against the governed because it creates a situation where citizen input will be uninformed and ineffective (1962, p. 74). He makes this final point using language that resonates to those subjected to public forums where the participants are uninformed:

An executive may be an incompetent fool, but the alternative to his decision is not the irrelevant judgment of an irresponsible wise man. The alternative is to bring the wise man in, so expose him as to make his judgment relevant and make him shoulder responsibility for it...Until that is done the outside observer is moderately useful as a commentator, and his is the unchallenged authority on what he likes and dislikes, but no more (1962, p. 74).

Appleby describes that governments should care whether citizens participate effectively not only because it is ideologically important to a democracy, but because it also a pragmatic necessity. He points to the chaos of other societies where citizen participation was not disciplined or informed. He chooses France as a clear example of the disruption caused by the wrong kind of democratic expression:

The fall of the French monarch in successive steps beginning in 1789 was followed in 1792 by the First Republic, in 1795 by The Directory, the 1799 Consulate of Napoleon, which gave way to the First Empire in 1804, the restoration of the Bourbons in 1815, the revolution of 1830 and the vesting of power then in Louis Philippe. The revolution of 1848 established the second Republic, taken over and converted into the Third Empire by Louis Napoleon in 1851, since then there have been the Third, Fourth, and Fifth Republics, with many incidental constitutional crises (1962, p. 191).

Appleby points out that these crises were risky and disruptive. Further, crises usually result in “drastic adjustments unlikely to serve long-run needs” of a society (1962, p. 191). He proposes that a much better strategy for the long-term health of a democracy is
to make small adjustments in response to citizen concerns. This ability to respond to issues as the arise is the key to building confidence in the further and to avoiding crises like those experienced during the last two centuries in France (1962,p. 191).

Diversity within a citizenry adds a layer of complexity to Appleby’s analysis. Not only does an administration need to listen to informed citizen voices, it needs to listen to a range of voices that may analyze information very differently. In The Promise of Representative Bureaucracy: Diversity and Responsiveness in a Government Agency, Sally Coleman Selden explores the issue of responding to diversity in effective ways and, more specifically, implementation of policy in equitable ways. She reviews the promise and reality of “representative bureaucracy” in meeting this need.

Selden introduces the topic of representative bureaucracy by describing the rationale for responding to diversity: “Decision-making that values diversity multiplies the points of access to government, disperses power, and struggles to ensure a full and developed rational dialogue” (1997, p. 13). She then quotes Lani Guinier who describes public policy as “the equilibrium reached in the group struggle at any given moment” (1997, p. 13). Selden concludes that the “yardstick that measures all policy,” regardless of viewpoints or standpoints, is whether or not the “bureaucratic power is legitimate in terms of constitutional values” (1997, p. 13).

Selden’s analysis assumes the value of highly flexible, responsive governance that changes as public opinion changes. It also illustrates that this public opinion is affected by many things, including demographic diversity. The alternative solution to good governance, however, would be a highly trained cadre of administrators and policy-makers who were guided by a public service ethic that enabled them to make decisions
that protected even minority viewpoints. This ethic would guide decisions that would be in the public interest and would not require actual representation of minorities among the decision-makers. The flaw with this approach, in Selden’s view, is that the public interest is an “elusive concept and thus administrators are left to develop their own opinions about what decisions and policies are in the public interest. They must rationally discern and weigh citizen needs, desires, and preferences to determine alternatives that approximate the will of the public (1997, p. 34).

The subjective element involved in deciding what is in the public interest is what makes a lack of diversity within the decision-making groups problematic. In the 1930s, Mary Parker Follett tried to resolve this tension by redefining the term “individual” in a way that incorporated both the personal and the social. Follett related the interaction between humans and their environment in the context of understanding the nature of community. She emphasized an intersubjectivity and interaction between an individual and those with whom he or she lives with in society. She writes:

Early psychology was based on the study of the individual; early sociology was based on the study of society. But there is no such thing as the “individual,” there is no such thing as “society: there is only the group and the group-unit – the social individual.” (231)

These insights are consistent with the work of legal and other theorists, such as law professor Christine Littleton. Littleton writes in “Does it Still Make Sense to Talk About Women” that it is sometimes necessary to differentiate between men’s and women’s needs and life experiences if fairness is to be achieved. She claims that this has been made difficult because: “Inclusion is considered in most feminist circles to be an
unalloyed good, exclusion to be either politically incorrect or at best a necessary evil to be practiced sparingly and temporarily” (1991, p. 32).

Similarly, law professor Martha Fineman states that gender-neutrality in a gender-sensitive world does not create neutral and inclusive results. She states that “Neutral treatment in a gendered world or within a gendered institution does not operate in a neutral manner….Ignoring differences in favor of assimilation has not made the differences in gender expectations disappear” (1992, p. 12). As Camilla Stivers, professor of public administration at Cleveland State University discusses in “Toward a Feminist Perspective in Public Administration Theory” (1990, 2004), while there may be no universal experience determined solely by gender, gender still carries with it a “propensity to look at the world in quite different ways” (1990, 2004, p. 480). Dr. Stivers concludes that these differences, therefore, should not be ignored and denied through an illusion of neutrality, but should be understood to “expose the incompleteness of our understandings” (1990, 2004, p. 480). She writes:

…A substitute for or way of moving beyond neutrality of technique and standards might be to take steps to assure that the full diversity of perspectives reflected in the field of concern become ingredients in the administrative process. I suggest, further, that it is similarly one-sided to assume that out of diversity must come conflict rather than collaboration, or that, when conflict does occur, it must be solved by reference to “objective” standards or techniques (1990, 2004, p. 480).

Law professor Martha Minow identifies a related problem which she calls called “the dilemma of difference” because “the stigma of difference may be recreated both by ignoring and by focusing on it.” Minow explains:
Decisions about education, employment, benefits, and other opportunities in society should not turn on an individual’s ethnicity, disability, race, gender, religion, or membership in any other group about which some have deprecating or hostile attitudes. Yet refusing to acknowledge these differences may make them continue to matter in a world constructed with some groups, but not other, in mind. The problems of inequality can be exacerbated both by treating members of minority groups the same as members of the majority and by treating the two groups differently. The dilemma of difference may be posed as a choice between integration and separation, as a choice between similar treatment and special treatment, or as a choice between neutrality and accommodation. Governmental neutrality may be the best way to assure equality, yet governmental neutrality may also freeze in place the past consequences of differences (1990, p. 20).

Ways in which individual perspectives can be reconciled with collective experience to arrive at a definition and experience of community that will recognize both individuality and group identity is also a focus of inquiry for contemporary post-modern theorists, such as law professor Joan Williams. Williams, in “Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory,” writes:

This reformulation of difference, which we could call post-modern difference, avoids essentialism because it refuses to concede that race, gender – or indeed, any given category – will always be determinative. It allows us to argue that, although race and gender may prove determinative in some particular context, this is a far cry from a reified “minority perspective” or “women’s voice” that determines how a given individual will react in every situation. This post-modern approach starts from the notion of a fragmented and shifting self….a post-modern approach to difference highlights that each person is embedded in a matrix of social and psychological factors that interact in different contexts (1991, p. 297.)

Interestingly, the research cited by Sally Selden revealed that demographic characteristics were “a poor determinant of attitudes, and that agency affiliation exerted more influence on bureaucrats’ attitudes than background characteristics such as race and social class (1997, p. 54). However, Selden concludes that “despite the effects of agency
socialization, racial background has been found to influence attitudes of individuals after they become civil servants (1997, p. 55). Selden found the impact of race to be “most pronounced at the ‘street level’ of bureaucracies, with a declining effect at ‘management level’ personnel” (1997, p. 59).

Another important finding was that higher-level minority administrators were more likely to represent minority interests in decision-making when they felt supported by their colleagues in doing so. As summarized by Selden: “Only to the degree that other actors in the policy process, such as colleagues, elected officials, and the community, value and support a minority advocacy or representative role, are individuals more likely to assume this role” (1997, p. 142).

To value the representation of minority interests or perspectives presumes that community is better served if policies are more responsive to public opinion. As Selden sums up: “A representative bureaucracy makes it potentially responsive to the needs and desires of the people. A bureaucracy that is demographically diverse should increase access to and input from an increasing number of perspectives. As a result, it should deliver decisions and services that are more responsive to the populace (1997, p. 33). The empirical findings regarding the impact on decision-making of demographics or social identity support that a representative bureaucracy can increase responsiveness to identifiable segments of the population (1997, p. 112). Whether or not this supports or diminishes a sense of community is not an issue that Selden addresses.

The late senator Paul Simon disputed the value of some aspects participatory democracy in *Our Culture of Pandering*. Simon illustrates, using many contemporary examples, that public opinion is often swayed by special interest groups with their own
self-serving agendas and that this is destructive to meeting community needs. Simon criticizes that fact that politicians often “…embrace the whims of public opinion rather than stand firmly for the public interests” (2003, p. 2). He points out that public opinion and public interest are not always the same. This often occurs in the face of misinformation by special interests. Simon points that these special interests can reap big rewards if they can manipulate the political process: “Those who have the big money have learned that flow of money…pays off handsomely. No stock market purchase will ordinarily reward the investor like this type of investment does.” (2003, p. 4). He also urges that a difference between public opinion and public interest can also occur when there is a lack of information caused either by improper withholding of information by key players or a simple lack of due diligence by citizens. Simon, like Appleby, holds out the education of the citizenry as the answer to bringing public opinion and public interest into alignment. Thus, Simon demands a high level of disclosure by public officials so that citizens can make informed decisions:

The public should demand that candidates speak frankly and truthfully about issues of concern, and it must understood that once a person is elected and looks at the facts in much greater detail, changes in attitude do and should occur… Perhaps more than anything else, the public must educate itself, not just about politics and political candidates but about local, national, and international issues; people must become involved. This is something most of us have not done (2003), p. 5).

When public servants fail to provide adequate disclosure about matters of community interest, the response is often censure by public “watchdog” commissions or criminal prosecution. In Rethinking Democratic Accountability, Robert Behn discusses the “accountability dilemma.” He describes the need for honesty and disclosure by public officials, but also wants to see accountability for performance (2001, p. 11). The
dilemma arises when aggressive enforcement of accountability standards for finances and fairness sometimes convince many “to focus on money and equity and to ignore results…[and] to be excessively cautious” (2001, p. 14). Similarly, Behn quotes Marc Zegans of Harvard University: “Rule-obsessed organizations turn the timid into cowards and the bold into outlaws” (2001, p. 30). Behn criticizes a system that has made watchdog commissions and officials competitive with each other in finding wrongdoing. He writes:

We have created an accountability system that depends upon the self-interested, competitive behavior of legions of accountability holders. But it isn’t really a “system” of accountability – more like an anarchy of aggressively competitive accountability…adversarial accountability for finances and fairness works too well. By “too well,” I mean that our existing institutions of accountability not only over-emphasize accountability for finances and fairness. They also undercut performance… [They] also face too much emphasis…on rules and not enough on results…We might temper the zeal with which … [they] attack the smallest failure to comply with formal rules (2001, p. 216).

Behn does not suggest that disclosure and fairness are unimportant; he just urges a balance of the public’s demand for truth telling and fairness with a similar demand for productivity. He would like to see alternative processes that would enforce accountability but would also foster responsibility and appropriate levels of risk-taking. He is confident that “we need not worry that we will abolish accountability for finances and fairness. The institutions with this job are too well-established to disappear, and the self-interest of those who lead and staff them will motivate continued vigilance. Behn urges that more than this kind of accountability is required to be useful on a macro-level. While Behn acknowledges that the following of commonly agreed to rules is an important aspect of community, he is similar to Adam Seligman, whose views were
discussed previously herein, in his resistance to an over-reliance on legal or formal constraints and punishments.

In *Speaking Truth to Power: the Art and Craft of Policy Analysis*, Aaron Wildavsky suggests that all analyses regarding the “best” way to solve problems relating to public administration are based upon a faulty premise. His thesis is that there is no best way to solve important problems affecting public life, only good ways to make incremental improvements. He states: “Instead of thinking of permanent solutions we should think of permanent problems in the sense that one problem always succeeds and replaces another. Then we might ask whether today’s answers are more moral or more effective than the solutions they succeeded or which they might replace…The capacity of policies to generate more interesting successors and our ability better to learn from them what we ought to prefer, may their most important quality” (1979, p. 5).

Wildavsky’s approach recognizes the value of skillful interpersonal interaction and adequate information sharing between individuals but also acknowledges that highly individualistic approaches sometimes come at the expense of a more community oriented perspective. In Wildavsky’s view, policy analysis is required to accomplish broader goals than the satisfaction of the needs of a few individuals. Good policy development requires a balance between intellectual analysis and the acknowledgement of the importance of the human element – including politics:

If analysis were purely intellectual, analysts would be everything, or if analysis were purely interactive, analysts would be nothing. Are we faced then, with a choice between mind without matter or force without insight? No. Our task is to develop a hybrid called policy analysis which uses intellect to help guide rather than replace social interaction…either pure planning or pure politics alone are unsatisfactory as modes of making collective choices (1979, p. 124).
Wildavsky also urges that good, community oriented policy requires more than simple pandering to majority rule or social interaction because “social interaction by itself accepts rather than corrects social relations” (1979, 398).

Wildavsky’s refusal to recognize public opinion as paramount in American policy-making is in contrast to the views expressed by Dwight Waldo in his classic work, *The Administrative State*. Waldo addresses the issue of majority and minority views and states that individualism is one of the “ultimate values” embraced by American public administration: “Government is a tool to be used in the services of the individual. It has no raison d’être beyond this. Neither state nor nation nor any less inclusive groups have purposes in themselves. They exist only to serve individuals” (1948, 1984, p. 72).

Serving individuals within a democratic system, in Waldo’s view, is mostly about securing for them a chance at the “Good Life.” He concludes that “Since the Good Life consists to a great degree in the enjoyment of material things, science is emphasized, efficiency and economy demanded, and industrialism highly prized (1948, 1984, p. 72).

Waldo, therefore, describes the benefits of collective enterprise within democratic societies in primarily individualistic and materialistic terms. It is government’s job to enable individual success, not to impose the will of the community upon individuals. Waldo cites the work of A.C. Millspaugh to further bolster this view of political democracy as fundamentally related to economic democracy. Millspaugh proposed that administration is the way that these goals of democracy will be realized. He, as a result, advocated that administration “should not be viewed as a “branch” of government but rather as an integral and vital part of the whole interacting democratic system. It should
be, not merely subject to or controlled by government, but an active agent in implementing, supporting, and realizing democracy” (1984, p. 93).

Waldo proposes that a purely scientific approach to government improvement, one that does not acknowledge the importance of personal interests and interpersonal relationships, will not be successful:

Government is a human institution…It is human throughout; it rests not only on formal arrangements, skills and numbers, but even more on attitudes, enthusiasms, and loyalty. It is certainly not a machine, which can be taken apart, redesigned, and put together again on the basis of mechanical laws. It is more akin to a living organism. The reorganization of government is not a mechanical task. It is a human task and must be approached as a problem of morale and personnel fully as much as a task of logic and management (1984, p. 167; citing “President’s Committee on Administrative management, Report with Special Studies,” Washington D.C., Government Printing Office, 1937).

Quoting M. Dimock in The Frontiers of Public Administration (1936), Waldo states:

“Any rigid or mechanical interpretation of the term [efficiency]…is inappropriate because good administration is not coolly mechanical: It is intensely human, warm and vibrant” (1984, p. 189). In his concluding questions posed to his readers, Waldo makes clear his own opinions about the importance of embracing the subtlety and nuance of human interaction in public administration, as well as the importance of maintaining a broad perspective as policy makers and implementers:

Are students of administration trying to solve the problems of human cooperation on too low a plane? Have they, by the double process of regarding more and more formal data over a wider and wider field of human organization, lost insight, penetration? Is formal analysis of organizations without regard to purposes that inspire them but a tedious elaboration of the insignificant? (1984, p. 202).

Waldo’s disdain for over-reliance on data analysis and expert opinion, and for the tendency of administrators to sometimes get lost in minutia, is echoed by Barker and
Peters in *The Politics of Expert Advice: Creating, Using, and Manipulating Scientific Knowledge for Public Policy*. They compare the United States to Europe in this regard, and report that “The social survey evidence reviewed here suggests that European mass publics continue to have faith in science per se…but they have little in scientists themselves as decision-makers” (1993, p. 113).

Barker and Peters include in their anthology certain portions of R. Inglehart’s *Culture Shift in Advanced Democracies* (1990). Inglehart sets forth the following post-materialism thesis: “There is in process an inter-generational shift in Western societies. This shift away from materialist values toward post-materialist ones…is caused by the improvements to the material conditions in post-war societies which science and technology have brought about…But, importantly, such changes embody a reaction against the disenchanted values of materialism which fostered those societal changes in the first place (Barker and Peters, 1993, p. 113). The analysis also focuses on the changes that the shift to a post-materialist society will bring: “For materialists…highly developed science and industry symbolize progress and prosperity. Among post-materialists…big business, big science, and big government [are] bureaucratic organizations that are evaluated negatively because they are inherently impersonal and hierarchical, minimizing individual self-expression and human contact” (Barker and Peters, 1993, p. 113).

According to Barker, Peters and Inglehart, perhaps big government could be tolerated, even by the post-materialists, if the dehumanization and impersonal factors could be mitigated by structured opportunities for meaningful inclusive decision-making. This possibility seems to be open, at least according to Inglehart, for he states “Room
could still be found for big science [or government of business] in a post-materialistic society, were the organization structures open to democratization (Barker and Peters, 1993, p. 113).

Interestingly, the data suggest that those with post-materialist viewpoints were much more likely to be active citizens than materialists and to “value the process of democratic participation in policy-making as a good in its own right...for post-materialists policy-making is not simply about finding the best solution to a problem. The ends do not always justify the means” (Barker and Peters, 1993, p., 114). One consequence, therefore, of this culture shift is that it will change “the balance of authoritativeness of the inputs into the policy process away from expertise and towards democratic representation (Barker and Peters, 1993, p. 14).

Other theorists doubt that this democratic representation is the key to better, stronger communities, as typified by the arguments of Mark Warren and Ariel Armony. These theorists emphasize that participation is not a guarantee of democratic progress, at least if one defines democracy as having a substantive component as opposed to only procedural guarantees. Armony writes that, while participation can enhance substantive benefits of democracy, it can also produce greater fragmentation and exclusion of minorities:

It is important to stress that civic engagement can have democratic effects on participants, political institutions, and the public sphere. Sometimes civic mobilization successfully expands grassroots participation in policy-making, integrates excluded sectors, and improves institutional performance. However, civic involvement may also be linked to undemocratic outcomes in state and society, the presence of a “vital” civil society may fail to prevent outcomes inimical to democracy, or it may contribute to such results.
Aronomy is concerned that free expression and community participation can sometime give voice to groups that are inimical to conceptions of community supported by most democratic societies. He writes:

Advocates of the civil society-democracy thesis have acknowledged that certain groups are clearly “uncivil” and thus do not promote democracy. However…it is not only society’s small extremist groups—such as civilian militias, prison gangs, or vigilante groups—that have a dark side. Indeed, in very different national and historical settings, the most seemingly inoffensive civic groups can turn into forces that erode existing institutions and democratic practices and prevent further democratization. (2004, p. 57).

Like professor Armony, Graeme Gill analyzes the ability of civic participation to support of destroy community these processes in a comparative public analysis framework. Gill provides a useful categorization of citizen groups to more easily differentiate between the opportunities and challenges faced by each in complex political environments. Specifically, he outlines the organization of autonomous activity in terms of three types of groups, as follows:

…First, all societies have a substructure of groups through which individuals structure their private lives (e.g. friends, hobby groups). These are limited in their scope, often local in their perspectives, and usually do not interact with the state of political authorities. This also provides a basis upon which second-order groups rest. These second-order groups represent their members’ interests in the broader public sphere and are the main currency of civil society. They constituted the dense networks of which the public sphere consists. Although these groups are not specifically politically-oriented and rest overwhelmingly on the non-political interests of their members, they may at times have to carry their members’ interest into the political sphere. The third-order groups are those which are specifically political in their outlook and aims, seeking to project and defend their constituents’ interests in the political sphere. The most important group of this type is the political party. Under an authoritarian regime, it is likely that a wide range of second order groups will be able to exist, but either none of the third-order politically-oriented groups will be tolerated, or they will labour under particularly tight restrictions (2000, p. 6).
Unlike Armony, Gill concludes that giving voice to citizen groups defines civil society and is a necessary precondition to democracy. Gill writes:

…Unless such politically-oriented groups are able to function freely, a civil society can not exist. Unless groups are able to defend their members’ interests politically, they are not really able to defend them at all (2000, p. 6).

The work of Israeli author and scholar, Avishai Margalit, first written in Hebrew and then translated by Naomi Goldblum for publication in the Harvard University Press, provides an integration of perspectives which favor either group autonomy or larger communal concerns. Margalit points out the differences between group and individual responsibility. In *The Decent Society* (1996), Margalit, who interviewed Palestinians during the Intifada and immigrants to Israel from the Communist bloc, writes: “Of the centrality of honor and humiliation in the lives of people – and, consequently, of the importance that ought to be allotted to the concepts of honor and humiliation in political thought. Thus the idea was born of the decent society as a society which does not humiliate” (1996, p. 150).

Margalit then summarized the importance of group versus individual action and differentiates between a decent society and a civilized one as follows: “A civilized society is one whose members do not humiliate one another, while a decent society is one is which the institutions do not humiliate people…The idea of civilized society is a microethical concept concerned with the relationships between individuals, while the idea of a decent society is a macroethical concept concerned with the setup of a society as a whole” (1996, p. 1). Functionally, this means that civility in interpersonal interactions will not guarantee a decent society, where no one is humiliated by institutions or
governance, unless the institutional structures in place guarantee minority rights as well as majority well-being (1996, p. 159).

This theme is repeated in the work of Chantal Mouffe, who urges a need for individual liberties and an appreciation of diversity, but also a recognition of a new “common political identity as radical democratic citizens” (1992, p. 236). Mouffe suggests that a new radical democracy would change the traditional tension between liberty and equality “By combining the ideal of rights and pluralism with the ideas of public spiritedness and ethico-political concern, a new modern democratic conception of citizenship could restore dignity to the political and provide the vehicle for the construction of a radical democratic hegemony” (1992, p. 238).

Community and The Mediator of the French Republic

An extensive report prepared in recognition of the thirtieth anniversary of the founding of The Mediator of the French Republic, “Le Médiateur de la République: Trentième Anniversaire 1973 – 2003,” discusses the benefits to citizens that have resulted from the founding of the office, consistent with those discussed by David Carnevale and others discussed previously, herein. In the report, an analysis of utilization rates and other indicators were used to evaluate the effectiveness of the offices of The Mediator. In addition, the report included commentary by administrators and others which stressed that the legislative reforms recommended as a result of the work of the Mediator have been very helpful to the public. Further, the analysis concludes that the work of the many field officers has been very useful to both citizens and the French government because it has provided valuable information about how the French administrative rules and
procedures are perceived by French citizens. In sum, the report concludes that the review of French laws, as they impact individuals, has allowed both the law and administrative actions to become more responsive to the needs of those served. The French government has concluded that this better fit of laws to needs increases citizen satisfaction and participation in governance, and will ultimately reduce the number of citizen complaints in the future (Minister of Justice, 2003).

The work of John Rohr is very helpful in exploring the important issues raised by the more innovative aspects of the Mediator’s work, including the issues of jurisdiction and the “rule of law.” Rohr, a professor at VPI, has written some of the most comprehensive studies of the political and philosophical underpinnings of French and American governments and their constitutions, including *To Run a Constitution* (1986), and *Founding Republics in America and France* (1995). His work illuminates some of today’s debates around the work of the Mediator and about the expansion of “extra-legal” solutions like ombuds and mediation in the American system. Rohr points out that both countries have rich constitutional traditions, including great attention to separation of powers. He explains that the French see these issues somewhat differently than Americans, especially regarding a strict separation of powers and the role of a constitution as a guide to governmental action.

As he explains in his treatise on the constitutional traditions of France and America: “French and American constitutional traditions take the principle of separation of powers with utmost seriousness, but understand it very differently” (Rohr, 1995, p. 39).
As Rohr later rote in his study of political ethics:

From the French point of view…the American version of separation of powers is seriously flawed. In 1958, for example, the founding fathers of the Fifth Republic debated the question of separation of powers at some length and found the American approach wanting because… [It] has led to harmful excesses. Chief among these excesses…was the contemptuous attitude of American congressmen toward high-ranking executive officers. The Founders of the Fifth Republic wanted none of this for France, a country that has traditionally held public administration in high regard (Rohr, 2001, p. 678).

Rohr points out that French administration has been very important to the stability in France because their constitutions are not held sacrosanct. He points out that each new Republic has rewritten constitutions and that French administrators have maintained stability in face of sweeping constitutional reform. He discusses the French concept of l’etat (the state) as being larger than a body of law or a written constitution, and explains that the French do not see their national identity as tied to any given government. Thus, concepts like the protection of “natural rights” and the application of standards of “equity” which are included in the rhetoric describing the role of The Mediator of the French Republic are not unusual.

According to Rohr, the French do not hold their constitution above the “people’s voice” as expressed by their Parliament and it is not the ultimate authority regarding the legitimacy of state action. This, as Rohr explains, is because: “…the identity of France is not tied to a particular constitutional text. No small part of General de Gaulle’s forcefulness was his utterly convincing appeal to an “eternal France,” and the French knew what he meant…French constitutionalism is seen as a tradition rather than a text. The various French constitutional texts are concrete manifestations of this constitutional
tradition and the tradition itself is more fundamental than any of them” (Rohr, 1005, p. 43).

Secondary sources on the topic of The Mediator of the French Republic were reviewed at the Library for Public Information (BPI) and the National Library of France (BNF), both in Paris. Many of the secondary materials available on the topic were available only in French. Access to materials created by and for the French provided a valuable perspective and the required translation into English was not an obstacle in developing general themes. Verbatim translations were not necessary for these purposes, and, therefore, direct translations of quotations included herein and later in this analysis are limited to only those necessary for completeness or accuracy.

A review of the monographs available in the BPI and BNF provided a sense of the evolution of the office and its mission over time. The earliest available monograph on the topic in those libraries was published in 1997, and is identified as a synopsis and reproduction of a “General Presentation of the institution on the site of information service of the Government” (Bouvier, 1997, p. 6). There was no listed author but instead an attribution for the “redaction.” There is a Forward by the then Mediator, Jacques Pelletier, in which he reiterates the basic mission of the office. The listed duties included assisting in the daily difficulties of French citizens as they interface with the French government, to fight against all forms of “exclusion, and to help provide a responsive and inclusive relationship between the government and the citizens which will strengthen social harmony and national solidarity” (Bouvier, 1997, p. 7). Interestingly, the word “citizen” is used interchangeably with “user,” and does not appear to exclude visitors, recent immigrants, or other groups (Bouvier, 1997). The document includes some
helpful historical data about the number of cases handled by the Mediator since the inception of the office in 1973, showing an increase from 1,773 in 1973 to 43,544 in 1996 (Bouvier, 1997, p.12). The annual reports of the Mediator also show the number of cases has continued to grow, with record levels in 2006 reaching 62,822 cases (The Mediator of the French Republic, 2006).

Throughout the literature, there are explicit references to the importance of protecting basic human rights. There is also considerable significance attached to the fact that the Mediator was appointed to a national commission on human rights in 1993. There is also, however, a distinction made between the historical ombudsmen function in countries like Sweden and the French Mediator’s role, emphasizing that the former was designed to mitigate against potentially oppressive governments while the latter works through the government to take referrals of complaints dealing with day to day administrative difficulties confronted by average citizens (Clark, 1984). This deference to parliamentary authority, and reticence shown regarding the role of Mediator as protector against oppressive or discriminatory governmental action, is a prevailing theme in much of the French literature reviewed.

The tension between the role of Mediator as guardian of basic human rights as opposed to playing a supporting role to the judiciary and legislature dates back to, according to information gathered in interviews of the leadership of the office, to the debates surrounding the founding of the office. There was significant controversy surrounding the creation of The Mediator of the French Republic in 1973 when the Parliament and the judiciary were outspoken opponents to what was perceived as an overstepping by an appointee of the President of the Republic.
This controversy was confirmed in a journal article found at the BNF. David Clark, a British scholar, describes the significant resistance to the ombudsman or mediator model in both Britain and France during the 1960’s. However, despite this resistance, France’s political alliances during the 1970s caused the government, as he says to “…succumb to ‘Ombudsmania’ and create a Médiateur in 1973.” He credits this shift to a “substantial body of party opinion from the center and left-of-centre of the political spectrum, together with a minority of academics and jurists associated with the civil rather than the administrative courts, [which] had become concerned at the gradual erosion of civil liberties and had succeeded by the early ‘70s” (Clark, 1984, p. 163).

Clark concludes that “wider lessons” from the French model include “the extent to which the expansion of state activity has been accompanied by a weakening of the legal instruments for controlling executive power” (Clark, 1984, p. 175).

This erosion of the centrality of Parliamentary authority is seen by Clark as more a testament to the growing complexity and comprehensiveness of the relationships between citizens and government than to an intentional attack by the executive on legislative or judicial authority. He states that:

The activity of government and the relationships between citizens and public authorities have become so complex that no single institution is capable of dealing with citizens’ grievances against the administration. The French experience demonstrates that an Ombudsman-style institution can be adapted without undue difficulty to an administrative law system, and without detriment to those features of the Ombudsman scheme that make it universally attractive: its simplicity, its appropriateness as a device for handling complaints about the small change of administrative blunders and oversights, and its potential contribution to improving the quality and sensitivity of public administration (Clark, 1984, 176).
The 25th Anniversary of the creation of The Mediator of the French Republic was celebrated in 1998. That celebration created a period of higher level of interest in the office and higher visibility. A basic text which described the inception and functions of the Mediator was published in 1999 as part of a series designed to educate the public on issues as diverse as yoga, hypochondria, and theories of art. The edition on The Mediator of the French Republic was intended to inform French citizens of the potential value of availing themselves of the Mediator’s services, and was, not surprisingly, quite practical in its approach.

Despite its intended non-academic audience, the author, Bénédicte Delauney, a university faculty member in law, economy, and social sciences at a large French university, added some interesting commentary to her basic coverage of the services offered. For example, she highlighted the original opposition to the creation of the Mediator function on the part of the Council of State, mentioning the “jealousy” and “suspiciousness” of legislators who hesitated to give up power (Delaunay, 1999, p. 9). The inclusion of such commentary in this kind of a book confirms what the Mediators and administrators expressed during their interviews. In short, many French do not trust government officials and the intervention of the Mediator increases their level of confidence. While this lightens the burden of legislators and administrative law functions, it is also causes them some concern (Sironneau, 2006).

In contrast to the accessibility of Delauney’s text for the general public, there was a much more theoretical review of the Mediator’s mission in the transcript of the proceedings from a two-day conference held at The Sorbonne entitled “Mediation: What is its Future?” This conference was also held in celebration of the 25th anniversary of the
founding of the office of The Mediator of the French Republic. The conference was
opened by President Chirac and was also attended by several members of the President’s
Cabinet. The sitting Mediator of the Republic at that time, Jacques Pelletier, was
congratulated and lauded by the dignitaries and he gave several significant speeches on
the past and future of his office.

The President was introduced by Mme. Michèle Gendreau-Massaloux, a
Chancellor of the University of Paris. She, not surprisingly, thanked both the President
and Mediator for the honor of their presence and their record of accomplishment, but also
emphasized that the future – not the past --of the mediator was the most important issue
at hand. She also emphasized that the government’s powers lie entirely with the citizens,
not with the government itself (Sorbonne conference, 1998, p.9). With this highly
democratic opening and introduction, President Chirac followed with a statement of
general support for the importance of the Mediator. Further, he pointed out that, though a
twenty-five year anniversary is a very short time in the history of French governmental
institutions, The Mediator of the French Republic has become part of the administrative

Chirac called the Mediator a “facilitator,” joking that while he was not sure that
the French Academy accepts this word yet as an official part of the French language, it
This point is important because it reiterates the deference to the legislature and judiciary
by characterizing the mediator as an advocate of a fair process, not an advocate of
substantive law. Chirac also emphasizes the theme of accessibility, pointing out that the
Mediator appoints departmental delegates who remain close to the people.
Chirac’s failure to emphasize the role of the Mediator as one who can and does recommend substantive changes to French law is consistent with the prevailing theme seen throughout the body of literature regarding the tension between the relative power of the judiciary, executive, and legislative branches. Chirac, through his remarks, acknowledged the importance of the Mediator’s mission while also deferring to other governmental bodies and their more substantive roles. Chirac’s speech seemed to accept the Mediator’s role as that of handling only “the small change” of administration, as David Clark described it in his writing about the complementary role of a mediator in a parliamentary democracy (Clark, 1984, 176).

President Chirac did mention the broader role of the Mediator as fighting “exclusion” and the value of the office in strengthening the solidarity of the French people who, especially those currently suffering unemployment, discrimination in housing or other problems (Sorbonne Conference, 1998, p. 18). He noted the increasingly complexity of French society and how unrealistic it would be to expect the judiciary to respond to the diverse needs within all spheres of government-citizen interactions. He further emphasized how undesirable it would be to have encouraged excessive litigiousness or accept an “over-judicialization” of social relationships within France, especially when such an approach would be “so inconsistent with French culture and traditions” (Sorbonne Conference, 1998, p. 19).

The basic theme regarding the relative merits of litigation versus mediation also arose during an interview with the departmental delegate in Annecy. The delegate noted that, in her seven years of experience as a mediator, she perceived that lawyers are more than willing to give up only those cases that are not profitable. In her words, they
referred complainants to the Mediator “without even a word of free advice” regarding other potential avenues of redress (Bazile, 2006).

Regarding the role of the central office in Paris, Pelletier did not accept the “small change of administration” characterization of his role, but instead began his remarks by emphasizing the numerous recommendations for changes in the text of laws that are made to Parliament each year by the Mediator. He conceded that sometimes those recommended changes are modest, but also stressed that they are sometimes substantial. He also emphasized the importance of the Mediator’s participation in the national Commission on Human Rights and the role of the office in seeking “equity” in all relationships between the public and the state. He closed his remarks by expressing hope that mediation would help provide new paths to truth, equity and solidarity (Sorbonne Conference, 1998, p. 201). In contrast, during his closing of the conference, M. Lionel Jospin, the Premier Minister of Parliament, carefully delineated that the Mediator does not possess administrative or judicial power. He congratulated the Mediator on the high rate of settlements achieved and emphasized that the value of the office was its proximity to the people and its flexibility in handling those day to day matters affecting citizens (Sorbonne Conference, 1998, p. 209).

While there was no record made of the number of attendees at the Sorbonne conference, Pelletier noted in his introductory remarks that the number of registrants and scholars who expressed interest and gave support was greatly encouraging and surpassed their expectations. He also mentioned the high level of interest of the press (Sorbonne Conference, 1998, p.3). This is interesting, given the concern about visibility of the
office expressed during the interviews. One possible explanation may be that a peak of interest occurring during the anniversary celebration that has been difficult to sustain.

As of May 2006, there were only seven articles which mentioned the Mediator in the collections of the BPI library in Paris. None of the earlier articles reflected an acknowledgement of a particularly important role of the Mediator in affecting large social issues. In contrast, one of the latest to be published in 2002 did mention the importance of the proposal of legislative reforms by the Mediator. However, the lead for the story was the addition of 140 new departmental delegates and the increase in complaints of 8.3% filed with those delegates (Moreau, March 10, 2002). The French press seemed most interested in the issue of access and flexibility in its coverage of the work of the Mediator. It was often mentioned in the context of a particular problem, such as the need for the equivalent of small claims courts or “neighborhood justice” issues (Gros, 2002).

Other stories in the French popular press mentioned the role of the Mediator, but focused mostly on personnel changes. For example, the retirement of Jacques Pelletier at the end of his six year term in 1998 (Londeix, January 27, 1998) and the appointment of Bernard Stasi by Jacques Chirac in 1998, both received some attention. In the latter case, the majority of the press dealt with the political differences between the Pelletier and Stasi, and the civility with which all the Ministers, with their own political differences, conducted themselves during the installation ceremony (Desaubliaux, May 14, 1998).

Other articles discussed the change from the 1970’s model of one or two delegates for each department to the trend in 2000 and 2001 of appointing delegates in certain “difficult” neighborhoods to deal with problems relating to poverty and the needs of recent immigrants (Freund, April 11, 2001). Perhaps this was in response to the first
annual report by Bernard Stasi, which asserted that the role of the Mediator was little known by the French people, especially among those who could most use assistance (Rivais, March 10, 1999).

The need for more accessible and comprehensive services for the most impoverished or marginalized members of French society has increasingly dominated the literature relating to the resolution of citizen complaints. In fact, an additional resource was created to more fully meet these needs, a government commission was charged in 2005 with the mission of addressing discrimination against what are referred to in the U.S. as protected classes. While beyond the scope of this review, this development in the French response to citizen complaints is a significant departure from previous theory and practice and warrants further study in the future.
CHAPTER III
RESEARCH DESIGN

Introduction

This study, grounded in the discourse of political philosophy, examines the effect of public mediation on community. The issue presented is whether mediation programs, when effectively linked to policy reform, can support community by balancing individual and community interests and providing a forum for respectful dialogue and collaborative decision-making. The research questions were designed to examine this issue through the analysis of data from existing theories and research and new data collected from The Mediator of the French Republic.

The data analysis identifies the elements that define community and public mediation, compares the elements of mediation with the elements of community, and then checks the results of these comparisons by examining the community building potential of The Mediator of the French Republic. For the purposes of this study, the term “element” means an essential component – broader and deeper than a mere characteristic. For example, an element of mediation is respect for self and others. A characteristic of mediation that demonstrates that element is the procedural restraint against interrupting the other party during a mediation session. Similarly, an element of community is open dialogue and a characteristic of community that demonstrates that
element might be town council meetings. To analyze conflict resolution or community at the level of characteristics was not appropriate for this study, as it would have included more detail than required and would be more appropriate for a practitioner’s manual. Instead, characteristics were identified as a preliminary step, but not included explicitly in the data analysis. The data analysis started at a higher level of comparison in order to facilitate the analysis of similarities, differences and areas of intersection among the elements found within theories and perspectives of conflict resolution and community.

Specifically, this study addressed the following three research questions: 1) What are the key elements of community and effective public mediation programs? 2) Which elements of effective public mediation programs and community are mutually supportive, functionally neutral, or discordant? and, 3) Does the mission and functioning of The Mediator of the French Republic provide an example of a mediation program that builds community?

The Discourse of Political Philosophy

The arguments presented in this study, which assume that there can be a rationally and systematically arrived at understanding of the relationship between “good” for the individual and for the community and the relevance of mediation to both, is consistent with the tradition of political philosophy. Sheldon Wolin describes the importance of these kinds of relationships within both philosophy and political philosophy in his most recent treatise on epistemology and methodology, *Politics and Vision: Continuity and Innovation in Western Political Thought* (2004). He writes:

Ever since Plato first perceived that the inquiry into the nature of the good life of the individual was necessarily associated with a converging (and
not parallel) inquiry into the nature of the good community, a close and continuing association has persisted between political philosophy and philosophy in general. Not only have most of the eminent philosophers contributed generously to the main stock of our political ideas, but they have given the political theorist many of his methods of analysis and criteria of judgment...By virtue of this alliance, political theorists accepted as their own the basic quest of the philosopher for systematic knowledge (2004, p. 4).

The theories and perspectives presented in this study are also consistent with the discourse of political philosophy in that they seek to respond to what is generally perceived as an important current social and political problem -- the erosion of community in economically developed, democratic nations. Many theorists have suggested that this problem of disengagement of citizens from each other and from their governments could become a crisis if not corrected. As Wolin describes, political philosophy has, traditionally, been seen as relevant and valuable when it responds to pressing social and political problems. In fact, he argues that the most influential political philosophy has been born out of times of political and social crisis or, at least, times that required a restoration of order within social or political relationships. He writes:

Most of the great statements of political philosophy have been put forward in times of crisis; that is, when political phenomena are less effectively integrated by institutional form...Although the task of political philosophy is greatly complicated in a period of disintegration, the theories of Plato, Machiavelli, and Hobbes, for example, are evidence of a “challenge and response” relationship between the disorder of the actual world and the role of the political philosopher as the encompasser of disorder. The range of possibilities appears infinite, for now the political philosopher is not confined to criticism and interpretation; he must reconstruct a shattered world of meanings and their accompanying institutional expressions; he must, in short, fashion a political cosmos out of political chaos …No political theorist has ever advocated a disordered society, and no political theorist has ever proposed permanent revolution as a way of life. In its
most elemental meaning, order has signified a condition of peace and security that makes civilized life possible (Wolin, 2004, p. 9).

In addition to addressing timely topics, political philosophy should also be grounded in a theoretical tradition that allows new theory to be both comprehensible and to benefit from the work of scholars who have addressed the same topics (Wiser, 1986, Wolin, 2004). Following a tradition of philosophical thought allows a theorist and those who read the theory to better understand the concepts set forth, as they will be familiar, but also allows the theorist the freedom to examine areas that previous theories have not fully explored (Wolin, 2004). James Wiser, in his text on the development of political theory, writes about “the importance of the scholarly community’s commitment to specific traditions and models” (1986, p. 59). As both Wolin and Wiser explain, using terms and concepts that build on past theory allows a common language and enhances a sense of continuity and cohesion. These characteristics make political theory, in Wolin’s words, “not so much a tradition of discovery as one of meanings extended over time.” (2004, p. 23). Consistent with this tradition, this analysis will explore and build on existing definitions of community and mediation in order to incorporate the new data collected in the study of The Mediator of the French Republic and the interpretations of that data.

While the analysis and conclusions presented in this study regarding the nature of community and the elements that support it differ from the conclusions of the theorists whom have been referenced, their work was an invaluable source of data and insight. In fact, the body of work of these scholars undoubtedly influenced this study in ways that have not even been fully understood during its preparation. On this issue, Wolin suggests
that, rather than try to identify every influence on every writer who impacts a theory, perhaps it is more fruitful to acknowledge a more general cumulative effect of theories building upon one another over time. He writes:

…A political philosopher unavoidably infects his own thought with past ideas and situations that have been similarly implicated with their own precedents. In this sense the past is never wholly superseded; it is constantly being recaptured at the very moment that human thought is seemingly preoccupied with the unique problems of its own time. The result is…a ‘coexistence of diverse elements,’ partly new, partly inherited, with the old being distilled into the new, and the new being influenced by the old. Thus the Western tradition of political thought has exhibited two somewhat contradictory tendencies: a tendency towards an infinite regress to the past... and a tendency toward acquiring new dimensions of insight (2004, p. 25).

The importance of continuity and cohesion notwithstanding, the tradition of political philosophy accepts the need for constant evolution of even well-defined areas of inquiry. Creativity and innovation are important because, as Wolin writes: “By viewing common political experience from a slightly different angle than the prevailing one, by framing an old question in a novel way, by rebelling against the conservative tendencies of thought and language, particular thinker have helped to unfasten establishes ways of thought and to thrust on their contemporaries and posterity the necessity of rethinking political experience (2004, p. 23). Therefore, despite the importance and value of existing theories on community and mediation, the data collected suggested areas that needed further analysis and this study attempts to address that need.

In order to better understand the data collected, the first research question focused on the identification of the elements of community and mediation that could be gleaned from existing theories and research. One of the first challenges faced was deciding which the theories to include in this study. Clearly, all theories about community and mediation
could not be included, as at least the former had been central to philosophical and political inquiry for thousands of years. Therefore, there was a need to select theories that shared enough common ground with each other and with the research questions posed to allow meaningful analysis and to enable the new theories and perspectives presented in this study to provide incremental progress toward a fuller understanding of community, conflict and the resolution of that conflict.

Wolin writes that the use of general categories to guide the selection of relevant data and theoretical foundations is an integral part of legitimate political philosophy. He writes that “…The use of certain political categories brings into play a principle of ‘speculative exclusiveness’ whereby some aspects of political phenomena and some political concepts are advanced for consideration, while others are allowed to languish. (2004, p. 21). Further, he explains that while political concepts are useful, the fact that they limit the scope of the inquiry must be acknowledged. He acknowledges that concepts are like “a net that is cast out to capture political phenomena, which are then drawn in and sorted in a way that seems meaningful and relevant to the particular thinker. But in the whole procedure, he has selected a particular net and he has cast it in a chose place” (2004, p. 21).

One basis for making choices among theories is their relevance to the time, place, and circumstances of the research questions one wishes to answer. Wolin writes that every political theory contains a “latent metaphysic” that has adopted some implicit or explicit propositions about “time,” “space,” “reality,” or “energy” (2004, p. 16). He explains that political theorists use terms for these concepts that are specially adapted to political philosophy. He writes that, for example: “…Instead of political space he [a
political theorist] may have written about the city, the state, or the nation; instead of time, he may have referred to history or tradition; instead of energy, he may have spoken about power. The complex of these categories we can call a “political metaphysic” (2004, p. 16).

Since this study explores the community building potential of public mediation in a modern, western democratic environment, the “political metaphysic” of this study attempts to capture definitions and concepts about community and public mediation that are relevant within the context of this research. These definitions and concepts must, necessarily, include consistent elements of time, space, political and social realities, and forces for generating energy. The theories about community chosen, therefore, all originate from scholars writing since the beginning of the 20th century, are from western democratic traditions, and are grounded in legal, political science, and public administration scholarship.

The analysis of the second research question required multiple layers of judgments about which key concepts to include and which definitions to accept when discussing the interrelationships between community, conflict, conflict resolution, and mediation. First, choices were made about the definitions of community and mediation to use and about which theories would be consulted to help frame those definitions. Next, choices were made about how to identify the elements of mediation programs deemed to be neutral, supportive, or discordant with the elements of community.

The tradition of political philosophy assumes the legitimacy of the need to make judgments and choices regarding which definitions and key concepts are used to build theory. Wolin acknowledges that the definitions of key concepts within political theory,
such as power, authority, or consent, are not absolute truths, but are, instead, “a legacy accruing from the historical activity of political philosophers” (2004, p. 6). Further, he writes:

When such concepts become more or less stable in their meaning, they serve as pointers that cause us to look for certain things or to keep certain considerations in mind when we try to understand a political situation or make a judgment about it. In this way, the concepts and categories that make up our political understanding help us to draw connections between political phenomena; they impart some order to what might otherwise appear to be a hopeless chaos of activities; they mediate between us and the political world we seek to render intelligible; they create and area of determinate awareness and thus help to separate the relevant phenomena from the irrelevant … hence, when the political philosopher reflects upon society, he is not confronted by a whirl of disconnected events…but by phenomena already endowed with coherence and interrelationships (2004, p.8).

A related challenge presented by this study was defining and refining the definitions of terms and concepts, such as community and conflict, which are used so often in everyday speech. The definitions required for comprehensive and detailed comparisons and analysis required clearer and more precise definitions than those used in casual conversation. These definitions were possible after the collection and analysis of relevant data and a process that Wolin describes as “explication.” By using explication, conceptual generalities that would be comprehensible to the reader, such as community or conflict, were broken into component parts and given new meanings sufficient to enable detailed analysis. In this way, they were made more precise and useful to “systematic discourse” (Wolin, 2004, p. 14, 15). This process is further described by Wolin in the following:

Although the vocabulary of the political theorist carries the traces of everyday language and experience, it is largely the product of the theorist’s creative efforts. The concepts that constitute this vocabulary are
shaped to fit the over-all structure of meanings of his theory. This structure of meanings contains not only political concepts, such as law, authority, and order, but also a subtle blend of philosophical and political ideas… (2004, p. 16).

After collecting data from existing theories and research and from the study of The Mediator of the French Republic, these data were analyzed in order to evaluate which elements of mediation support community. This required not only observation, but also the use of imagination – new ideas and perspectives based in theory and in common experience – about what community can be and how mediation programs that support community can be designed and maintained. Using imagination to show these interrelationships is a necessary part of political philosophy because no one theorist or reader of theory can have firsthand knowledge of all information required for understanding complex phenomena. As Wolin explains:

The use of concepts and a special language enable [the theorist] to bring together a variety of common experience and practices, such as those connected with the enjoyment of security and the exercise of power, and to show their interconnections (2004, p. 14)….Theorists have given us pictures of political life in miniature, pictures in which what is extraneous to the theorist’s purpose has been deleted. The necessity for doing this lies in the fact that political theorist, like the rest of mankind, are prevented from seeing all political at first hand. The impossibility of direct observation compels the theorist to epitomize a society by abstracting certain phenomena and providing interconnections where none can be seen. Imagination is the theorist’s means for understanding a world he can never “know” in an intimate way (2004, p. 19).

Wolin emphasizes that imagination is not just a “methodological convenience” but is, instead, essential to creative thought because it “has been the medium for expressing the fundamental values of the theorist; it has been the means by which the political theorist has sought to transcend history” (2004, p. 19).
One important aspect of the legitimate use of imagination in political theory is its connection to political realities (Wiser, 1986, Wolin, 2004). This study was linked in very obvious ways to political realities, because the data collected originated in the well-documented case studies of other researchers or in the study of the actual mission and functioning of The Mediator of the French Republic. This process of linking the theoretical to the real prevented the conclusions reached from becoming what Wolin cautioned against as random or arbitrary constructions. Instead, the conclusions reached in this study can become part of a “systematic theory” which Wolin defined as “a network of interrelated and (ideally) consistent concepts; none of the concepts is identical with experience, yet none are wholly severed from it (2004, p. 15).

The data analysis required for answering the first two research questions, therefore, involved making judgments and advancing propositions that could not be fully judged using strictly empirical standards. For example, the definitions of community and mediation chosen and the judgments made about their interrelationships and interdependence cannot be justified using strict, empirical standards. But, because these judgments were grounded in theoretical traditions, linked to data and political realities, and relevant to the context of the analysis, they were acceptable tools to use to advance the discourse of political philosophy chosen for this study. This legitimate function of judgment is explained in the following:

The political theorist is in a situation of being able to advance propositions and to employ concepts that cannot be adjudged true or false by a rigorous empirical standard. This objection is readily admitted insofar as it pertains to a large number of the statements and concepts contained in most political theories. It is not, however, a conclusive objection, because it assumes that an empirical test affords the only method for determining whether or not a statement is meaningful (Wolin, 2004, p. 14).
The third research question, regarding the community building potential of The Mediator of the French Republic, also raised the challenge of integrating theoretical foundations, political realities, and actual data collected. Data from the Mediator’s mission and functioning were evaluated based on concepts and definitions derived in part from actual observation and in part from new theories and perspectives developed within this study regarding what mediation can accomplish. The recognition of the importance of two types of vision, both actual perception and imagination, is also part of the discourse of political philosophy. The legitimacy of imagination and of an acknowledged standpoint is explained in the following:

…Political philosophy constitutes a form of “seeing” political phenomena in that the way in which the phenomena will be visualized depends in large measure on where the viewer “stands.” There are two distinct but related senses of vision…[and] both of them have played an important part in political theory. Vision is commonly used to mean an act of perception…In this sense, vision is a descriptive report about an object or an event. But vision is also used in another sense, as when one talks about an aesthetic vision or a religious vision. In this second meaning, it is the imaginative, not the descriptive, element that is uppermost…most political writers, even avowedly scientific ones…have felt constrained to envision a right pattern for the political order…a theoretical insight by adding an imaginative dimension to their representation…(Wolin, 2004, p. 18).

Using the French term “engagé” to further make his point, Wolin concludes that a wise choice of theoretical concepts and methods can allow a theorist to use imagination and perception to both connect with timely political issues and to explore fundamental or timeless themes. This study has attempted to participate in the discourse of political philosophy at these multiple levels by combining direct observations of the current role and mission of The Mediator of the French Republic with an analysis of the visions of community and conflict within existing theory. Further, the new theoretical perspectives
introduced in this work have then been related to current community issues. This
integrative effort is fundamental to political philosophy, as described in the following:

...Most formal political speculation has operated simultaneously at two
different levels. At one level every political philosopher has concerned
himself with what he thinks to be a vital problem of his day... No political
thinker concerns himself exclusively with the past any more than he seeks
to speak solely to the distant future; the price in both cases would be
unintelligibility. This is only to say that every political philosopher is to
some extent engagé, and every work of political philosophy is to some
extent a tract for the time. At another level, however, many political
writings have been intended as something more than livres de
circonstance; they have been meant as a contribution to the continuing

Finally, the ultimate argument set forth in this study – that mediation has the
potential to build community – is grounded in the tradition of political philosophy in that
it attempts to envision a better political reality than currently exists. Wolin describes this
creative work as the “architectonic impulse” to “lend differing dimensions to the
perspectives of political philosophy: dimensions of aesthetic beauty, religious truth,
historical time, scientific exactitude, and economic advance. All of these dimensions
possess a futurist quality, a projection of the political order in to a time that is yet to
be...(2004, p. 20).

Wolin defends that the importance of this projection and imagination is grounded
in the earliest philosophical traditions of Plato and has been proven over the millennia.
He concludes that the ultimate goal of political philosophy is to use imagination to inform
decision-making and, therefore, enhance the good for both individuals and society. In
this way, this study of the potential of mediation and the argument that it should be used
by public administrators in practical ways to build community is consistent with the
tradition of political philosophy. Wolin concludes:
Plato recognized that political action was highly purposive in character, that it was largely conscious and deliberate; to “take counsel” before acting was seen to be a distinguishing requirement of political activity, as characteristic of Homeric kings as of Athenian statesmen. But to act intelligently and nobly demanded a perspective wider than the immediate situation for which the action was intended; intelligence and nobility were not ad hoc qualities, but aspect of a more comprehensive visions of things. This more comprehensive vision was provided by thinking about the political society in it corrected fullness, not as it was but as it might be. Precisely because political theory pictured society in an exaggerated, “unreal” way, it was a necessary complement to action. Precisely because action involved intervention into existing affairs, it sorely needed a perspective of tantalizing possibilities (2004, p. 20).

Methodology

The data required for answering the first and second research questions regarding the connections and interrelationships between the key elements of community and public mediation programs, both typical and ideal, were gathered from the existing theories and research discussed in the literature review. For this purpose, the literature was used as an instrument of analysis to arrive at the key elements of both community and mediation and to enable comparisons of their mutually supportive and discordant elements. The elements derived from the literature and the comparisons of those elements are discussed in the data analysis portion of this study.

The initial step of the analysis that was required to answer the first research question was the collection of data on the key elements of community. The data used to identify the elements of community were collected from existing theory and research which were organized into four theoretical perspectives: 1. Communitarianism, 2. Social capital theory, 3. Civil society theory and, 4. Tolerance-based inclusion. These perspectives were chosen because the study explores the community building potential of
public mediation within a specific political and social context -- modern and western democratic societies. These contextual elements comprise what Stanley Wolin referred to as a “political metaphysic,” that is a combination of time, space, political and social realities, and the forces that generate energy within that those realities (2004, p. 16). The four theories about community chosen for inclusion in this study shared these contextual elements. All were developed since the beginning of the 20th century, all were from western democratic traditions, and all were grounded in political science and public administration scholarship. These theories were, therefore, the most relevant to the context of this research and were sufficiently consistent or complementary in their general concepts and definitional elements to enable incremental advancements of their work. These elements were identified and illustrated, first in separate diagrams and then within Venn diagrams, to show similarities, differences, and areas of intersection.

The second step of the analysis that was required to answer the first research question was the collection of data on the key elements of public mediation programs and ombudsmen programs, both typical and ideal. These data were collected from both model standards of practice developed for practitioners and from the theoretical perspectives of legal and public administration scholarship. These two different types of data sources were chosen because both the ideal of mediation, as discussed in theory, and the reality of mediation, as captured within the model standards of practice, were relevant to an evaluation of the community building potential of public mediation programs. An examination of both theory and practice was important because the data showed that the standards of practice were sometimes, but not always, in concurrence with the ideal mediation programs envisioned within legal and public administration theory. The
elements of each model of conflict resolution chosen for analysis were identified, including both typical and ideal mediation and ombudsman programs, and illustrated in separate diagrams and then within Venn diagrams to show similarities, differences, and areas of intersection.

To answer the second research question, the key elements of community were compared with the elements of public mediation programs. Additionally, these data were used to further develop the argument about which elements of these mediation programs were discordant, neutral, or supportive of the elements of community.

Identifying the Key Elements of Community

The key elements of community were identified through a review of the research and literature on community theory. This field was narrowed, for the purposes of this study, to four basic theoretical perspectives: communitarianism, civil society theory, social capital theory, and a tolerance-based inclusion perspective. These theories were used as an instrument of analysis and their elements were compiled and organized in appropriate tables and diagrams and compared to identify areas of intersection, agreement, and discordance. The results revealed the kinds of connections and interrelationships demonstrated by the Figure 1, below. The details added to these figures are discussed in the data analysis portion of this study.
Identifying the Key Elements of Mediation/Ombudsman Programs

The key elements of both typical and ideal mediation and ombudsman programs were identified through a review of the research and literature from both model standards of practice developed for practitioners and from the theoretical perspectives of legal and public administration scholarship. These theories, which define the philosophical roots and continuing development of alternative dispute resolution and the divergence from
traditional jurisprudence and litigation, were used as an instrument of analysis and their elements were compiled and organized in appropriate tables and diagrams and compared to identify areas of intersection, agreement, and discordance. The results revealed the kinds of connections and interrelationships demonstrated by the Figure 2 and Figure 3, below. The details added to these figures are discussed in the data analysis portion of this study.
Figure 2. Elements of Public Mediation Programs

Figure 3. Mediation, Ombudsman Programs and Ideal Public Sector Mediation
Evaluating the Community-Building Capacity of Mediation

The community-building capacity of public mediation was examined by comparing the elements of community and mediation, as determined by using the existing literature as an instrument of analysis. These elements were compared to identify areas of intersection, agreement, and discordance. The results revealed the kinds of connections and interrelationships demonstrated by the Figure 4, below. The details added to these figures are discussed in the data analysis portion of this study.

Figure 4. Common Elements of Mediation and Community

Evaluating the Community Building Capacity of The Mediator of the French Republic

To determine the community building capacity of The Mediator of the French Republic, first the key elements of that office were identified. To identify the key elements, data was collected from the following documents: 1) Annual reports prepared
by The Mediator of the French Republic during the period from 2002-2007; 2) Monthly electronic newsletters from 2007 and 2008; 3) Official websites and government-issued informational brochures distributed during 2007 and 2008; and 4) Written materials from secondary sources, such as journal articles and monographs, gathered from libraries in both France and the United States during the period 2004-2008. Secondary sources on the topic of The Mediator of the French Republic were reviewed at the Library for Public Information (BPI) and the National Library of France (BNF), both in Paris. The journals available in the BPI and BNF provided comprehensive and detailed analysis of issues facing The Mediator of the French Republic and the monographs provided a sense of the evolution of the office and its mission over time.

Other important information was gathered from personal interviews with the functional leadership of both the central office in Paris and a regional representative of the office during the spring and summer of 2006. Interviews of citizen participants were not conducted, both because their names were held in confidence under French procedural mandates and because their individual experiences with the program would not necessarily help reveal the program’s intended mission.

The personal interviews were conducted in Paris and in the Haute-Savoie region of France over a five week period. The Paris interviews were conducted at the central office of The Mediator of the French Republic and included Michel Sironneau, (Conseiller pour les affaires internationales et les droits de l’Homme), Marine Calazel (Chargeée de mission pour le Délégué Général), Bernard Dreyfus (Délégué Général), and Audrey Dallery and Cécile de Lorme, collaboratrices. In addition, one of The Mediator’s regional delegates in Annecy, France was interviewed. Annecy, the capital of Haute-
Savoie, is in the French Alps and is one of the areas of France that is geographically most distant from Paris. The delegate, Marie-Claude Bazile, is a senior official in the Office of the Prefecture. In France, the prefectures are representatives of the French national government and are located in each of the departments in France. Departments in France perform roughly the same duties as state governments in the United States.

The language difference was not a significant barrier during these interviews, as the discussions were conducted in a mixture of French and English and all participants expressed comfort in their level of comprehension. In addition, the interviews were recorded to aid later review of written notes from the meetings. It was especially helpful to have the assistance of a translator during the meeting in Annecy, allowing for a more sophisticated level of discussion and the gathering of more complex and comprehensive information. Additional details regarding actual cases of mediated disputes were provided by a review of case files shared by members of the Mediator’s staff.

The annual reports and special reports prepared by The Mediator of the French Republic provide detailed information regarding the mission and functioning of the office. Each annual report was approximately 100 pages long and contained many quantitative as well as qualitative data. Copies of the annual reports were obtained during a personal visit to The Mediator’s offices, where the staff provided an English version of the 2004 Annual Report and a French version of the 2005 Report. An English translation of the 25th Anniversary Report was obtained online in 2005. Since the on site data collection during 2006, English versions of all annual reports written since 2004 have been made available online and were also used in this study. Additionally, the office’s
official website added an English version and it was a valuable source of timely information.

Additional information on recent developments and the day-to-day functioning of the office was gathered from the monthly newsletters of The Mediator of the French Republic. At the time of the author’s meetings at the Paris office in 2006, the newsletters were distributed only in hard copy only a few issues could be obtained. Recently, however, the newsletters were put online, although they continue to be available only in French.

The journals available in the national libraries in Paris provided comprehensive and detailed analysis of issues facing The Mediator of the French Republic and the monographs provided a sense of the evolution of the office. Many of the materials available on some topics were available only in French. Access to these materials that were created by and for the French provided a valuable perspective and the required translation into English was not an obstacle in developing general themes. Verbatim translations were not necessary for these purposes and, therefore, direct translations or quotations included in this study were limited to only those necessary for completeness or accuracy.

The final step in the analysis required to answer the third research question regarding the community building potential of The Mediator of the French Republic required comparing the elements of the mission and functioning of that office with both the elements of community and the elements of public mediation programs, both typical and ideal. These elements were compared in order to identify areas of intersection, agreement, and discordance. These comparisons showed which elements of The
Mediator of the French Republic were not characteristic of public mediation programs, typical and ideal, and enabled an analysis of whether these unusual elements enhanced or diminished the potential to build community. The results of these comparisons revealed the connections and interrelationships demonstrated by the Figure 5, below. The details added to this figure are discussed in the data analysis portion of this study.

Figure 5. Elements of the Mediator of the Republic, Public Mediation, and Community
Conclusion

This goal of this study was to examine the effect of public mediation on community. The main questions that this study addressed were whether mediation programs can support community and whether The Mediator of the French Republic provided an example of the community-building potential of mediation. The analysis and conclusions reached in this study were based on data from existing theories and research and from new data collected from The Mediator of the French Republic. The study identified the intersection of mediation and community as currently defined in the theories chosen for review and proposed a new perspective which would redefine the elements of mediation and community as interdependent and mutually supportive.

The key elements of the mission and activities of The Mediator of the French Republic were identified using quantitative and qualitative data. These data included the qualitative data collected during interviews and the quantitative and qualitative data collected from secondary sources such as the office’s annual reports, monographs, journal articles, newsletters, and official websites and publications. The broader theoretical analysis, grounded in the discourse of political philosophy, provided clearer and deeper meaning.

The perspectives presented in this study regarding the evaluation of the community building potential of public mediation programs may have general utility. The results of the specific evaluation of the community building potential of The Mediator of the French Republic, however, were not intended to be representative of any larger population and cannot be directly transferred to other settings because of the highly contextualized nature of the data collected.
CHAPTER IV
DATA ANALYSIS

Introduction

This study uses existing theories and research on community and mediation as instruments of analysis to enable the identification and comparison of key elements and the evaluation of areas of similarity, difference, and intersection. In addition, new documentary and interview data from The Mediator of the French Republic were collected and analyzed to evaluate whether the mission and functioning of that office provided an example of a mediation program with community-building potential.

A central issue presented in this study is whether or not mediation programs can successfully balance individual and community interests and provide a forum for respectful dialogue and collaborative decision-making that will support community. This issue was explored by collecting and analyzing data sufficient to answer the following three research questions: 1) What are the key elements of community and effective public mediation programs? 2) Which elements of effective public mediation programs and community are mutually supportive, functionally neutral, or discordant? and, 3) Does the office of The Mediator of the French Republic provide an example of a public mediation program that builds community? The results of this analysis are presented, below, for each of the three research questions posed in this study.
Research Question #1: What are the key elements of community and public mediation programs?

   To answer this first research question, the existing theories and research on community and mediation that were discussed in the literature review were used as an instrument of analysis to identify the elements of both community and effective public mediation. These elements were then compared for areas of overlap and intersection. To accomplish this, first, the elements of community were identified and illustrated in a series of diagrams. Second, the elements of mediation and ombudsman programs, both typical and ideal, were identified and illustrated. Third, the elements of community were compared to the elements of public mediation programs to determine which were mutually supportive and which were neutral or discordant.

Elements of Community

   To determine the key elements of community, data from existing theories and research were divided into four perspectives: communitarianism, civil society theory, social capital theory, and a tolerance-based inclusivity perspective. While each of these four perspectives has their own body of literature and a comprehensive review of each was beyond the scope of this study, they shared common definitional and contextual elements and a common interest in identifying the kinds of individual and institutional emphases that either strengthen or diminish a sense of community. The following analysis of that data explored areas of both connection and disconnection. The data from each theoretical perspective was analyzed and illustrated separately, followed by an analysis of their similarities, differences, and areas of intersection.
Communitarianism

The data collected from the existing theories and research on community that were reviewed for this study and discussed fully in the literature review, showed that communitarianism, like most other theories on community within the democratic tradition, defined the elements of community as including democratic processes, discourse, and the delimitation of the role of the government and bureaucracy to support procedural fairness. However, this theory differs from other theories on community, such as social capital theory or civil society theory, in its view that a framework of shared substantive values is just as critical to community as participatory democracy or procedural fairness.

Communitarians define the goal of community as building a good society and propose that this requires not only democratic processes, discourse, and delimitation of the role of the state, but also a framework of constantly evolving but shared substantive values. The core elements of this framework include the following:

1. An acknowledgement of shared values that defines the virtues society seeks to uphold and a strong commitment to shared purposes;
2. A clear sense of social responsibility;
3. A strong commitment to mutual tolerance;
4. A high regard for individual rights, but tempered by collective interests;
5. Society-wide dialogues;
6. A limitation of identity politics;

The core elements of this communitarian perspective are illustrated in Figure 6.
Tolerance-Based Inclusivity

The tolerance-based inclusivity perspective defines community as an ongoing process of working out differences among individuals who will, by their very nature, find it difficult to reconcile their views with the views of others. This process depends on civility, tolerance, and discourse. It does not rest on a view that human beings are naturally tolerant of discordant viewpoints or that they can easily reach consensus. Instead, the tolerance-based inclusivity perspective is based on the recognition that even the most strongly held convictions may not be correct in their underlying assumptions or
ultimate conclusions. This acceptance of the shortcomings and misjudgments of ourselves and others is critically important, though the perspective acknowledges that the shortcomings or misjudgments of others will always be more obvious to us than our own.

Further, this perspective requires that community exists between subjects – not between subjects and objects. Individuals must be seen as ends in themselves, not a means to reaching an end of an externally derived conception of collective good. In fact, this perspective resists objectifying community as a concept outside of actual human interaction because such objectification can lead to inherently invalid attempts at universalizing the highly personal nature of social relationships. Nonetheless, essential elements of community can be derived from this perspective, including the following:

1. A willingness to enter into community;
2. A commitment to serious communication and inquiry;
3. Realizing that all personal judgment is subject to error;
4. Valuing and respecting all human beings, despite their limitations;
5. Allowing movement and freedom among citizens, even when it threatens unity;
6. Using social traditions to enhance present experience, not as sacred rites or methods of exclusion;
7. Expressing tolerance by allowing others to remain at a comfortable “distance;”
8. Encouraging creativity in human interactions;
9. Seeking truth by acknowledging and moving beyond selfishness and pride;
10. Exposing every social value to criticism and inquiry so that they don’t become
dogma or command, including even core values such as justice, order,
democracy, or happiness;
11. Acknowledging that all action, if imposed on others, is an objectifying use of
power;
12. Respecting society and accepting its limitations on personal freedom;
13. Accepting personal responsibility for judgment and choice;
14. Being attentive to the needs of others, even if unexpressed, and remaining
ready to respond to those needs;
15. Embracing plurality;
16. Creating opportunity for individualized experience by accepting that all
members of a community need not experience formal equality (Tinder, 1980,
1995).

The key elements of this perspective are illustrated in Figure 7.
Social Capital Theory

The term social capital refers to the kinds of social connectedness and participation that build and strengthen community. The term social capital is used because, like money, it is a tangible asset that enables and promotes community development. Activities which bring people together to talk, to solve problems, and to work together socially, politically, or otherwise, help build social capital. Social capital
theorists urge public institutions to study their past activities and programs to assess how they have created or destroyed their community’s social capital.

For the purposes of this study, an aspect of social capital theory that warrants special attention is the differences between what is referred to as “bridging” and “bonding” social capital (Putnam, 2000, 2001, 2007). Bonding social capital is created when people of similar characteristics and interests spend time together. By recognizing the importance of bonding social capital, especially as nurtured through voluntary associations, social capital theory is consistent with traditional civil society perspectives.

Somewhat different from civil society theory, however, is the concept of bridging social capital (Putnam, 2000, 2001, 2007). This term refers to social relationships that are created purposefully, and often with third-party assistance, between people of different backgrounds, races, ethnicities, ages, or socioeconomic classes. The following key elements necessary for the creation of bridging and bonding social capital:

1. Fostering opportunities for face-to-face contact, deliberation, compromise, and consensus-building;

2. Providing feedback mechanisms and credible opportunities for citizen participation, both individually and as organizations, so that legislators and administrators can learn from their mistakes;

3. Avoiding governmental actions that are shown to hurt neighborhood networks, community norms, and voluntary organizations;

4. Making special efforts to bring together people from different demographic groups for problem-solving;

5. Providing opportunities for meaningful interaction across ethnic lines;
6. Using national resources to strengthen and support locally based programs that are coping with the short-run costs of immigration and diversity (Putnam, 2000, 2001, 2007).

The key elements of community from this social capital theory perspective are illustrated in Figure 8.

**Civil Society Theory**

The existing research and theories reviewed for this study showed that the civil society perspective has many variants. The perspectives chosen for analysis in this study shared basic definitional and contextual elements and were particularly relevant to the
questions and context of this study. Most importantly, the civil society theories included in this study shared a common recognition of the fundamental importance of autonomous and voluntary associations within a community. These theories propose that these associations provide functions that are essential to community and which transcend political or temporal boundaries. When used as an instrument of analysis, these theories provide data that enables the identification of these functions and other defining characteristics of the civil society theory of community. These can be summarized as follows:

1. Private associations aid others in the community;
2. Socialization in private groups builds citizenship skills and motivates civic participation;
3. Freedom of voluntary association;
4. Protection of social and group autonomy;
5. Achievement of public ends independent of state power or control;
6. Social organizations are representative and contestatory; give voice to citizens by fostering debate and pressing for governmental action (Edwards and Foley, 1996).

These key community building elements of civil society are illustrated in Figure 9.
Elements of Community: A Comparison of Four Theoretical Perspectives

Since the goal of this study was to develop a model for an evaluation of the community building potential of citizen complaint mediation programs, it was important to examine a variety of theoretical perspectives to identify areas of consensus about the elements that support community. Some theories were easy to place in an existing category of community theory, as the writers referred to themselves as clearly belonging to a particular school of thought. In other cases, the perspectives were difficult to place within existing theoretical frameworks and were, therefore, analyzed separately. This

Figure 9. Elements of Society: A Civil Society Perspective

Elements of Community: A Comparison of Four Theoretical Perspectives

Since the goal of this study was to develop a model for an evaluation of the community building potential of citizen complaint mediation programs, it was important to examine a variety of theoretical perspectives to identify areas of consensus about the elements that support community. Some theories were easy to place in an existing category of community theory, as the writers referred to themselves as clearly belonging to a particular school of thought. In other cases, the perspectives were difficult to place within existing theoretical frameworks and were, therefore, analyzed separately. This
was the case with the tolerance-based inclusivity perspective, which was a new category created for the purpose of this study.

Despite the complexity, a review of these theories as instruments of analysis revealed significant areas of agreement and disagreement about what elements constitute community. Some of the most significant differences between the four theoretical perspectives included the following:

1. Communitarianism valued the protection of collective interests as much as or, arguably, more than the strict protection of individual interests or freedoms. This contrasted with the perspective of tolerance-based inclusivity, which viewed all interaction as defined by two or more subjects acting upon each other and did not view the collective “good” as a meaningful concept apart from the sum of these individual interactions. It also differed from civil society theory’s emphasis on the importance of protecting voluntary associations, whatever their goals, from undue pressure from government or other external authority.

2. Civil society theory emphasized the importance of voluntary associations and intragroup consensus, while the bridging social capital aspect of social capital theory emphasized intergroup interaction and consensus. The tolerance-based inclusivity perspective viewed all intragroup and intergroup interactions as derivative, as one-to-one interactions were presented as the foundation of community.

3. Communitarianism and social capital theory emphasized the need for shared core values about substantive issues within a community, while civil society
theory and tolerance-based inclusivity perspectives prioritized procedural integrity. These procedural safeguards were presented as key to enabling the kinds of dialogue and social interaction necessary to arrive at individualized conceptions of what is good for an individual or a group of individuals.

4. Communitarianism and social capital theory called for the evaluation of the purpose of social groups and the provision of active support to only those with commonly accepted “good” views or goals. Civil society theory valued the process of joining and maintaining voluntary associations, without evaluation of their purpose, because they were seen as the best way to give voice and power to individuals against overreaching by government or other external authority.

The elements of community which the four theoretical perspectives shared include the following:

1. Membership in a community should be voluntary and should include an acceptance of certain limitations on personal freedoms.

2. Community relies upon the demonstration of respect for all individuals by the government and by fellow community members.

3. Differences among and between community members must be dealt with constructively and with the support of government and public administration.

4. Open dialogue is necessary so that community members can share views;

5. A goal of dialogue is to better understand and value the needs of others.

An illustration of these similarities, differences, and areas of intersection are illustrated in Figure 10.
Figure 10. Elements of Community: Similarities, Differences, and Areas of Intersection
Elements of Mediation and Ombudsman Programs (Typical and Ideal)

For the purposes of this analysis, it was important to understand the similarities and differences between typical mediation and ombudsman programs and ideal public mediation as conceptualized by public administration and legal scholars commentators and scholars. Therefore, the elements of both mediation programs and ombudsman programs, both typical and ideal, were determined and compared.

Elements of Mediation

The key elements of mediation programs were identified through the review of the model standards of conduct for practitioners and commentary from both legal and public administration theorists. These sources, discussed fully in the literature review, were used as an instrument of analysis for the identification of key elements and a comparison of those elements.

The literature and standards of practice reviewed informed the following summary of the key elements of mediation:

1. An impartial, competent, third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to the dispute;
2. An opportunity is provided for parties to define and clarify issues, identify interests, generate alternatives, and reach mutually satisfactory agreements;
3. Confidentiality is maintained unless otherwise agreed to by the parties or required by applicable law;
4. Process control is maintained by the mediator to enhance procedural fairness and the safety of the parties and to promote mutual respect among all participants;
5. The parties control the outcome;
6. There is an absence of procedural formality;
7. Parties’ underlying interests and preferences are identified through openness and disclosure without exposing either party to undo risk;
8. Conflicts of interest are identified and managed (i.e. When an administrator involved in a dispute will not address an issue that may help the organization but hurt his/her career);
9. A problem-solving atmosphere is fostered;
10. Strategic or positioning behavior is reduced that is caused by a perceived threat to self-esteem or public image;
11. Parties are assisted in moving beyond posturing and recriminations about past wrongs so that parties can begin to consider possible future gains;
12. Disputes are reframed to avoid blame and lessen the perception that concessions are sure losses in order to lessen the cognitive barrier of “loss aversion;”
13. A neutral source for settlement proposals is provided to avoid the automatic discounting of any proposal of settlement by an adverse party and the cognitive barrier of “reactive devaluation” (Model Standards of Practice, 2005; Mnookin, 1993; Lacabarats, 2003).

The elements of mediation are illustrated in Figure 11.
Elements of Ombudsman Programs

The key elements of ombudsman programs were identified through the review of the model standards of conduct for practitioners and from commentary from both legal and public administration theorists. These sources, discussed fully in the literature review, were used as an instrument of analysis to identify key elements and for the comparison of those elements. These existing theories and model standards of practice informed the identification of following key elements of ombudsman programs:

1. Independence from other branches of government;
2. Neutrality, fairness, and impartiality, both real and perceived;

3. Sensitivity to the political context, as evidenced by steps to avoid embarrassment to individual administrators;

4. Emphasis on individualized problem-solving with a secondary goal of using those solutions to improve procedures and policies in the future;

5. Ability to work within a bureaucracy and to provide solutions that are creative, but also consistent with basis administrative expectations;


The elements of ombudsman programs are illustrated in Figure 12.

Figure 12. Elements of Ombudsman Programs
Elements of Ideal Public Mediation Programs

The analyses of the key elements of mediation and ombudsman programs were supplemented by the analysis of the ideal forms of the public mediation programs as envisioned by commentators and theorists. Commentary from legal and public administration scholars provided data on the elements that would exist in ideal public mediation programs and enabled a comparison with data from case studies and model standards. These sources, used as instruments of analysis, informed the identification of the following essential elements of ideal mediation:

1. Use open dialogue to identify differences;
2. Encourage parties to revalue their needs;
3. Encourage self-respect and the respect for the views and interests of others;
4. Reduce positions and demands to their constituent parts;
5. Examine symbolic meaning of the language used by the parties;
6. Understand that actions and behavior have interactive effects;
7. Concentrate of real problems, not theories;
8. Defuse hostility by careful choice of language;
9. Teach the value of mediation throughout society;
10. Increase process control of the parties (how decisions are made);
11. Increase outcome control of the parties (the nature of the decisions themselves);
12. Reduce reliance on hierarchical power to resolve disputes;
13. Value experience as a source of wisdom even if not accompanied by organizational authority or power;
14. Use interest based, collaborative and consensus-based negotiations;

15. Commit to a partnership orientation;


These elements of ideal public mediation are illustrated in Figure 13.
Elements of Mediation and Ombudsman Programs and Ideal Public Mediation: Areas of Intersection

For the purposes of this analysis, it was important to understand the similarities and differences between typical mediation and ombudsman programs and commentators' conceptions of ideal public mediation programs. The data indicated that the most important differences between ideal mediation and typical mediation and ombudsman programs included the following:

1. Ideal public mediation would include a mission to teach the community about the value of mediation. Typical ombudsman and mediation programs tended to instruct only the parties about the values of collaborative methods of conflict resolution.

2. Ideal public mediation would encourage the examination of deeper, symbolic meanings of the language used by the parties, even if not directly expressed directly. Typical mediation and ombudsman programs did not focus on this transformational potential of dispute resolution but, instead, emphasized only the need for the parties to clearly articulate their needs and interests.

3. Ideal public mediation would foster a partnership orientation where not only the interest of the parties but also the interests of the organization would be acknowledged and advanced. Typical mediation and ombudsman programs tended to focus only on the needs of the parties, though this was slightly less true of ombudsman programs, which tended to institutionalize governmental needs in their more bureaucratically-oriented solutions.
4. Ideal public mediation would give freedom to the parties to help define and control the process of resolving their dispute, while both typical mediation and ombudsman programs stressed the need for the third-party neutral to retain process control. Mediation and ombudsman programs both emphasized the need for the parties to have control over the outcome of their dispute, though this was more central to mediation programs.

5. Both ideal public mediation and typical mediation programs disregarded or de-emphasized hierarchy or bureaucratic restraints in the resolution of disputes, while ombudsman programs worked within existing hierarchies and bureaucracies.

6. Ideal mediation would encourage a review and revaluation of the desires of the parties based on information gathered and the interpersonal dynamics which developed during the mediation. This approach was consistent with interest-based negotiations, though it was not expressed in those terms. Typical programs sought mutually acceptable resolutions that were sometimes, but not necessarily, based on interest-based negotiations. The resolutions of disputes by mediators or ombudsmen were sometimes achieved through simple compromise that did not require a review or revaluation of the parties’ desires or interests.

The elements that were deemed important in all mediation and ombudsman programs, both typical and ideal, included the following:

1. Institutionalized protection of the independence and neutrality of the mediator or ombudsman;
2. Processes which ensured, or at least encouraged, respectful and open dialogue between the parties involved in the dispute;

3. Protection of the confidentiality of the information shared during the resolution of the dispute, or at least protection of the identities of the complainant;

4. An emphasis on the importance of the protection of individual rights and needs, and responsiveness to those needs;

5. An emphasis on future-oriented solutions, not punishment for past wrongs.

An illustration of these similarities, differences, and areas of intersection are illustrated in Figure 14.
Figure 14. Elements of Mediation and Ombudsman Programs (Typical and Ideal)
Research Question #2: Which elements of public mediation programs and community are mutually supportive, functionally neutral, or discordant?

To answer the second research question, the elements of community and public mediation were compared to determine which elements required to support community were included in public mediation programs, both typical and ideal. Further comparisons were then made which took into account more detailed data regarding the elements of each model of dispute resolution. These more detailed comparisons were important to enable the evaluation of the argument that public mediation programs will support community when they are linked with policy reform. The analysis of this data has been presented in two forms. The more general comparisons were illustrated by a Venn diagram that shows areas of intersection between the elements of community and public mediation programs, both typical and ideal. The more detailed comparisons were illustrated in a table which summarizes the elements of public mediation and community that are mutually supportive, functionally neutral, or discordant.

Elements of Community and Public Mediation Programs

The more general comparison between the elements of community and public mediation programs, both typical and ideal, revealed that the elements of community which intersected with the elements of public mediation programs included the following:

1. The fostering of self-respect and respect of others during the process of conflict resolution;

2. Process safeguards that encourage and enable open dialogue;
3. Voluntary participation by the parties that reflects a willingness to accept some constraints on personal freedom.

The general comparison of the elements of community and public mediation programs, both typical and ideal, revealed that the most significant areas of difference included the following:

1. While both community and public mediation programs required respectful interactions, even during disagreement, community also required tolerance and accommodation of difference. Public mediation programs required only neutrality or the mediator and impartiality within the process, not tolerance or accommodation of difference by either the mediator or the parties to the conflict;

2. While community valued collective and individual needs, mediation was designed to protect individual interests. This latter point, however, was less true in ombudsman programs and ideal mediation than in typical mediation;

3. While mediation and ombudsman programs required confidentiality, community required an open sharing of information within the community.

These similarities, differences, and areas of intersection between the elements of public mediation programs and community are illustrated in Figure 15.
Figure 15. Elements of Community, Mediation, and Ombudsman Programs: Areas of Intersection
Elements of Mediation that are Supportive, Neutral and Discordant with Community

To enable more detailed comparisons, these data were also organized and analyzed to compare whether the elements of typical mediation and ombudsman programs and ideal public mediation were supportive, neutral, or discordant with the elements of community. An examination of the neutral or discordant elements was instructive, as it revealed aspects of public mediation that may actually harm community, at least as it is defined by the consensus of the four theories chosen for this study.

The elements of typical mediation and ombudsman programs and ideal public mediation programs that were neutral to community included procedural fairness in dispute resolution processes. This fairness was protected by the impartiality and neutrality of the mediator or ombudsman.

Elements of these programs that were supportive of community included:

1. Defining and clarifying issues;
2. Focusing on the future, not on punishment for past wrongs;
3. Encouraging self-respect and respect for views of others;
4. Defusing hostility through reframing;
5. Encouraging openness and disclosure, though this was limited by confidentiality in typical mediation and ombudsman programs;
6. Sensitivity to political context, though this was less true of typical mediation programs than ideal mediation programs or ombudsman programs;
7. Focusing on fairness, though this was more characteristic of ombudsman programs and ideal mediation programs because typical mediation programs tended to be more value-neutral regarding outcomes;

8. Working effectively within bureaucratic restraints, though this was more true of ombudsman programs than either ideal or typical mediation programs;

9. Providing policy recommendations, though this was more true of ombudsman programs and ideal mediation programs than typical mediation programs;

10. Considering organizational needs as identified during interest-based negotiations, though this was more true of ideal mediation and ombudsman programs than typical mediation programs,

11. Encouraging a collaborative, consensus-based, partnership approach, though this was truer in ideal mediation programs than in typical ombudsman or mediation programs.

Elements of these programs that were discordant with elements of community included the following:

1. The value-neutral stance of mediators regarding outcomes made typical mediation programs discordant with community-oriented substantive or outcome considerations, such as tolerance or accommodation of difference;

2. The confidentiality of issues raised or results obtained required in both typical and ideal mediation and ombudsman programs was discordant with the community-oriented element of open sharing of information among community members;
3. The interest-based negotiations that were typical of mediation programs tended to focus only on the individual interests and needs of the parties to the dispute and not the collective needs of the community.

This analysis is presented in graphic form in Table 1.
## Table 1. Effects on Community: Mediation and Ombudsman Programs

### Effects on Community

<table>
<thead>
<tr>
<th>Supportive</th>
<th>Discordan</th>
<th>Neutral</th>
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</thead>
<tbody>
<tr>
<td><strong>Mediation</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defines and clarifies issues</td>
<td>Independence</td>
<td>Impartiality and neutrality</td>
</tr>
<tr>
<td>Focus on future, not punishment for past wrongs</td>
<td>Confidentiality</td>
<td></td>
</tr>
<tr>
<td>Encourage self-respect and respect for views of others</td>
<td>Outcome control by parties reduces uniformity of results</td>
<td>Values experiential wisdom</td>
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<td>Defuse hostility and blaming through reframing</td>
<td>Participation is voluntary</td>
<td>Mutually satisfactory agreements</td>
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<td>Encourage openness and disclosure</td>
<td>Interest-based negotiations do not include community interests</td>
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<td>Sensitivity to political context</td>
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<td>Focus on fairness</td>
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<td><strong>Ideal Public Mediation Program</strong></td>
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<td>Interest-based (includes system goals)</td>
<td>Independence</td>
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<td>Collaborative, respectful dialogue</td>
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<td>Partnership approach</td>
<td>Process control by parties tempered by organizational needs</td>
<td>Reduce reliance on hierarchical power</td>
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<td>Value experiential wisdom</td>
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Research Question #3: Does the mission and functioning of The Mediator of the French Republic provide an example of a public mediation program that builds community?

To answer the third research question, the elements of the mission and functioning of The Mediator of the French Republic were identified and then compared to the elements of community and public mediation programs, both typical and ideal. The elements of The Mediator of the French Republic were identified through a review of written documents and through interviews with members of the Mediators’ leadership team in the Paris office and a departmental delegate of the Mediator in Annecy, France during May 2006. The written documents included governing documents, official websites, selected government publications and newsletters, and the annual reports of the Mediator during the period from 2004-2006. These sources, used as an instrument of analysis, informed the identification of the following key elements of the mission and functioning of The Mediator of the French Republic:

1. Improving laws through reform proposals;
2. Increasing access to justice and opening dialogue;
3. Teaching the value of consensus-based dispute resolution;
4. Protecting collective good against special interests;
5. Protecting individual rights against institutionalized discrimination;
6. Providing equitable remedies to complement legal remedies;
7. Providing fair processes (Impartiality, neutrality, open dialogue).
Data on the mission and functioning of The Mediator of the French Republic during the period 2004-2007 were organized and analyzed according to these key elements and then evaluated for their tendency to support community. The results of this analysis are presented, below, for each of the key elements of the Mediator’s mission and day-to-day functioning.

Mission and Functioning of The Mediator of the French Republic: An Overview

The French government established The Mediator of the French Republic in 1973 to provide a “more humane and direct relationship with public authority…the harmonization of relations and to fight against all forms of exclusion” (Mediator of the Republic, hereinafter “MOR”, 2003, p. 6). The Mediator is a single individual, usually with a long and distinguished career in public service, who is appointed by the President of the Republic for a term of six years. The Mediator has approximately 100 staff members at the central office in Paris and almost 300 throughout the French Republic. During his\(^1\) term, he cannot be removed from office except under extraordinary circumstances and his term cannot be renewed. The Mediator may run for elected office during his term as Mediator only if he held the office prior to accepting his appointment.

The scope of the Mediator’s jurisdiction is very broad. He is charged with the resolution of issues arising out of “administration,” which includes national, state, local government offices, public establishments, and any other organization charged with serving the public.

\(^1\) The masculine pronoun is used because the current incumbent is male and there has never been a female Mediator of the Republic.
The Mediator of the French Republic does not belong to the executive, legislative, or judiciary branches of the government. This independence was formalized by an amendment to the governing statute in 1989 which clarified that the Mediator will be an “independent authority” who “within the limits of his role receives no instructions from any other authority” (MOR, 2003, p. 22).

All individuals living in France or its overseas departments may seek the assistance of The Mediator of the French Republic. Citizens can go directly to one of the Mediator’s departmental delegates or can request the assistance from their parliamentary representative, who will then refer the matter to the Mediator. The Mediator can also, in special cases, consider complaints from citizen without a referral from a Member of Parliament.

In addition to the general mission to resolve citizen complaints, the Mediator is also specifically charged with the protection of those who are disadvantaged by economic status or otherwise. The Mediator is directed, as described by commentary within the annual reports, to focus “particular attention to people on the fringe of society, to the acknowledgment of the rights of the worst off, and to fight against outright poverty and exclusion from society” (MOR, 2003, p. 14). This mission is reiterated at every level of governmental discourse, as is the commitment to “adapt to changes in society and to reconcile strict equality of rights with the equality of opportunity so as to benefit underprivileged individuals or classes” (MOR, 2003, p 40; Council of State, 1996).

The Mediator of the French Republic can recommend equitable relief for individual citizens and the general revision of applicable codified law. The Mediator can address not only procedural errors by administrators, but can also suggest modifications
to laws (MOR, 2003). Even when legal proceedings have been commenced, the Mediator can go to the administrative authority in question to try to effect a settlement.

Further, the Mediator maintains the right to intervene in a legal action if required to protect the interest of the equity for the complainant. The Mediator cannot question the validity of a court ruling, but can “make recommendations to the organization in question after a court ruling and …can propose an equitable remedy if an inequity comes from the application of texts [laws]…not foreseen when the legislation was drawn up” (MOR, 2003, p. 37).

The Mediator can only recommend, not require, equitable relief or legal reform. As the Mediator acknowledges in one of his annual reports to Parliament and the President of the Republic, “The Mediator cannot decide or impose. He must persuade and convince” (MOR, 2003, p. 51).

Key Elements of The Mediator of the French Republic

The key elements of the mission and activities of The Mediator of the French Republic were identified using quantitative and qualitative data. This data included the qualitative data collected during interviews and the quantitative and qualitative data collected from secondary sources such as the office’s annual reports, monographs, journal articles, newsletters, and official websites and publications. These sources enabled the division of the major goals and functions of The Mediator of the French Republic into seven main elements: improving laws through reform proposals; increasing access to justice and fostering dialogue; teaching the value of consensus-based dispute resolution; protecting collective and individual interests; protecting individuals against
institutionalized discrimination; providing fairness (impartiality and neutrality) and
accountability (investigation, injunction, and discipline); and providing equitable
remedies to complement legal remedies. Each of these elements were examined and then
compared with the elements of other mediation and ombudsman programs. Finally, the
elements of The Mediator of the French Republic were evaluated, as a whole, for their
potential to support community.

Improving laws through reform proposals

As outlined in The 30th Anniversary Report of the Mediator (2003), substantial
changes to the laws establishing the Mediator’s powers occurred in 1976. These changes
enlarged the Mediator’s reform proposal powers. Whereas the original enacting
legislation gave the Mediator the ability to make suggestions for changes to the internal
procedures of French administration, the 1976 amendments gave the Mediator the power
to “suggest any modifications to legal texts or rules that he deems justified” (MOR, 2004).
The report explains the utility of this enlarged power:

The numerous claims sent to The Mediator of the French Republic create
many occasions to pinpoint poor procedure following, the insufficience
[sic], or the maladjustment of a norm. If one of the tasks of The Mediator
of the French Republic is to obtain out of court settlements in individual
disputes, it is also necessary that he be able to suggest changes to
administrative methods or a modification to texts when they are the cause
of a recurring malfunction or inequitable situations. These two modes of
action are totally complementary (MOR, 2004, p. 44).

The Mediator’s annual reports in 2005 and 2006 also highlight this reform power
as one of the most important and defining features of the Mediator’s work. Both
reference the need for the reform proposal power to help French law and administrative
procedure adapt to social change and to address unfair results that were unanticipated
when the laws or procedures were created. The 2005 annual report states:

When an administrative decision, though legally founded, violates human
rights, the Mediator of the French Republic is empowered to make
recommendations in fairness …[and] equally has an important reform-
proposal power with which he helps improve administrative and legal
procedures so that the law can be adapted to social changes, and in
iniquities [sic] stopped (MOR, preface, 2006).

The annual reports of the Mediator document the types of reform proposals
submitted to the French Parliament and also track whether the proposals have resulted in
change. The 2003 annual report states: “the [reform] proposals cover the vast domain of
French administrative life and concern very varied sectors: the improvement of the
situation of people with little income, improving the equality of opportunity for
handicapped people, or improving the public health system and the rights of patients.
Furthermore The Mediator of the French Republic has been closely associated with the
major ‘face-lifts’ of the administration and the improvement of day-to-day relations with
citizens” (MOR, 2004, p.47). Similarly, the 2004 annual report states: “[The proposals]
concern all aspects of life. Some of them aim at stopping tragic situations, whereas other
more modest ones tackle small everyday problems, which when juxtaposed, tend to
become societal problems”(MOR, 2005, p. 60).

The 2006 annual report describes the importance of reform to meet changing
social demands. It states: “In terms of reform, the Mediator of the French Republic has a
large field of action at the heart of on-going debates: changes in the family, professional
mobility, harmonization of European and national laws, protection of citizens and
consumers, disabled persons, work accidents, and occupational diseases” (MOR, 2006, p. 79).

The 2006 annual report also reports that it has become more important to work with the French government and other countries to eliminate conflict between French and other European law within what is described in the report as the “European Community” (MOR, 2007, p. 23). The 2006 annual report explains that the EU has laws and legal definitions that are sometimes in direct conflict with related or intersecting French law. Consequently, an increasingly important role of the Mediator is to discuss with French Parliament the incompatibility between laws of the European Community (EU) and French law. Thus, the Mediator hears complaints about unfair results caused by this incompatibility by both EU citizens living in France and French nationals who have lived for a time in other EU countries but then return to France (MOR, 2007, p. 23). The Mediator strives to alleviate any hardship caused and to strengthen the relationship with his EU counterpart, the European Mediator.

The quantitative data included in the Mediator’s annual reports track the numbers of proposal submission and adoptions each year. These data show that in 1998, 29 proposals were submitted and 23 adopted; in 1999, 15 were submitted and 7 adopted; in 2000, 20 were submitted and 12 adopted; in 2001, 11 were submitted and 14 adopted; in 2002, 17 were submitted and 22 adopted; in 2004, 21 were submitted and 17 were adopted and this was reported to be “slightly above the figure for 2003” [2003 data were unavailable for this analysis]; and, in 2005, 18 proposals were submitted and 13 were adopted.
Both the data and the commentary reflect that many of the reform proposals are met with parliamentary approval, although a good deal of consultation between the Mediator and the ministers and their staffs is often necessary. Further, the data show that some reform proposals take a number of years to be approved (MOR, 2005, p. 15). In fact, the Mediator expressed great satisfaction that one of these proposals, to abrogate the rule that patients must be taken to the hospital nearest their residence, was adopted “after thirteen years of perseverance” (MOR, 2005, p. 66).

During a group meeting with the staff in the Paris office of the Mediator in May, 2006, one of his top advisors confirmed this process of reform proposal preparation, review, and negotiation (Sironneau, 2006). He explained that the complaints they hear are often technically difficult, involving specialized or complicated areas of the law. In these cases, they sometimes seek the assistance of legal scholars to help craft recommendations for legal reforms. If such a recommendation for reform is deemed appropriate, then the Mediator will first speak with the Member of Parliament who referred the complainant. He will also then speak directly with a Cabinet Minister, particularly if he knows the minister personally. This is often the case, as the Mediator at that time was a former cabinet minister. Sometimes, as a result of these conversations, the Minister agrees to propose a change in the law. Other times an agreement is not made, and the Mediator may then lobby for the change with other legislators.

For this reason, the advisor to the Mediator explained that the work of the Mediator is not always faster than traditional court proceedings. Given the complexity of some of the issues and the desire to use individual cases to inform general reform proposals, it often takes a long time to reach agreement in some cases. In fact, there are
often parallel processes taking place in any given case. The advisor explained that the Mediator might be attempting to arrive at a negotiated solution while a court case is pending. He also clarified that, while the Mediator cannot go against the decision of a court, he can suggest additional remedies using equitable powers or by proposing reforms to law or procedure (Sironneau, 2006).

Day-to-day applications of these processes were discussed at length by one of the delegates of the Mediator during a meeting in Annecy, France, in May 2006 (Bazile, 2006). She explained that an area of particular legal deficiency is the definition and application of employment benefits. She explained, for example, that for the purposes of computing unemployment benefits, public service employment and private employment use different criteria to tally time and establish the right to benefits. Since some employees work in both public and private sectors, they do not meet the strict criteria for coverage in either sector. Both the public and private sectors are justified in not awarding benefits when the employee’s time is split evenly between sectors. Other citizens have reported that there are also inconsistencies how eligibility for employment benefits are calculated. For example, one sector counts days, the other counts hours. The delegate explained that the situation is even more complicated due to inconsistent funding of employee benefits across France. Sometimes, when one of the employers is a municipality, she finds that the “town hall” doesn’t contribute to the national system. In those cases, either the cities fund employee benefits funded like a private employer by joining with other municipalities to form a collective or they are not part of any system at all (e.g. very small towns). Therefore, she must work with the entities to craft an equitable solution outside the strict legal parameters (Bazile, 2006).
The Mediator’s delegate explained that other delegates have reported the same problems in their semi-annual reports to the Mediator, and that she would meet with other government officials about this to discuss the “judicial vacuum” caused by the ineffective interface of the statutes. She explained that two times a year they compile statistics about the complaints that they have handled and illustrate the major themes through a few specific cases. Since only the Mediator can recommend changes to law, the delegates can only give input to the reform proposal process through their reports. In the case of the employee benefits issues, she was hopeful that her reports and the reports of other delegates would eventually result in a successful reform proposal by the Mediator to change the law (Bazile, 2006).

The delegate also described that the Mediator’s work can result in the reform of administrative procedures. She explained that delegates sometimes discover in the course of their investigations that others have been similarly impacted by erroneous administrative actions. For example, she discovered that a complaint brought to her by one individual, accused of speeding and fined inappropriately, was caused by an administrative policy error that had affected many others as well. In France, because radar picks up speeders automatically, citizens are often notified only after the fact when they receive a citation in the mail. In this case, there was no notification given. The fines were compounded because they were not paid, and the citizen’s bank accounts were charged. Such action is usually only taken after four separate letters have been sent to the accused. When the delegate investigated, she found that ten other citizens had made similar complaints. She was looking into the matter, because she thought it highly unlikely that ten individuals would make up such a story. If she found that the police
were in error, she would recommend that the fines of all the individuals be forgiven, the banks records adjusted, and the procedure for collecting fines corrected.

*Increasing Access to Justice and Opening Dialogue*

As described in *The 30th Anniversary Report of the Mediator* (2003), any person living in France can make a complaint to the Mediator. There are no limits concerning nationality, a “foreign citizen” living in France can use the services if the complaint arose from the acts of a French administrator or the application of French law (MOR, 2004, p. 26). However, per the originating statute and continuing until the time of the 2003 report, direct access to the Mediator by ordinary citizens was limited by a Parliamentary filter. The Mediator was to act only after being called upon by a Member of Parliament (MP) who received a complaint from his/her constituents. After complaints were received by MPs or senators, they would “judge whether the complaint falls within the scope of the role of The Mediator of the French Republic and is worthy of his involvement” (MOR, 2004, p. 27).

The Parliamentary filter was described as a problem by one of the advisors to the Mediator, who expressed that the filter can potentially limit the effectiveness of the office (Sironneau, 2006). He suggested that this referral process has been demanded by the Parliament because the MPs wanted to get the political capital that resulted from helping solve the problems of their constituents by making the referrals and communicating the outcomes.

The advisor maintained that a sensitivity regarding separation of powers was also relevant to the development of the process through which cases are referred through the
MPs. He explained that there was some controversy when The Mediator was created because legislators feared that their power to interface with citizens would be adversely impacted. He hoped that the model would change and citizens would be able to come directly to The Mediator. He pointed out that only two counties, France and England, have this filter (Sironneau, 2006).

*The 30th Anniversary Report of the Mediator* (2003) supports the view that the Parliamentary referral process was based on political, rather than functional, considerations. The report discusses that in both England and France, there have been longstanding strong parliamentary traditions and strong administrative courts to protect basic rights. The report states: “In both of these counties Parliament exercises true control over the government, and the administrative courts sanction public action, assuring the very real role of protecting freedom [and] the French Mediator and the Parliamentary Commissioner for Administration[England] are not called upon directly by the citizen, but via an MP” (MOR, 2004, p. 65). The report contrasts the French and English model with the ombudsman model in other countries, such as Sweden, where the ombudsman was created to provide better representation to citizens and to limit “royal absolutism” (MOR 2004, p. 65). The report describes that, in Sweden, since there was not a strong parliament, the ombudsman needed to be able to respond directly to citizens in order to protect liberties and fundamental rights.

This tension regarding separation of powers, representative governance, and the role of the Mediator as contrasted with the roles of Parliament and the administrative courts, is mentioned in all annual reports reviewed. The 2003 report, in addition to the discussion above, included the following language showing marked deference to
legislators: “The Mediator isn’t called upon directly by the people, but through a Member of Parliament or a Senator, as elected representatives have traditionally fulfilled the role of intermediary between citizens and public authorities” (MOR 2004, p. 10).

In the 2004 annual report, the commentary discusses the controversy that still exists regarding the parliamentary filter. It describes “an increasing recurrence of the question as to whether it is appropriate to maintain what could be called the ‘parliamentary filter,’ i.e. the citizen’ obligation, in the sense of Article 6 of the law dated 3 January 1973, to file …via a member of parliament, deputy or senator. In view of these question, it is interesting to note that 32% of the complaints were, in fact, sent directly to there central services, either by mail or e-mail. Nevertheless, if the complain is not filed via a member of parliament and is considered acceptable, the complainant is asked to regularize his demand to comply with this obligation” (MOR, 2005, p. 10).

In 2004, the newly appointed mediator, Jean-Paul Delevoye, appointed an “emergency unit” to deal with issues that could not wait for formal referral through MPs (MOR, 2005, p. 3). In addition to this special screening of emergencies, by 2005, an internal screening process had been implemented to deal with the increasing numbers of complaints filed directly with the Mediator or his delegates without first going through a Member of Parliament. This “Admissibility section” asked complainants to “regularize” complaints by forwarding through an MP, but the office of the Mediator would continue to work on cases during that process (MOR 2006, p. 40). By 2006, the annual report stated that out of a total of 62,822 cases received, only 48.4% of those were done through a referral through an MP or a senator. This percentage included 6.2% that were “regularized” after initial filing. Mr. Delevoye also emphasized in his 2006 report that
“making the law easily accessible” was a priority for his office, even when the cases fell outside his jurisdiction, through a strong resource and referral function that would guide citizens through other appropriate channels to resolve their complaints (MOR, 2007, p. 73).

The mission to make justice accessible was also accomplished through the enlargement and enhancement of the role of the regional delegates. This was confirmed by the Mediator’s delegate (Bazile, 2006). The delegate explained that while she could not offer any remedy in cases in which she did not have jurisdiction, she could always make appropriate referrals. For example, she was not permitted to handle employment cases or cases involving industrial injury. She could, however, give general information, such as informing citizens about their right to second opinions in cases involving fitness to work. Further, the delegate stated that the most important qualifications for her position were “people skills” and knowledge of other offices and resources that could be called upon to help resolve issues (Bazile, 2006).

The annual reports from 2003-2006 also report the important development of the role of delegates of the Mediator throughout all departments of France. This new emphasis on strengthening the presence and competence of the delegates has been responsive to access to justice concerns, especially among the poor (MOR, 2007).

Originally, the mediator did not have regional representatives. However, by 1978 there was an amendment to the governing law that added “departmental correspondents” who later became called “representatives” and, most recently, “delegates” (MOR, 2004, p 60). In 1980 there were only one or two representatives per department. In response to increasing numbers of complaints and concern about the isolation of the poor from
government services, in 2000, 130 new representatives were added in the suburbs. As the 2003 report states: “The representatives work from either the Prefecture of each department or, when they are working in run down suburbs, in buildings that are easier for the underprivileged members of the community to access. Wanting the representatives to be close to the population, The Mediator of the French Republic, since 2000, prioritized their installation in existing local structures: town hall, offices of law and rights, offices of public service, etc.” (MOR, 2004, p. 59).

By 2002, there were 260 representatives (MOR, 2004, p. 60) and, in 2006, there were 270 delegates. The 2006 report emphasizes the importance of the delegates in making legal remedies accessible, stating: “The proximity of the delegates’ offices, the fact that their services are free of charge, and their readiness to listen reassure the persons puzzled by complex procedures and anonymous voice servers; they thus help to ease often tense situations, through clear and impartial explanations” (MOR, 2007, p. 72). The 2006 report also states that during that year delegates handled 90% of the cases referred to the institution (MOR 2007, p. 72).

In 2006, there was also an acknowledgment of the new challenges raised by the increased access afforded to citizens through electronic communications, including telephone and email. For example, the 2006 annual report states that the number of email complaints received during that year totaled 3,119. This was a 100% increase over the previous year. The delegate of the Mediator explained that the delegates screen written requests for assistance by telephone. The telephone conferences helped them determine whether or not all proper administrative channels had been exhausted and whether or not an MP had made the referral. She added that the MP does not have to represent the area
in which the complainant resided, as long as they were a sitting MP. She explained that if the telephone screening and telephone interviews with the complainant revealed an insufficient “intellectual level” or level of competence, then the delegate would report that it was deemed impossible to build an appropriate file without a personal interview. The delegate would then meet personally with the complainant and make appropriate copies of documents for the file, send copies to the other parties and to the MP. She also stated that the legislature is very protective of the right to refer all cases because it helps build relationships and positive public relations with their constituents (Bazile, 2006).

In sum, the increasing importance of the departmental delegates throughout France and the accessibility afforded by telephone and email communications has changed the way the Mediator receives complaints. Further, economic and other pressures have given rise to increasing numbers of emergency situations that require immediate intervention. These factors have caused significant “relaxation of the referral procedure,” but referrals through Members of Parliament are still perceived as politically important (MOR 2004, p. 27, MOR, 2007).

The access to law mission also has resulted in expressions of concern about the increasing complexity of French laws and administrative procedures. While citizens have traditionally been held to the standard of compliance to law without regard to actual knowledge of those laws, the Mediator expressed the concern that complexity alone was making the law increasingly inaccessible to ordinary citizens. In the 2005 annual report, he writes:

Our objective is to make the law easily accessible to all citizens, regardless of who or where they are: disabled persons, entrepreneurs, employees. The question of access to the law is a real societal issue. It is
an illusion to believe that ignorance of the law is no excuse, when more and more people do not know their rights, or where to obtain useful information, or the right person to talk to in an administration that, for our most fragile and less-informed compatriots, it turning into a real obstacle course (MOR, 2006, p. 3).

Additional factors relevant to the goal of increasing access to justice are the Mediator’s visibility and the level of public awareness about his mission and the range of services offered by his office. Interns in the Parisian office of the Mediator, both students of law and society in French universities, raised this issue (Delorme, Dallery, 2006). They shared that neither had heard of the office before their assignment to the office of The Mediator of the French Republic for three-month internships. They reported that their fellow students also did not know about the Mediator or his function and that they had to explain at length the nature of their internship assignment to those students. They felt it was a problem that teachers do not include it in discussion at the primary and secondary school levels. They agreed that the newsletters now being published under the direction of the Paris office are a positive step toward better public awareness (Delorme, Dallery, 2006). An advisor to the Mediator concurred that the effectiveness of the Mediator in the provinces would be enhanced if the public were better educated about the services available. He explained that many citizens, especially those in outlying areas, do not know about the Mediator (Sironneau, 2006). This contention has also been made in the French press (Moreau, 2002).

When this issue was shared with the mediator’s delegate, she responded with “All I know is that I’ve got too many cases to handle!” (Bazile, 2006). At the time of the interview, the delegate reported that she had thirty open files. She explained that at the same time the previous year she had sixty open files, so she expected that there would be
more to come. There were three times as many contacts as files, because many complaints were screened out as inappropriate for further action. She also pointed out that it is not unusual for people to not know about services that they have never needed. Based on her experience, when people have a situation where the Mediator would be helpful, for example when they are in conflict with public service providers, they are then told about the Mediator by one of the administrators involved in the controversy and the file is appropriately forwarded for disposition. She found that the most reliable ways for citizens to get information about The Mediator of the French Republic and her role as delegate were through the internet and through referrals by administrative offices with which they are in conflict. In addition, she explained that sometimes a delegate in one office makes referrals to another delegate due to expertise or geographic considerations (Bazile, 2006).

The delegate of the Mediator was encouraged that the Mediator had begun distributing large, glossy newsletters each month, but regretted that they were only sent to fairly high-ranking administrators. She suggested that the internet was the best resource for general information, but acknowledged that many of the poorest citizens may not have access to computers or the language skills to understand the content of the websites. She also maintained that the visibility was not a serious problem because the Mediator appears on television to discuss his function and magazines have carried stories. She stated that she had been quoted in the local press, but then acknowledged that not all delegates are willing to speak to the press (Bazile, 2006). Her conclusion that access was not an issue may have also have been based, in part, on the significant recent investments
in the redesign of the website and the publication of an electronic newsletter (MOR, 2005, p. 15).

The delegates’ challenge to providing access to law for citizens, as reported by the delegate to the department of Annecy, is that there is not enough time or other resources to adequately cover all of their responsibilities. Like many delegates, the Annecy delegate’s position was held in addition to other professional duties. Her fulltime job was as the communications attaché for the prefecture of Haute Savoie, and she had also served as the Mediator’s delegate since 1999. She assumed the position when the former delegate, who had been in the same prefecture’s administrative area, became ill. She was one of four delegates serving the citizens of Haute-Savoie, but she was the only one in Annecy, the capital. She enjoyed the work because it allowed her to get more deeply involved with issues that she only knew superficially as communications attaché. She often did the work for the Mediator during the evenings or on weekends because she was very busy in her fulltime job and supervised five staff members. For example, when there was a fire in the Mont Blanc tunnel, she worked around the clock but still continued to perform the delegate function as well. She pointed out that this may be the reason that retired civil servants serve as delegates in many prefectures (Bazile, 2006).

The delegate to the Mediator in Annecy reported that delegates are supposed to spend one to two half days a week on their work for the Mediator. In reality, she reported that it often takes much longer than that to handle all of the open cases and to review new complaints. They were not paid a salary, but received 350 Euros a month to cover expenses and to reimburse them for travel and other costs. They did not have to make an accounting of those costs. If there were insufficient funds in the budgets available
through their fulltime administrative position to cover expenses related to their work for the Mediator, then they needed to use the 350 Euros to buy envelopes, paper, and other supplies. The prefecture typically provided office space and a secretary for delegates (Bazile, 2006).

The delegate interviewed for this study was pleased that the Mediator added more delegates over the last few years because the demand was high and there were often long distances to be traveled by citizens seeking assistance. The fact all the prefectures were going to have delegates had, in her opinion, made a positive difference in response time and effectiveness (Bazile, 2006).

**Teaching the value of consensus-based dispute resolution**

The Mediator’s official mission, as outlined the enacting legislation of 1973 and subsequent amendments, does not include a duty to teach citizens the value of consensus-based dispute resolution or to work collaboratively with courts and legislatures to reduce unnecessary litigation or other forms of contention. However, the annual reports of the Mediators and other documents reflect a firm commitment to this work. This commitment is based, in part, on the perceived need to educate citizens not only about fair and constructive conflict resolution, but also for the need for fair laws and public administration.

*The 30th Anniversary Report of the Mediator* (2003) discussed the importance of the preparation and dissemination of the Mediator’s annual reports in its educational mission: “The publication of an annual activity report is the key moment of contact for The Mediator of the French Republic with citizens. This publication was set up from inception by article 14 of the law, in the form of a presentation of a report to the President
of the Republic and the Parliament. The law of April 12th 2000 concerning the rights of citizens in their relations with administrations goes further, specifying that this presentation would take place during a session open to the public before each of the two elected assemblies’” (MOR, 2004, p. 70).

Related to this educational mission is the Mediator’s involvement in the National Consultative Commission for Human Rights, created in 1947. The 2003 annual report describes the commission and its work “to insure the reciprocal passing of information from the state to society regarding human rights, and to guarantee the plurality of convictions and opinions in this domain” (MOR, 2004, p. 70).

In 2004, the teaching mission of the office became even more explicit and was referred to by the Mediator in his editorial section of the report simply as “pedagogy.” He described that his office’s method of acting “entails pedagogy, because a complainant is not necessarily right, but will be in a better position to accept the decision taken against him if it is explained to him (MOR, 2005, p. 3). In the next annual report in 2005, he elaborated on this theme, calling the “pedagogy of no’ as important as the ‘pedagogy of yes,’ even if it is just to reduce this feeling of arbitrariness or injustice, a source of current tensions” (MOR 2005, p. 3).

The Mediator explained that, in addition to trust in the inherent fairness of governmental and administrative actions necessary to consensus-based dispute resolution, there is also a need for an understanding of the importance of the law serving the greater good. He writes:

…I believe that our fellow citizens, who require to be told the truth, should be spared certain illusions. The Mediator is not and should not be regarded as somebody who will solve all problems and systematically
agree with the complainant against the administration. One must be able to reject an unfounded complaint and explain that the position of a public service is compliant with the law and the general interest (MOR, 2006, p. 3).

The Mediator also explained in his 2004 annual report that the teaching will be reciprocal and the Mediator needs to also learn from citizens and from other public and private sectors. He wrote:

[The Mediator’s work] involves exchanges and being open to others: the need for mediation is highly present in our society and explains the growing interest shown in different activity sectors for this conflict settlement method. In the face of this tendency, the Mediator of the French Republic must not feel that he has a monopoly on the values of mediation and ignore what mediators and conciliators in companies or public services, social organizations and communities are doing in their own fields and at their own levels (MOR, 2005, p. 3).

Finally, the Mediator, in his 2004 report concludes that one of the central values of mediation is pedagogy “because to explain is also to respect” (MOR, 2005, p. 3).

The potential power of the Mediator to affect public opinion through pedagogy and the need to protect the Mediator’s reputation for credibility, neutrality, and impartiality to accomplish this and his other missions, is evidence by the Article 14a of the enacting statute of 1973. It states: “It is punishable by imprisonment from one to six months and a fine of 2,000 to 10,000 francs, or one of the two, for any person to put the name of The Mediator of the French Republic, with or without this title, in any propaganda document or advertisement whatever its form” (MOR, 2004, p. 76). This was modified later to say: “Any person who includes or leaves the name of The Mediator of the French Republic, whether or not is followed by his capacity, in any propaganda or advertising document of any nature, will be imprisoned for one to six months and fined in the sum of 3,750 Euros” (MOR, 2005, p. 79).
Outside of France, the Mediator is involved with educational efforts through international ombudsman associations, such as the International Ombudsmen’s Institute (IOI). The mission of the IOI, which includes national mediators, regional, local and special-issue ombudsmen, is to disseminate information about the value of mediation and other consensus-based dispute resolution methods throughout the world (MOR, 2004, p. 69). The Mediator’s annual report in 2003 reported that Bernard Stasi, then Mediator, was elected as the European representative on the executive committee of the IOI and was also instrumental in establishing an association of French-speaking ombudsmen and mediators (AOMF). Stasi was also elected president of this organization in 2001 and the representation of the organization at that time included 30 French-speaking countries on five continents (MOR, 2004, p. 69).

The Mediator also works with individual representatives from other countries to teach about the French model so that it might be adapted to other contexts. For example, the 2006 Annual report chronicled visits to the Mediator occurring during that year, including the author’s visit in May 2006:

Mediation in the world: A number of organizations and personalities around the globe are showing interest in the Institution, and are learning from the Mediator of the French Republic about his role and activities. In 2006, the services of the Mediator of the French Republic received successively three Chinese delegations. They also received the chairman of the Human rights section of the Turkish Prime Minister’s cabinet, as well as Becky J. Hoover, and American lawyer and academic (MOR, 2007, p. 70).

In addition, French departments overseas, such as in the French West Indies, have their own delegates of The Mediator of the French Republic who are supposed to perform pedagogical, as well as conflict resolution functions. However, it is still a challenge for
very small, isolated populations to receive instruction or assistance from the office, as was discovered during the author’s visit to the small island of St. Barthelemy in the French West Indies in November 2007. Attempts to reach the mediator’s delegates in the nearest offices of the prefecture in Guadalupe and St. Martin’s were unsuccessful. When inquiries were made at the local library in St. Barthelemy about the prefecture’s whereabouts, it was confirmed that there was no local branch of the prefecture’s office on the island. Since the nearest office could only be reached by boat or small plane, it posed a challenge for both direct service delivery and the teaching mission of the Mediator.

On the local level, the delegates reported challenges in their pedagogy mission. It was reported that some topics have become increasingly difficult for citizens to understand, and this misunderstanding has resulted in increased complaints. For example, the delegate from Haute Savoie discussed that the issue of urban development and zoning was increasingly problematic. She explained that the local prefecture is deemed to have “management of the mountain” responsibilities in her local area around Annecy in the French Alps. If the town makes zoning decisions, the prefecture can veto those changes. The land, especially near Lake Annecy, is in high demand. There are also many rules governing construction that are intended to maintain a good aesthetic value and to protect safety. For example, avalanche zones must be respected. These are difficult issues for citizens to understand because their property values decline if there are restrictions on square footage for new buildings. Other administrators often refer frustrated citizens to her office for assistance in resolving the conflict (Bazile, 2006).

The delegate provided case files of some of the more recent complaints that she has handled. One example involved a citizen who was angry because lakeside property
he had purchased decreased in value when it was determined to be in an avalanche corridor. Further, because of the low value and building limitations, the city wanted to take the property through eminent domain. Another example involved a citizen whose building had been declared in a “red zone” where new building could not take place. This was hard for him to understand because there were many buildings there that were permitted to continue doing business in that same area. In these cases, she found that there was usually no mistake by the public administrators. There was a plan in place and it was applied fairly to all citizens. Complainants simply needed to be educated about these plans and assured that there was no discrimination involved. Once they understood this, then they could better accept the governmental actions taken (Bazile, 2006).

Protecting collective and individual interests

The 2003 and 2004 annual reports of the Mediator emphasize protection of individual rights, but also express deference to the role of representative government and the judicial system in developing fair laws and providing uniformity and evenhandedness in the application of the laws (MOR, 2004, 2005). The Mediator more explicitly addresses the issue of individual rights versus collective interests in a number of instances in his 2005 Annual Report. He stated that he perceived, in general terms, a new emphasis on protecting individual members of French society instead of building a community that would protect the interests of all. He wrote: “In a society where the sense of duty is declining while people continue to claim more rights, I believe it is particularly interesting to think about abuse of rights, deprivation of rights, and conflict of rights” (MOR, 2006, p. 3).
In the editorial comments to the 2006 annual report, the Mediator made even more explicit references to a trend toward individualism over community interests and concluded that this was not desirable. He stated that this individualism did not protect individuals but, instead, left them more vulnerable. He wrote:

> We are in a society clearly tending towards the inversion between the community and the individual. Previously, it was the community that made and protected the individual. Today, emphasis is fully on the individual. The individual is given maximum freedom, and is thus prone to maximum fragility (MOR, 2007, p. 22).

Further, the 2006 Annual Report reflected the view that France had become more individualistic at the expense of more historically collectivist characteristics of French culture. The report stated:

> The institutions of the Republic are meant to be of general interest. It is essential to support this dimension which characterizes our Republic, despite a certain tendency which is looming…In fact, people no longer fight for their rights, rather they wish to exercise their rights to the detriment of others; people no longer expect the judge to say what is right, but that he becomes an instrument of personal vengeance; people no longer ask for equal treatment or equity, instead they defend their personal interests (MOR, 2007, p. 50).

The 2004 annual report of the Mediator pointed out that the need to balance individual rights and collective interests had been a topic for discussion at an international conference in which the Mediator participated in September 2004. The conference was hosted by the International Institute of Ombudsmen and attended by more than 450 mediators, jurists and others from 77 countries. The topic of the conference was “Balancing Individual Rights and Responsibilities in the Exercise of Citizenship – the role of Ombudsmen and Mediators” (MOR, 2005, p. 75). The report stated that discussions at the conference “highlighted the concerns of mediators and ombudsmen
around the world in terms of common challenges: precariousness, weakening of social links, difficulty to live together” and the “balance between the measures that are essential for the protection of our democracies and the protection of individual liberties and human rights...the respect of different cultural identities ...and the call of equal rights for all” (MOR, 2005, p. 75).

The delegate of the Mediator assigned to Haute Savoie confirmed this tension between collective and individual rights in the day-to-day complaints heard by the Mediator’s office. The need to weigh private versus collective interests was a challenge in the urban development cases that this delegate received. While she could intervene if she found that there had been favoritism shown to a party or that there had been unfairness or discrimination against the complainant, it was usually a case of public safety or collective interests at the root of the actions taken by the government. She explained that there was a legitimate interest in protecting against danger and controlling urban development to maintain the beauty of Annecy in its setting in the French Alps, but that citizens often concluded, in her words, that the “Mayor was mean and unfair.” She hoped that continuing efforts to educate citizens about the complexities of these legal and safety standards would reduce these suspicions of arbitrariness and would help citizens accept that the collective good outweighed individual property interests in this domain (Bazile, 2006).

Protecting individual rights against institutionalized discrimination

When the office of The Mediator of the French Republic was created in 1973, the enacting legislation did not explicitly charge the office with protecting human rights against discriminatory laws or administrative practices. The law did, however, direct that
the Mediator would act “when it appears that the application of legislative or regulatory provisions would result in an injustice” (MOR, 2005, p. 79). Mediators have made clear, both in their editorial comments and the annual reports, that this charge requires special attention to “equal opportunity” and the most “underprivileged individuals or classes” (MOR, 2004, p. 40).

The Mediators have not typically referred to minority rights with respect to different racial and ethnic groups. This is consistent with French governmental policy, which has traditionally adopted a racially neutral stance in their law and public administration. As discussed in the New York Times, “France does not gather data according to race, religion or ethnicity, even in its census. The practice has been seen as an ill-conceived American invention that encouraged divisiveness” (Sciolino, 2004, p. 1).

The 2004 annual report describes one exception to this rule in the treatment of “Harkis” -- the term derived from Arabic to describe the Muslim Algerians serving the French army during the Algerian War of Independence from 1954-1963. The report explained that repatriated French Muslims and their descendants faced unique issues and that the office would attend to these issues as part of the office’s “general competence” since it was deemed that a special mediator need not be appointed to ensure the protection of the rights of this ethnic group (MOR, 2005, p. 59). In 2004, Aissa Dermouch, an Algerian-born educator was appointed as the only prefect (department head) in France who was foreign-born or Muslim. The question had been raised about whether or not this was a function of affirmative action (Sciolino, 2004).

Nicholas Sarkozy, now the President of France, discussed during a debate in November of 2003 that, despite the traditional French view, he supported the efforts to
provide special aid to those living in the poorest suburbs. He stated: “There are parts of France and categories of French citizens who have loaded on their heads so many handicaps that if we do not help them more than we help others, they will never escape”(Sciolini, 2004, p. 1). Jacques Chirac, then President, responded during a different public meeting that discrimination could not be positive and that it was not “acceptable to “appoint people based on their origins” (Sciolini, 2004, p. 1).

Similarly, The New York Times reported in 2007 that there was some controversy over the opening of a new museum on immigration in Paris, because, they wrote: “Multiculturalism, which by its very existence the museum takes for granted, is an alien and incendiary concept here…being a French citizen means you’re not categorized as African French or Southeast Asian French or West Indian French; you’re just plain French. That’s the republican ideal, citizenship bestowing theoretical equality, belying the reality of racism. French school children are steeped in the concept of a single France (Kimmelman, 2007, p. 1).

Information gathered at the central office of The Mediator of the French Republic in May 2006 confirmed that there were no available data on the racial or ethnic composition of complainants or respondents (Sironneau, Calazel, Delorme, Dallory, 2006). The staff explained that under French law it was illegal to collect data on characteristics, such as race, religion or ethnicity. This longstanding French policy had, even then, been challenged by French higher education institutions and others because it did not recognize racial categorization as a valid factor in employment or educational admission decisions (Sciolino, 2004).
As a result of the limitations on demographic data collection, a list of prepared questions was not used for the collection of data about the staff of the Mediator’s office or the complainants and respondents. The high ranking staff with the office of The Mediator of the French Republic confirmed during these meetings that neither counting people by demographic categories nor affirmative action, which the French translate as “positive discrimination,” was widely seen as a good solution to racial or other inequities (Sciolino, 2004).

In May 2006, the only reports of the Mediator that were available in an English version were the 2004 Annual Report and the The Thirtieth Anniversary Report (2003). Consistent with other information gathered at the Paris office of the Mediator and the press coverage in France on these issues, there were no demographic data on complainants in those documents. The most recent annual reports do include the following demographic data, however still without reference to race or ethnicity. The following data summarize certain characteristics of complainants between March and September 2006, as included in the 2007 annual report:

**Category**
- Men: 55%
- Women: 39%
- Couples: 5%

**Age and Status**
- 1 out of 10 persons is aged below 30
- 1 out of 4 persons is retired
- 2 out of 3 persons are of working age
**Place of residence**
4% of the complaints are from people living outside France
22% are from people living in the Paris region
74% are from people living in other parts of France (including the French overseas administrative departments and territories)

**Socio-economic background**
33% are from people from a modest background
37% are from people from an average background
23% are from people from a rich background (MOR, 2006, p. 7).

While these demographic data do not provide enough detail for conclusions about the effectiveness of the Mediator in reaching all segments of the population, they do suggest that most of those seeking assistance are at least thirty years old (66%) or retired (25%). Thus, it is fair to conclude that the youths of the riots in banlieues (suburbs) have not, typically, sought the Mediator’s assistance. Further, the majority of complaints come from areas outside of Paris (74%).

Most recently, the Mediator has stated that the poorest are often those most disadvantaged by the system of public laws and administration. He stated in the 2006 annual report: “Finally, in an increasingly complex society, access to law is often a real problem. Here again, it is not fair that the most helpless may be the first to be penalized” (MOR, 2007, p. 12). This theme is more fully developed later in the report which stated:

There is an obvious reality: for many citizens, access to the law is a problem. *Ignorance of the law is no excuse*, but the complexity of laws and the labyrinth of procedures often constitute insurmountable barriers, thus creating painful inequality. The Mediator of the French Republic is particularly aware of the fact that the individuals most affected by this situation are the most helpless, those who need public support most but who, in a lot of cases, do not even have access to clear and updated information about their rights (p. 49).
The 2006 report conceded that French society has not always fully protected all members and posed the question: “How good is a society that cannot maintain its cohesion by protecting the most fragile?” (MOR, 2007, p. 33).

Apart from classes of individuals who are disadvantaged, the annual reports of the Mediator also stressed that anyone could suffer special hardship due to life circumstances beyond their control. The 2006 report stated: “Any of us can suffer misfortune, we are all potentially vulnerable…In a system which tends to neglect the fragile, our duty is to strive, without naivety, for their protection (MOR, 2006, p. 32).

The 2006 annual report pointed out that the protection of individual rights could sometimes also serve the common good (MOR, 2006). The report described how the charge of The Mediator to suggest reforms to laws based on inequities raised in individual cases could serve the greater good at the same time an individual’s issues are addressed. It stated:

The cases examined by the services of the Mediator of the French Republic often raise questions of social changes or iniquities [sic] to which politicians and lawmakers must find answers. Beyond the isolated actions, the Mediator of the French Republic, his delegates and the experts in his central services are attentive to the unjust character of each situation. Behind an individual complaint is often a problem that calls for a collective response (p. 10).

For example, one key area of concern for the Mediator during 2005 and 2006 were the collective rights of disabled persons. The Mediator’s report in 2006 explains how individual cases, brought to light by members of the French press, social agencies and court personnel, had given rise to a commitment to broad reform in the area of disability services:
Sometimes, the attention of the Mediator of the French Republic is also drawn to a phenomenon by external players. This was the case for guardianships and the legal status of so-called “incapable” persons. Alerted by two journalists, The Mediator of the French Republic examined in 2005 the unacceptable abuse and legal loopholes which undermined the protection of the most fragile members of society. Before starting any reform proposal process, and to form an opinion of his own, the Mediator of the French Republic held several meetings with judges of the court of first instance, family associations, and private guardianship managers. He went to the Lyon region to see how the…(union of guardians in the Rhône-Alpes region) actually worked, accompanied by a member of parliament. He also met with several ministers and was auditioned by the National assembly’s law and social-affairs commissions. All the players agreed on the urgent need for such a reform (p. 10).

Other members of French society that the Mediator described as particularly vulnerable and mistreated were French prisoners. The Mediator described how the problems of this segment of French society came to his office’s attention:

At the beginning of 2006, reports about the situations of French prisons were particularly alarming. On 15 February 2006, Alvaro Gil-Robles, the Council of Europe's Human Rights commissioner, published his report, followed on 24 May, by the International Prison Observatory report, which deplored the sometimes disgraceful states of French prisons. In the aftermath of this, there was an assessment of the general situation of prisons, with the participation of delegate Mediators of the French Republic. One hundred and thirty-seven delegate Mediators of the French Republic volunteered to distribute questionnaires to some 45,000 detainees and ensured that the 15,600 answers were returned for processing, according to the rules of confidentiality (p.61).

Based on their findings of systemic problems within French prisons and the significance of the obstacles that those problems would cause in the reintegration of prisoners back into the community, the Mediator took extraordinary action and signed an agreement with the French government to establish a presence within the prisons so that prisoners could bring their concerns directly to The Mediator of the French Republic. Details of this agreement, and the Mediator’s belief in its importance for long term
community interests within France, were explained by the Mediator in his 2006 Annual Report:

The agreement signed on 16 March 2005 between the Mediator of the French Republic and the Minister of Justice kick-started the opening of delegate-mediator offices, on an experimental basis, in ten prisons. The presence of delegate Mediators of the French Republic onsite, once a week, helps improve concretely the access of 7,500 detainees to the law. It is not the fact that they are deprived of it, but rather their detention, that makes it difficult for them to have access to information, to the complaint procedures and to the services of the Mediator of the French Republic. The Mediator of the French Republic also sees a second objective in it: facilitating their reintegration into society. Handling the problems encountered by detainees and their families in their relations with administrations prepares the detainees’ release and their chances of social reintegration (p. 61).

The 2006 annual report described that the experiment of putting delegate offices within ten prisons met a significant need. It included statistics which showed that during the first year, ten percent of all French prisoners came to the offices to request assistance (MOR, 2006, p. 62). The report also described how this success in meeting a real need led the French government to announce in October of 2006 that offices of delegate Mediators would be added to each prison. Further, an oversight function was established, characterized as the “general control of prisons” and was “entrusted to the Mediator” (MOR, 2006, p. 62). This new function would also, according to the report, satisfy the new standards for prison reform instituted by United Nations Convention against torture and The Council of Europe. These groups recommended that an independent authority be given an “assessment mission” to improve actions taken to respect “human dignity” within prisons. The 2006 annual report of the Mediator states that in France, the Mediator of the French Republic will play this role (MOR, 2006, p. 1).
The 30th Anniversary Report of the Mediator in 2003 explained that the mission relating to protection of human rights has grown over the years. It states:

Promotion and protection of human rights: The Mediator of the French Republic takes part in the national and international protection of human rights. Although the legislator [sic] didn’t expressly give him this mission, The Mediator of the French Republic carries it out as part of his job defending and re-enforcing public liberties (MOR, 2004, p. 70).

The Mediator’s office has established a separate administrative unit to oversee issues of Human Rights and International Relations and it is supervised by one of the Mediator’s top advisors. The head of this unit, Michel Sironneau, explained that the central office tended to handle issues that affect the majority of French citizens, not minority populations. Further, he explained that indigent clients or those otherwise marginalized have not been the focus of the Mediator’s work. This is partly due to the fact that they must wait for referrals from members of Parliament in all but emergency cases. He explained that access to the courts has been provided to the poor at no cost through “aide juridictionnelle,” similar to Legal Services in the United States (Sironneau, 2006). His colleague disagreed with him about the quality and accessibility of legal services available to the indigent in France and was somewhat critical of these services (Calazel, 2006). Sironneau defended their quality and believed them to be as good as those available to clients with paid legal counsel.

Sironneau also commented that while discrimination cases can be heard, they are rare. He believes this is because when the Mediator’s office was created, public administrators did not perceive discrimination as a serious problem. He suggests that even now, more discrimination occurs in private relationships than in the public sphere. He cited employment matters and housing as particularly problematic. He explained that
this gap in attention to discrimination issues was addressed with the newly established High Authority against Discrimination (HALDE).

The French, according to Sironneau, do not like to concentrate on differences. He confirmed that the Mediator was not allowed to collect data on race, ethnicity, or other demographical information because of the policy called “pas du race,” roughly translating to “not about race.” He concluded by reflecting that changes should be made to more effectively address institutionalized discrimination and stated: “Égalité is a beautiful word but it cannot just be on paper” (Sironneau, 2006). He explained that the debate regarding the use of “positive discrimination” [affirmative action] was fairly recent, and that no law had yet been proposed to enact any such policies. Both he and his colleagues agreed that it might be difficult to enact corrective policies if it continued to be illegal to keep racial, ethnic, and gender statistics. They understood that the affirmative action model in the United States was heavily dependent upon the collecting and reporting of demographic data. They suggested that a new model might be envisioned in France that would accomplish some of the positive aspects of corrective measures without the divisive affects of concentrating on the differences among French citizens (Sironneau, 2006; Calazel, 2006).

In the day-to-day working of the Mediator, the staff reported that there were important provincial differences within France that needed to be considered (Sironneau, 2006). They reported that different geographic areas of France were not the same culturally or politically and that there were language differences and differences in cultures and traditions. For example, they explained that the Corsicans and Britons criticized the centralized French government for not recognizing them as separate groups.
They added, however, that there had been no disagreement about the legitimacy of a centralized legal framework or the legitimacy of the Mediator. They believed that this was in large part due to the fact that all national services, as well as the Mediator, have had representatives at the local prefecture level (Sironneau, 2006; Calazel, 2006).

The delegate of the Mediator reported that, increasingly, complainants believed that they were discriminated against. For example, she found it ironic and problematic that some said that only minorities have rights while others said that they were discriminated against because they were minorities. She acknowledged that some citizens remain angry after her intervention because they did not like the answers that they were given by her or other administrators. They had occasionally made threats against her safety or threatened to write to President Chirac to complain. She said that she wishes that she “had a magic wand” to fix all problems, but she did not. She felt that citizens have too great a sense of entitlement to public services. She felt that they believe “society owes them” and they, therefore, demanded things that they would never demand from a private business. She concluded that, as a result, when they did not get special treatment, they actually did believe that they have been wronged or discriminated against (Bazile, 2006).

*Providing Fairness (Impartiality and neutrality) and Accountability (Investigation, injunction and discipline)*

The 30th Anniversary Report of the Mediator (2003) provided valuable commentary regarding the impartiality and neutrality of the Mediator. The report explained that the French have adopted a mediation model, rather than a classic ombudsman model, as the basis for The Mediator of the French Republic because the
office was to listen and respond fairly to both complainants and administrators and encourage both sides to resolve issues collaboratively. The idea was to strengthen these relationships between the government and the people, not to act as a check against an overreaching government (MOR, 2004, p. 65). However, the report stated that the Mediator is similar to ombudsmen in that both are independent from other branches of government in order to be impartial and neutral in their response to citizen complaints.

This emphasis on collaboration with and support of the French government was politically important at the time the Mediator’s office was created (Sironneau, 2006). An advisor to the Mediator shared his personal memories of the controversy that resulted when The Mediator of the French Republic was first created. He explained that the French thought that the model seemed too Anglo-Saxon, especially since Canada used mediation so widely. In addition, he felt the concern resulted from the fact that the French are very proud of their system of public administration and administrative courts (Sironneau, 2006).

However, he explained that there was no longer any controversy. He explained that administrators have been overwhelmed with heavy workloads and knew the Mediator was very helpful to them. The Mediator has improved the quality of their work by pointing out problems and has helped them work efficiently by relieving the burden and expense of conflict resolution. Most importantly, citizens have been more satisfied because they can seek “non-legal” solutions. He explained that the Mediator had positive results in 80% of the cases, and this helped relieve a good deal of distress among administrators and the public. He has seen steady increases in the numbers of referrals to members of Parliament from the administrative bodies involved in the controversies. This
suggested to him that public administrators are satisfied with both the process and the results obtained. He explained that administrators are also reassured because the Mediator did not “choose sides” or find fault, but limited his intervention to providing a rationale and collaborative process that is fair to all (Sironneau, 2006).

This experience was confirmed by the Mediator’s delegate from Haute Savoie. She found that her credibility as a neutral and impartial party was strengthened by the support she received from her supervisors and from other administrators. She explained that if she concluded that an injustice had occurred due to favoritism, discrimination, or simple mistake, she would typically advise the administrator that he or she should change their position on the case and they would do so. In addition, at least in zoning cases she heard, the prefecture would overrule the town’s decision on zoning under his explicit statutory authority to veto municipal land use decisions. This was rare, however, because usually there was a legitimate land use plan being applied fairly by the town’s administrators. Conversely, if there had been no injustice, then she would close the case in a timely manner and notify the parties of her decision (Bazile, 2006).

The Mediator’s delegate explained that the commitment to neutrality and impartiality is the reason that full investigations must be completed. She explained that delegates are often given files that are incomplete when they accept a referral from a Member of Parliament and that the files tell only “one side of the story.” While the correspondence included in files was helpful because the chronology of the conflict and the position of the involved administrative body or public service providers could be determined, her investigations usually required many telephone calls and requests for information for clarification and additional information (Bazile, 2006).
The credibility of the Mediator and his delegates and their commitment to fair and impartial dispute resolution were described in the annual reports as central to the well-being of French democracy. In his editorial comments to his 2004 annual report, the Mediator wrote:

Therefore, this first activity report [the annual report] is also that of an observation: That of a worried society that is unsure of its values. A society which more than ever needs to recover its self-confidence…As a privileged observatory of social advancement and a moral authority whose independence is recognized by all, the Institution of the Mediator of the French Republic must strive to restore this confidence (MOR, 2005, p. 5).

Further, in the 2004 annual report, the Mediator made assurances that there would be “no taboo topic, concealed reality, or protected service or organization.” He vowed to raise even the most politically sensitive topics “if need be, in 2005, and [to] participate in the debates they will give rise to” (MOR, 2005, p. 5).

The annual report in 2006 reiterated these themes and the Mediator’s editorial comments to the report outlined the importance of fair and impartial mediation of complaints both in government and in the private sector. He wrote:

When a society abandons dialogue, it ushers in violence. This is the danger facing our democracy. A lot of companies and communities have got it right. This is why they have created mediation centres. Citizens also need to be listened to and be heeded, just like politicians. Over the years, more especially in 2006, the Institution of the Mediator of the French Republic has established itself as a place of dialogue, exchange and respect between players from different fields. By enabling them to join forces to fight for a common cause, devoid of any power struggle, it has served as a gateway for re-creating mutual trust between the constituent and the administration, between the citizen and the politician (MOR, 2007, p. 1).

The 2006 annual report also described how the reputation of The Mediator of the French Republic to provide fairness and impartiality was strengthened by legal reforms
resulting from what the French refer to as the Outreau Affair. In that case, beginning with accusations by school children in 2000, several French citizens living in Northern France in the town of Outreau were unjustly accused, found guilty, and imprisoned after poorly investigated accusations of child molestation. The convictions were eventually overturned by a French appeals court and the justice minister apologized to the acquitted and their families in a Parisian press conference in December of 2005 (Nytimes.com, 2005).

Public dissatisfaction with the conduct of the French courts in the Outreau case, and especially with the relatively inexperienced judge who allegedly demeaned and insulted the defendants throughout the process, led to significant legal reform. In his editorial comments to his 2006 Annual Report, the Mediator mentions the Outreau case and summarizes the impact of resulting legal reforms on the work of his office, stating:

Any person who feels that the behavior of a magistrate in a case he or she is involved in might constitute a disciplinary fault, may seek the help of the Mediator of the French Republic…On the one hand, judicial independence… must be respected. On the other hand, it is absolutely necessary to ensure a litigant that his or her complaints will be considered equitably and not in a situation of power struggle in which he or she will certainly have the impression of being in a legally weak position (MOR, 2006, p. 1).

These changes have enhanced the Mediator’s power to investigate and recommend discipline. This is clear on the Mediator’s official website, where the central mission of conciliation is modified by coercive powers:

Mediation is now an original and efficient method of settling conflicts: rather than by constraint, which would clash with the services and run counter to the objective sought: The intention of the Mediator of the French Republic is to act through dialogue, via "recommendations" and "proposals". However, if he does not arrive at an accepted solution with the government office, he has special powers:
• *proxy disciplinary power:* he may initiate disciplinary proceedings against an official who is manifestly at fault if the competent authority refuses to take disciplinary action against him/her.

• *power of injunction:* he may, "in the event of non-execution of a court decision", compel the government to comply with the decision within the period stipulated by him. If this injunction is not complied with, non-execution of the court decision may be the subject of a special report published in the Official Journal.

• *power of investigation:* Ministers and all the public authorities must facilitate the task of The Mediator of the French Republic, and their help can prove invaluable in complex and sensitive areas: he may, for example, ask the Cour des Comptes (a state body that supervises the financial affairs of public bodies and local authorities, and monitors the way public funds are used) to open investigations…(MOR website, December, 2007).

The larger role of the Mediator as an evaluator of fairness, as opposed to solely an impartial, neutral, and effective resolver of conflict, also become apparent when the office was charged with the “assessment” of prisons to protect “human dignity” during 2006 (MOR, 2006, p.1). The editorial comments of the Mediator, Mr. Jean-Paul Delevoye in the 2006 Annual Report, expressed his views regarding the international importance of this new mission:

Another development is looming in the human rights field: external control of places of detention. France will soon ratify the United Nations Convention against torture and must create, within a period of twelve months, an independent body to control prisons. .. The Council of Europe recommends to Member States to give this prerogative to ombudsmen. So, in France, the Mediator of the French Republic will be entrusted with this task. It is important to point out, however, that it is not about inspection power but rather an assessment mission, aimed at improving the actions to take with respect for human dignity. I have already met with some players in the prison world: management, personnel, chaplaincy services, psychiatrists, and I will be particularly vigilant about the resources provided to carry out this mission.
… My ambition and the ambition of my officials for 2007 is to assume these responsibilities for total respect of human dignity, vulnerable persons and justice (MOR 2006, p. 1).

Providing equitable remedies to complement legal remedies

Many of the cases that come to the Mediator could be handled more quickly by a formal administrative determination by another office within French government and administration. The Mediator’s assistance is sought because either the complainants or the referring administrators believe that negotiated solutions can be more creative and flexible.

The mediator’s staff interviewed for this study contended that the most common reason for a referral to the Mediator is that the citizen involved in the conflict has lost confidence in the fairness of the public administrators involved in the matter. One explained that, in his estimation, many French citizens do not trust administrative offices or politicians (Sironneau, 2006). He explained that this was due, in part, to the fact that the formal legal and administrative framework sometimes created an unfair result. He believed that the power of the Mediator to ask that the law not be strictly applied in cases where an injustice would result was a valuable complement to typical legal remedies (Sironneau, 2006). Another staff member concurred that the basic mission of the office is to provide an individualized response to injustice (Calazel, 2006).

The delegate from Haute Savoie reported that non-legal solutions are very important in resolving the complaints that are brought to her attention. For example, she explained that housing issues are very common. She explained a case where a woman was facing an impending eviction from subsidized housing. She was over fifty years old and had no children at home. She was disabled and received public support. Her rent
was 241 Euros a month, and she was in arrears. She owed 1,842 Euros when she brought the complaint. The administrator provided good records and had made attempts to move the complainant into a smaller apartment. The apartment where she was living was assigned to her when she had children still living at home. Since her children had moved out, she no longer qualified for such a large unit. The compromise offered by the city involved was to forgive the debt if she moved to a smaller unit. That was deemed reasonable by the mediator and the offer was made to the tenant and she accepted it as a final resolution of her complaint. It was a solution that was not required by law, as the administrators had correctly applied all legal requirements, but it was an equitable solution that was acceptable to all parties involved in the dispute (Bazile, 2006).

Conclusion: Key Elements of The Mediator of the French Republic

The elements of the mission and functioning of The Mediator of the French Republic were identified through a review of written documents and through interviews with members of the Mediators’ leadership team in the Paris office and a departmental delegate of the Mediator in Annecy, France, during May 2006. The written documents included the governing documents, official website, selected government publications and newsletters, and the annual reports of the Mediator during the period from 2004-2006.

These data sources enabled identification of the key elements of the Mediator’s assigned mission and reported activities. These elements include both procedural and substantive elements and are summarized and illustrated in Figure 16.
Comparison of The Mediator of the French Republic, Public Mediation, and Community

In order to evaluate the Mediator’s potential to build community the key elements of the mission and operation of the office of The Mediator of the French Republic were compared to elements of community and of other public mediation programs, both typical and ideal. The elements of The Mediator of the French Republic were then analyzed to determine whether the office provided an example of a program with community-building potential.
The data showed that the elements of The Mediator of the French Republic which were in accordance with the elements of community (as defined by the consensus of the four perspectives included in this study) and with other public mediation programs included the elements of voluntariness, respect for self and others, and open dialogue.

The elements of The Mediator of the French Republic which were in accordance with the elements of other public mediation programs but not with community included the procedural fairness guarantees of impartiality and neutrality. These elements are discordant with community to the extent that they include a value-neutral stance of the mediator regarding the fairness or lack of fairness of outcomes. The ability to use equitable, not legal, remedies is also discordant with the community element of procedural fairness, but consistent with elements of both typical and ideal public mediation.

The elements of The Mediator of the French Republic that were in accordance with the elements of community (as defined by the consensus of the four theoretical perspectives included in this study), but not with other public mediation programs included the following:

1. An anti-discrimination stance by the Mediator and a commitment to access to justice. This mission to fight discrimination and to increase access to justice supports community because it requires fairness in both procedures and results, It differs from the more value-neutral position, especially regarding results or outcomes, that is characteristic of public mediation programs;
2. Protection of collective interests as well as individual interests. This balancing of collective and individual interests by the Mediator, as evidenced by the Mediator’s deference to zoning and urban development decisions and the recent warnings by the Mediator against selfish or self-serving use of the Mediator’s resources, is consistent with community but inconsistent with the emphasis on personal interests that is characteristic of public mediation programs;

The element of The Mediator of the French Republic that was discordant with both the elements of mediation and of community was the ability to investigate and request injunctions or discipline when the Mediator believes that there has been wrongdoing. This element is inconsistent with community needs for full disclosure and open dialogue and inconsistent with public mediation programs’ characteristic focus on future-oriented resolutions of complaints without blaming or seeking punishment for past wrongs.

An illustration of these similarities, differences, and areas of intersection are illustrated in Figure 17.
Figure 17. Community, Public Mediation, The Mediator of the Republic: Areas of Intersection
The data on the elements of The Mediator of the French Republic and typical and ideal mediation programs were also organized and analyzed to compare whether the elements were supportive, neutral, or discordant with the elements of community. This analysis expanded the analysis of mediation, ombudsmen, and ideal public mediation that was illustrated earlier in this analysis (Table 1, p. 228).

The data were analyzed to determine whether or not the elements of The Mediator of the French Republic supported the conclusion that a public mediation program, when linked to policy reform, can support community by protecting both individual and collective interests. The data showed that the elements of The Mediator of the French Republic which were in accordance with the elements of community and with other public mediation programs included the elements of voluntariness, respect for self and others, and open dialogue.

More importantly for the purposes of this study, the data showed that certain elements of the Mediator’s mission and functioning which are not typical of other mediation programs were also supportive of the elements of community. These elements include the following:

1. The power of the Mediator to make reform proposals to the President and Parliament;

2. A mission of outreach to all members of society in order to increase their access to justice;

3. A commitment to teach the value of mediation within the community, not just to the parties involved in the dispute;
4. A consideration of both collective and individual interests to protect majority interests against undue individual demands;
5. An anti-discrimination stance. The recent formation of a separate anti-discrimination office (HALDE), formed pursuant to the Mediator’s recommendations will strengthen this mission.

The analysis of the data led to the conclusion that some elements of The Mediator the Republic are discordant with the elements of community presented in this study. These elements include the following:

1. The use of equitable as well as legal remedies;
2. The power to investigate and seek injunctions or discipline.

The power of the Mediator to use equitable remedies that may be inconsistent with the rule of law is discordant with the elements of community if it creates inconsistent results which are perceived as unfair. While the Mediator’s commentary warns that equitable remedies cannot be used to establish precedent, this protects only against further erosion of the rule of law and does not protect against the use of different equitable remedies in similar situations.

The power of the Mediator to investigate and request injunctions or disciplinary action be taken in the cases where he believes there has been wrongdoing by an administrator is, as evidenced by the data, inconsistent with the elements of mediation. Elements of mediation require that there be open disclosure of information and a focus on future-oriented solutions rather than on determination of culpability or punishment for past wrongs, and community requires a forum for disclosure and open dialogue. This analysis is presented in graphic form in Table 2.
Table 2. Effects on Community: Mediation, Ombudsmen, The Mediator of the Republic

<table>
<thead>
<tr>
<th>Types of Conflict Resolution</th>
<th>Supportive</th>
<th>Discordant</th>
<th>Neutral</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Mediation</strong></td>
<td>Defines and clarifies issues</td>
<td>Confidentiality</td>
<td>Impartiality and neutrality</td>
</tr>
<tr>
<td></td>
<td>Focus on future, not punishment for past wrongs</td>
<td>Outcome control by parties reduces uniformity of results</td>
<td>Values experiential wisdom</td>
</tr>
<tr>
<td></td>
<td>Encourage self-respect and respect for views of others</td>
<td>Voluntary</td>
<td>Mutually satisfactory agreements</td>
</tr>
<tr>
<td></td>
<td>Defuse hostility</td>
<td>Interest-based</td>
<td></td>
</tr>
<tr>
<td><strong>Ombuds</strong></td>
<td>Sensitivity to political context</td>
<td>Independence</td>
<td>Neutrality and impartiality</td>
</tr>
<tr>
<td></td>
<td>Works within the bureaucracy, some policy impact</td>
<td>Confidentiality</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Open, respectful dialogue</td>
<td>Informality of reform recommendations</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Focus on future,</td>
<td>Interest-based</td>
<td></td>
</tr>
<tr>
<td><strong>Ideal Public Mediation Program</strong></td>
<td>Interest-based (includes system interests)</td>
<td>Process control by parties tempered by organizational needs</td>
<td>Reduce reliance on hierarchical power</td>
</tr>
<tr>
<td></td>
<td>Respectful dialogue</td>
<td></td>
<td>Value experiential wisdom</td>
</tr>
<tr>
<td></td>
<td>Partnership approach</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Future-oriented</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Mediator of the Republic</strong></td>
<td>Reform function</td>
<td>Equitable remedies</td>
<td>Impartiality and neutrality</td>
</tr>
<tr>
<td></td>
<td>Anti-discrimination</td>
<td>Investigation, injunction, proxy disciplinary powers</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Make justice accessible</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Pedagogy</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Respectful dialogue</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Collective and individual needs</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Summary of Data Analysis

The data were analyzed to first identify the common elements of community (as defined by the consensus of the four perspectives chosen for this study) and public mediation programs, both typical and ideal. Then, those elements were compared to evaluate the community building potential of public mediation programs in general. Finally, the elements of the mission and function of The Mediator of the French Republic were analyzed to compare areas of intersection with elements from existing theories and perspectives on public mediation and community and to evaluate whether the mission and function of that office provide an example of a mediation program that supports community.

Identifying the Key Elements of Community and Mediation

To answer the first research question, the four perspectives on community chosen for this study were reviewed and the essential elements of the theories included in each were indentified. These theories, organized into four perspectives, were chosen as instruments of analysis because they were consistent or complementary in their social and philosophical antecedents and shared common definitions and modes of inquiry.

Some of the most significant differences between the four perspectives included the following:

1. Communitarianism valued the collective good over the protection of individual interests, while the more libertarian civil society perspective emphasized protection of individual rights and freedoms. The tolerance-based inclusivity perspective acknowledged no collective “good” apart from the sum of individual interactions;
2. The civil society perspective emphasized the importance of voluntary associations and *intragroup* consensus, similar to the bonding social capital concepts of social capital theory, while the bridging social capital aspect of social capital theory emphasized *intergroup* interaction and consensus;

3. Communitarianism and the social capital perspective valued groups with commonly accepted “good” views or goals, while the civil society perspective valued voluntary associations as a way to give voice and power to individuals against any government overreaching and, therefore, the social value of these private groups did not depend on their views or goals;

4. Communitarianism and the social capital perspective emphasized the need for shared core values about substantive issues within a community, while the civil society and tolerance-based inclusivity perspectives valued the processes of dialogue and social interaction to arrive at individualized conceptions of what is good for an individual or a group of individuals.

A review of the data on mediation and ombudsman programs, both typical and ideal, showed that the most important elements of ideal mediation which did not exist in typical programs included the following:

1. The mission to teach the community about the value of mediation;

2. The examination of deeper, symbolic meanings of the language used by the parties, even if not directly expressed directly;

3. A partnership orientation whereby the interest of not only the parties but also the organization are acknowledged and advanced;

4. Freedom of the parties to control the process of dispute resolution;
5. A disregard or de-emphasizing of hierarchy;

6. The revaluation of the desires of the parties based on information gathered and the interpersonal dynamics which develop during the mediation.

The elements of ideal public mediation that were in accordance with typical programs included the following: independence and neutrality of the mediator or ombudsman; respectful and open dialogue, confidentiality, and responsiveness to the individual needs of the parties to the dispute.

Evaluating the Community Building Capacity of Public Mediation

To answer the second research question, the elements of community and public mediation were compared to determine which elements that were deemed important to support community were included in public mediation programs, both typical and ideal. This comparison revealed that the elements of community which were in accordance with the elements of public mediation programs included the following: self-respect and respect of others, open dialogue, and voluntary participation. The most significant areas of divergence included the following: impartiality and neutrality, independence from other areas of government, confidentiality of issues raised or results obtained, and the use of interest-based negotiations that did not protect the collective interests of the community.

Evaluating the Community Building Capacity of The Mediator of the French Republic

To determine the community building capacity of The Mediator of the French Republic, the key elements of the office’s mission and functioning were identified, based
primarily on written documents and interviews with the Mediator’s staff. Those elements were then compared with other public mediation programs and with the elements of community.

The elements of The Mediator of the French Republic that were found to be in accordance with the elements of community included the following: a broad and formalized reform function; increasing access to justice and opening dialogue through regional delegates and other outreach; addressing discrimination; teaching the value of consensus-based dispute resolution to the community; and balancing individual and collective interests.

The elements of The Mediator of the French Republic that were found to be discordant with community included the use of equitable as well as legal remedies and the power to investigate and seek injunctions or discipline.

In sum, the data on the elements of community and public conflict resolution programs, including The Mediator of the French Republic, revealed interesting areas of intersection between the four perspectives on community and the elements of public dispute resolution. For the purposes of this study, the most significant themes that emerged were an assignment of different levels of importance to individual versus collective rights and to shared substantive values, such as equality, versus value-neutral procedural safeguards, such as impartiality or neutrality.

Further, a comparison of the elements of The Mediator of the French Republic with the data from the perspectives on community revealed that its mission and functioning is closely aligned and supported by the tolerance-based inclusivity
perspective and aspects of the social capital perspective. The analysis of these themes is illustrated in Table 3.
### Table 3. Community as the Protection of Collective and Individual Interests

<table>
<thead>
<tr>
<th>Protection of Collective Interests</th>
<th></th>
<th>Protection of Individual Interests</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>WEAK</strong></td>
<td>STRONG</td>
<td><strong>WEAK</strong></td>
</tr>
<tr>
<td><strong>Conflict Resolution Methods:</strong></td>
<td><strong>Conflict Resolution Methods:</strong></td>
<td></td>
</tr>
<tr>
<td>Ombuds - Individualized response,</td>
<td>Mediation with Reform and Human Rights Functions - Individualized response, access to justice for all, legal and equitable authority, broad reform function to correct malfunctions and inequities. (Mediator of the Republic)</td>
<td></td>
</tr>
<tr>
<td>no broad reform or outreach</td>
<td></td>
<td></td>
</tr>
<tr>
<td>function, correct malfunctions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>and omissions, use legal authority</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mediation - No reform function</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Litigation - Rule of law, positivist stance only affects policy through precedent</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Theoretical links:</strong></td>
<td><strong>Theoretical links:</strong></td>
<td></td>
</tr>
<tr>
<td>Bonding Social Capital Theory</td>
<td>Bridging Social Capital Theory</td>
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<tr>
<td>(Putnam)</td>
<td>(Putnam)</td>
<td></td>
</tr>
<tr>
<td>Civil Society Theory</td>
<td>Tolerance-based Inclusivity (Tinder)</td>
<td></td>
</tr>
<tr>
<td>Social Contract Theory</td>
<td>Categorical Imperative (Kant)</td>
<td></td>
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<tr>
<td>(Rousseau)</td>
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<td></td>
</tr>
<tr>
<td><strong>Conflict Resolution Methods:</strong></td>
<td><strong>Conflict Resolution Methods:</strong></td>
<td></td>
</tr>
<tr>
<td>Force – Self-help</td>
<td>Representative Democracy - Voting, legislative action by majority rule; minority rights upheld in court</td>
<td></td>
</tr>
<tr>
<td>Voluntary Consensus – No protection of minority rights or formalized definition of community membership</td>
<td>Litigation as tool of Social Reform - Goals not focused on actual parties, e.g. Roe v. Wade.</td>
<td></td>
</tr>
<tr>
<td><strong>Theoretical links:</strong></td>
<td><strong>Theoretical links:</strong></td>
<td></td>
</tr>
<tr>
<td>War of All against All – life is solitary, brutish and short without law/authority (Hobbes)</td>
<td>Communitarianism - Shared core values and protection of collective interests are as important, if not more so, than protection of individual interests (Etzioni)</td>
<td></td>
</tr>
<tr>
<td>Natural Harmony – external protection not necessary because reason results in harmony of interests (Mill, Locke)</td>
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</tbody>
</table>
Purpose and Questions

The purpose of this study was to determine whether the effective mediation of citizen complaints can help build community. Existing theories of community and mediation programs, both real and ideal, were analyzed and enlarged to provide a new perspective on the elements which create community and to evaluate whether mediation can help strengthen social bonds. One model of citizen complaint mediation – The Mediator of the French Republic – was analyzed to determine whether it provides evidence of the community-building potential of public mediation programs. To accomplish the purposes of this study, data were collected and analyzed to provide the basis for answering three research questions: 1) What are the key elements of community and effective public mediation programs? 2) Which elements of effective public mediation programs and community are mutually supportive, functionally neutral, or discordant? and, 3) Does the office of The Mediator of the French Republic provide an example of a mediation program that builds community?

Findings

The ultimate question of whether or not mediation can support community was explored through the analysis of data from the mission and practices of The Mediator of
the French Republic and from existing theories and research on mediation and community. There are many theories of community and mediation, and one of the first challenges of this research was to determine which theories to include. Clearly, all theories could not be included, as the nature of community has been central to philosophical and political inquiry for thousands of years. Therefore, there was a need to select theories which shared enough common ground for meaningful comparisons and which were particularly relevant to the research questions.

Choosing theories with significant areas of commonality and contextual and theoretical consistency allowed meaningful analysis and comparisons and enabled the development of new perspectives which built on the work of others in the field. The new perspectives presented in this study are intended to provide incremental advancement toward an understanding of community, conflict between citizens and their governments, and mediation as a tool for the effective resolution of that conflict.

In addition to the analysis of various theories of community, differing views of the process of mediation and the related work of ombudsmen were also evaluated for common themes. Both typical and ideal forms were analyzed and standards of practice were compared to scholarship and commentary in order to arrive at the key elements that captured both the theory and practice of public mediation. Finally, the basic elements of The Mediator of the French Republic were identified and compared with other typical and ideal mediation programs. This comparison showed that the French model shared many theoretical and practical elements with the other theories reviewed and, therefore, that the model could provide useful data to address the research questions posed in this study.
The common elements of community as delineated in the existing theories chosen for review included, at their most fundamental level, a shared recognition of the voluntary self-restraint and ongoing communication that is required to live in community. More specifically, there was a commonly recognized element of voluntariness, rather than coercion, at the heart of community. Existing theories agreed that membership in a community should be voluntary and should include an acceptance of the limitations on personal freedoms that such membership requires. The theories also agreed that community relies upon a tolerance of difference and the demonstration of respect for all individuals by the government and by fellow community members. In all theories, it was acknowledged that this respect and tolerance should be enforced by appropriate government intervention, if necessary. Finally, all theories agreed that open dialogue is necessary so that community members can share views and better understand and value of the needs of others.

While the identification of these common elements was important for the ultimate evaluation of the community building potential of mediation, the differences between the theories of community were in some ways more interesting. Specifically, the comparison of even those theories which shared what Sheldon Wolin would call a “political metaphysic,” meaning that they all used similar definitions and contexts for their discussions, revealed significant differences in their views of the nature of conflict, the nature of human beings, and the best types of government intervention to achieve either the control or liberation of community members (2004, p. 16).

The most basic of the differences delineated in existing theory about the elements of community centered on the view of collective versus individual interests. This
difference is of key importance when evaluating the impact of mediation on community, as mediation is a highly individualized and outcome-neutral response to conflict. In mediation, the parties are free to fashion their own resolutions without regard for precedent or concern for the future implications for society. Thus, a view of community which advocates for a high level of control or influence over the actions of individuals in order to further the collective good is not going to be well-supported by mediation. Conversely, views of community that value individual freedoms and procedural safeguards designed to protect those freedoms will be well-supported by the outcome-neutral process of mediation.

For example, an analysis of existing theories of community showed that communitarian theory values the protection of collective interests as much or even more than the strict protection of individual interests or freedoms. Further, communitarian theory holds that there is an objectively identifiable set of desirable substantive outcomes when individuals are in conflict, not just a need for procedural safeguards or fairness. In these ways, this theory sees community as, in part, a method of controlling individual action if those actions would interfere with the commonly accepted view of the good. This is in some ways similar to the social capital theory concept of bridging social capital. Bridging social capital is seen as important to advance collective interests by bringing together individuals and groups who would not, absent external forces, come together to solve problems or reach consensus. Mediation does not provide the best support for these views of community because it does not guarantee particular outcomes for individuals or groups. Content-driven interventions with inherent powers to control,
such as adjudication, are required if a community wishes to guarantee certain substantive outcomes.

In contrast, the perspective of tolerance-based inclusivity views community as based on the micro-level interactions between two or more subjects. This theoretical perspective does not view the collective good as a meaningful concept apart from the sum of these individual interactions. It also values the process of dialogue as important as an ends in itself, as it views this dialogue as the only way that individuals might come to understand and tolerate a position that is different from their own. This view of community is very compatible with mediation, as mediation does not create any authority to impose conditions or exercise control and it provides individualized solutions that do not rely on collective notions of objectively defined desirable or undesirable results.

Mediation is also supportive of the view of community advanced by civil society theory. Civil society theorists emphasize the importance of protecting voluntary associations from undue pressure from government or other external authority, whatever the goals of the associations might be. This view is in accordance with the goals of mediation because, like mediation, civil society theory is largely content-neutral and values the process of dialogue and voluntary human interaction as ends in themselves.

Put another way, communitarianism and the bridging social capital aspect of social capital theory emphasize the need for shared core values about substantive issues within a community, whereas civil society theory and tolerance-based inclusivity perspectives prioritize procedural integrity and fairness. Mediation supports a model of community that is defined by free and voluntary associations of individuals with high levels of self-determination within their relationships and high levels of autonomy in the
resolution of their conflicts. Mediation does not support a model of community that is
defined by forced consensus or which requires substantive outcome guarantees in the
resolution of conflict.

The data collected and analyzed from the mission and functioning of The
Mediator of the French Republic showed that the French model meets both individual
and collective needs. The French model showed that when parties are allowed the self-
determination provided by mediation and, in addition, the mediators are then empowered
to make appropriate reform proposals based on the information gained during those
mediations, then both individual rights and collective interests can be protected. The
Mediator does not attempt to respond in advance to those goals or definitions with legal
or other formalism. Instead, his work responds to real problems suffered by actual
community members. Once a pattern of a certain type of problem appears over time, or if
there is a particularly egregious case of a law having unfair or unintended consequences,
then the Mediator’s reform proposals can be considered by duly elected legislators and
appropriate changes can be made to laws or administrative procedures. This process
advances a collective “good” that is constantly redefined to respond to changes in social
conditions or the needs of the members of the French community.

The data on The Mediator of the French Republic and other public mediation
programs were supplemented by data on ombudsman offices, since the mediation of
citizen complaints involves many of the same issues and uses some of the same strategies
as ombudsmen. Also, data on typical mediation and ombudsman practices were
supplemented by data on ideal forms of these offices to enable a fuller full understanding
of both the theory and practice of public mediation.
The elements that were deemed important in all mediation and ombudsman programs, both typical and ideal, included the institutionalized protection of the independence and neutrality of the mediator or ombudsman, process protections to enhance respectful and open dialogue and confidentiality, a commitment to the importance of the protection of individual rights and needs, and an emphasis on future-oriented solutions rather than punishment for past wrongs.

Certain departures of practice from theory were evident from the comparison of data on ideal forms and data from actual mediation and ombudsman practice. The most fundamental difference was the practitioner-orientation toward immediate and practical solutions for the parties at hand, typically accomplished through various forms of interest-based negotiations or simple compromise. Ideal forms of public mediation would strive for a more transformational result for both the parties and the organizations involved in disputes. The basic premise of this transformational perspective is that mediation cannot only resolve disputes, but can also lead the parties to a fuller understanding and empathy for the needs of others and a revaluing and reprioritizing of their own needs. Additionally, ideal forms of mediation would address organizational needs by fostering a partnership orientation between the parties and would include a mission to teach the community about the value of mediation. Further, ideal mediation would encourage an examination of deeper, symbolic meanings of the language used by the parties, even if not directly expressed, and the effects of external factors, such as institutionalized discrimination, in order to address the root causes of conflict.

Typical mediation and ombudsman programs focus neither on these broader organizational or societal goals, nor on the transformational potential of dispute
resolution. Instead, typical programs emphasized only the need for the parties to clearly articulate their needs and interests and to reach a settlement that was satisfactory from their individual perspectives. This was slightly less true of ombudsman programs than of mediation programs, as the ombudsman programs tended to indirectly address governmental needs by seeking more bureaucratically-oriented solutions to citizen complaints.

Another important basic difference between ideal and typical forms of mediation and ombudsman programs centered on issues of control. Specifically, the ideal forms would give more power to the parties involved over both process and outcome of the mediation of the claim, while the practitioner-orientation was to allow the parties to control the outcome, but not the process. This appeared to be a product of increased bureaucratization of mediation and ombudsman programs in response to large volumes of cases and a desire to increase a uniformity of quality and types of assistance offered across large, national programs. The use of traditional governmental mechanisms to achieve solutions, which was more characteristic of ombudsman programs than mediation programs but present in both, also required the mediator or ombudsman to exercise a greater degree of control over both process and outcome than envisioned in mediation theory.

Differences between ideal and typical forms of mediation and ombudsman programs also reflected the particular contexts in which actual programs operated. For example, standards of practice for practitioners dealt at length with the interrelationship of mediation to other forms of conflict resolution available to the parties, such as adjudication. Further, since mediation does not rely on precedent, statutes, and other
sources of substantive law that typically develop slowly over time, it was shown to be sensitive to current environmental factors, such as social and political pressures on parties or the governmental entities about which they complained. Finally, the data showed that mediation is sensitive to the environment in which it occurs because it is a party-driven process whereby individuals fairly and truthfully present their own claims and work together to reach consensus. Individuals determine what is fair or truthful based, in large part, on the culture in which they have been raised and other external factors.

Despite the relatively minor differences, the analysis of available data showed that the ideal forms were not radically different from the model standards promulgated by practitioner groups such as the American Bar Association or International Ombudsman Association. This was not surprising, as notes from the drafting committees documented that the model standards and uniform laws were written with extensive input from both practitioners and theorists. Similarly, the work of mediators and ombudsmen in the field, as reported by researchers through case studies, showed that actual practice of mediation had been brought into substantial conformity with the model standards during the period of study.

Once the key elements of both community and mediation were identified, mediation was then evaluated for its potential to build community. The data showed that the elements of mediation that were neutral to community included procedural fairness in dispute resolution processes and the impartiality and neutrality of the mediator. Elements of mediation that were supportive of community included its ability to enhance communication through a fair and neutral process which facilitated open expression and the mediators’ efforts to ensure that the process accorded respect to all parties. These
themes of enhanced and respectful communications were also supported by data on the aspects of mediation that defused hostility, defined and clarified issues, and encouraged openness, disclosure and empathy for the views of others.

Characteristics of mediation which were discordant with community centered primarily on the theme of the protection of individual versus collective interests. Specifically, the value-neutral stance of mediators regarding outcomes made typical mediation programs discordant with community-oriented substantive or outcome considerations, such as tolerance or accommodation of difference. However, the data showed that this value-neutral stance was designed to protect fairness of process and that fairness was supportive of the elements of community. Similarly, while the confidentiality guarantee typical of mediation was discordant with the community-oriented element of open sharing of information among community members, it protected individual interests and enhanced the elements of openness and full disclosure that were shown to be supportive of the elements of community. Finally, the interest-based negotiations that were typical of mediation programs were not, in themselves, supportive of community as they tended to focus only on the individual interests of the parties to the dispute and not the collective needs of the community.

Findings on the elements of The Mediator of the French Republic showed an amelioration of some of the elements discordant with community that were characteristic of other mediation programs. The data showed that the duties and responsibilities of The Mediator of the French Republic reflected the French view of the world and the unique characteristics of their culture and, further, that this culture has traditionally assigned a high value to the protection of collective interests.
Some of the characteristics of French social and political theory that were clearly reflected in the data on the mission and work of The Mediator of the French Republic included the historical emphasis on the state (état) as a transcendent entity, the related flexibility in their view of separation of powers, and their high regard for the common social, philosophical, and political heritage that defines what it means to be French. Within the rhetoric about the Mediator’s mission, these concepts were defended as larger than any law, constitution, regime, or demographic characteristic. Further, the data showed that these concepts were perceived to be more important than differences or divisions that may exist within French society. For example, the French perspective of “pas du race” (not about race) has made it illegal to collect demographic data on racial characteristics or to participate in any form of American-style affirmative action because an emphasis on difference is viewed as destructive to their sense of a unified French community. Therefore, while the express mission of The Mediator of the French Republic is to increase fairness in the application of French law and administrative procedures for all members of society, particularly those most at risk due to economic or other factors, records were not maintained that would track whether the kinds of difficulties encountered by citizens varies with demographic characteristics.

The data showed that this perspective of a united French community has been recently challenged by the increasing diversity and civil unrest within French society. The Mediator’s annual reports now track data on certain demographic characteristics, such as income levels, place of residence and gender. This seemed to reflect a growing concern that such differences in individual situations may affect accessibility or other factors relating to the mediation process. In addition, the French have recently
established a new anti-discrimination agency (HALDE) to address all forms of discrimination. These recent adjustments may be a response to the increasingly contentious relationship between some members of French society and their government, as evidenced by recent rioting in predominantly poor, immigrant communities in and around Paris. The tension between the need to respond to individual or minority group interests and the need to protect the collective good is evidenced by the expressions of concern by The Mediator of the French Republic regarding what he described as a recent and unhealthy emphasis on individual rights within French society. Similarly, the former President of the French Republic, Jacques Chirac, also expressed concern over a growing litigiousness among the French which he warned ran counter to their national character.

Like all mediation, the French model showed sensitivity to social, legal, and political contexts and the major goals and functions of the office have evolved over time. The Mediator’s commentary links some changes in the mission and operations of the office to political and social forces at the national or international level. For example, the Mediator’s power to investigate judicial wrongdoing was enhanced after a particularly egregious case of judicial misconduct in a highly publicized child molestation case and a new directive to oversee conditions within French prisons was linked to international calls for better monitoring of the treatment of prisoners. The data showed that, currently, the main elements of the mission and functioning of the Mediator fall into the following categories: improving laws through reform proposals; increasing access to justice and fostering dialogue; teaching the value of consensus-based dispute resolution; protecting collective and individual interests; protecting individuals against institutionalized discrimination; providing fairness (impartiality and neutrality) and accountability.
investigation, injunction, and discipline); and providing equitable remedies to complement legal remedies.

A comparison of the elements of The Mediator of the French Republic with those of community and other mediation programs yielded both expected and unexpected results. The expected results were that certain elements of the Mediator’s mission and work were typical of other mediation programs and supportive of community. These elements included respectful dialogue and voluntary participation. An unexpected result was that the element that was not typical of other mediation programs, the power to propose legal reforms to the French legislature, was the most directly supportive of community.

The broad and formalized reform proposal function, which allows the Mediator to use information gathered during the mediation of individual complaints to inform reform proposals, enables the Mediator to advocate for changes in those laws which have been shown to be defective or patently unfair. While carrying out this reform proposal function, the Mediator uses the information gathered from mediations in aggregate form or with names redacted so as to protect confidentiality of the mediation process. This unique power to propose legal reforms allows The Mediator of the French Republic to simultaneously support the protection of both individual and collective interests.

Other themes which emerged from the data on The Mediator of the French Republic regarding the office’s potential to support community included a commitment to increasing access to justice and teaching the value of mediation throughout the country. This commitment, not typical of mediation programs, was demonstrated by outreach and educational activities and the provision of local representatives of the
Mediator in every geographical area. These local delegates were empowered to address local complaints, free of charge, while the central office in Paris provided budget support and monitoring of both processes and outcomes.

The analysis of the data showed that some elements of The Mediator the Republic were discordant with elements of community. These included the Mediator’s power to use equitable as well as legal remedies and the power to investigate and seek injunctions or discipline. The data showed that the power of the Mediator to use equitable remedies, when combined with the reliance on widely dispersed departmental delegates, had the potential to create inconsistent results among similarly situated individuals. Such inconsistency would be discordant with a definition of community that required a fair application of commonly accepted legal or other norms process fairness. The power of the Mediator to investigate and request injunctions or disciplinary action in cases where he believes there has been wrongdoing is, as evidenced by the data, also inconsistent with the elements of mediation and community. The elements of mediation required a focus on future action instead of punishment for past wrongs and both the elements of community and mediation required a forum for disclosure and open dialogue.

Summary of Findings

The findings of this study were based on the analysis of data from the mission and practices of The Mediator of the French Republic and from existing theories on mediation and community. These data support findings of similarities, differences, and interrelationships between the elements of community, mediation, and The Mediator of the French Republic. The most significant findings are summarized, below.
Elements of community:

1. Voluntary membership and self-restraint;
2. Sharing of views through open dialogue;
3. Respect and tolerance;
4. Valuing the needs of others.

Elements of mediation and ombudsman programs, both typical and ideal:

1. Institutionalized protection of the independence and neutrality of the mediator;
2. Process protections to enhance respectful dialogue and confidentiality;
3. Protection of individual rights and needs;

Elements of mediation which support community:

1. Enhancement of communications through fair and neutral processes;
2. Definition and clarification of issues;
3. Encouragement of open expression, disclosure, empathy, and respect;
4. Reduction of hostility through the reframing of issues.

Elements of mediation which are discordant with community:

1. Independence and outcome-neutral stance of mediators;
2. Confidentiality guarantees;
3. Voluntary participation;
4. No benefits except to the parties;
5. Interest-based negotiations which disregard collective interests.

Elements of The Mediator of the French Republic which support community:

1. Encouragement of respectful dialogue;
2. Teaching the value of mediation;
3. Increasing access to justice;
4. Seeking fair application of laws through an anti-discrimination stance;
5. Power to propose policy reforms that consider collective and individual needs.

Elements of The Mediator of the French Republic which are discordant with community:
1. Use of equitable as well as legal remedies;
2. Power to investigate, seek injunctions, and recommend discipline.

Significance of the Findings

Existing theories often assume that the elements of community are predetermined by human nature and that methods of conflict resolution can only respond to innate human characteristics. For example, a Hobbesian view of community requires a Leviathan ruler to protect members of society from the brutality of their fellow community members (Hobbes, 1651, 1968). This view of community requires centralized and authoritarian forms of conflict resolution to protect the common good from individual aggression, greed, and unbridled self-interest. The Lockean view of community requires that individual liberty should be protected because it holds that basically enlightened and fair-minded human beings will use their freedom to enter into arrangements and resolve their conflicts in ways that meet their shared expectations (Locke, 1689, 1960). This view of community requires individualized processes of conflict resolution designed to maximize the liberty and autonomy of individuals within the bounds of fair procedural guidelines.
The most significant themes that emerged during this study were the differing views among community and mediation theorists, politicians, administrators, and practitioners about how much importance to attach to individual versus collective rights and to shared substantive values, such as economic or racial equality, versus value-neutral procedural safeguards, such as impartiality or neutrality. Not surprisingly, those who viewed community as protecting individuals from each other favored directive conflict resolution processes that carefully constrained individual liberties in favor of the advancement of majority norms, such as traditional adjudication based on precedent and codified law. Those who viewed community as a voluntary association of individuals who could and should order their own affairs favored participatory democracy with guarantees of minority rights, supplemented by voluntary and creative alternatives for the protection of individual rights, such as mediation.

The findings of this study support an alternative view to these opposing theories about community and conflict resolution. This study advances the perspective that the nature of community is not determined by human nature -- how humans are, with legal or governmental constraints simply responding to that nature -- but rather can be defined by how humans choose to act, with mediation providing guidance for appropriate action. Further, the findings in this study support a conclusion that individual and collective interests need not be fundamentally irreconcilable. Instead, the perspective offered by this study is that the very nature of community is defined, in part, by the kinds of dispute resolution processes put into place. This view of community and conflict allows the conclusion that effective public administration can help build community by putting into
place a mediation process which resolves citizen disputes by nurturing open and honest
dialogue and reconciling individual and collective interests.

The data in this study support the conclusion that The Mediator of the French
Republic provides an alternative model that successfully balances both individual and
collective rights. Specifically, the reform proposal powers granted to the Mediator enable
him to use information gained during many mediations all across France to suggest
changes to French law and administrative procedure. Further, because the mission of the
office embraces some shared, traditionally French values, such as non-discrimination and
procedural fairness, the work of the Mediator supports important community norms and
enhances a sense of social cohesion.

The findings of this study, therefore, also support the conclusion that the
collaborative process of mediation can build community by: 1) Creating a forum for
dialogue that strengthens interpersonal and group relationships and, 2) Using the
information gathered and the solutions reached during individual mediations to help
improve public policy and better serve collective interests. In sum, the data reviewed in
this study show that if a mediation program is voluntary, widely available to all members
of society, staffed by neutral, competent and independent mediators, and linked with
mechanisms of policy reform, then relationships can be strengthened and collective
interests can be advanced without unduly limiting personal rights and freedoms or
impeding the resolution of individual complaints.

The comparison of the elements of mediation and of The Mediator of the French
Republic with the data from theoretical perspectives on community revealed that their
elements are closely aligned in some important ways. Specifically, The Mediator’s work
puts into practice both the tolerance-based inclusivity perspective, including its reliance of certain aspects of Kantian theory, and the perspectives of the social capital theorists, who emphasize that individuals should be treated as subjects rather than objects and as ends in themselves, not a means to reaching an end of an externally derived conception of collective good. Further, these theories of community concur with themes of mediation and The Mediator of the French Republic in that they emphasize the importance of the circumstances surrounding concrete problems and advocate fair and inclusive processes through which practical solutions can be reached, rather than a reliance on highly objectified, formalistic, or universal rules that would guide substantive outcomes.

The data and analysis of this study build on these theoretical antecedents and give them more immediacy and deeper meaning by suggesting a way to operationalize the concepts of community, collectivism, and individualism through the particular form of mediation exemplified by The Mediator of the French Republic. When assessing the significance of the French model, the uniquely French environment in which The Mediator of the French Republic operates is an important consideration. Nonetheless, the findings on both the expressed mission and day-to-day functioning of The Mediator of the French Republic show that the office can serve as a very useful example of the community building potential of mediation within the contextual limitations of the data.

Recommendations for Future Research

This study explores areas where existing theories about community and mediation differ, intersect, and where they leave important questions unanswered. The perspective on community and the mediation of citizen complaints advanced by this study suggests ways that existing community theory can be made operational. Further, this study, while
limited in scope to selected theories of community and certain types of conflict resolution, provides incremental advancement of a theoretical perspective which links the collaborative process of mediation to community-building. By doing so, it expands the definition of community to include the type of conflict resolution processes that are put into place.

The data presented in this study show that, when public mediators are empowered to use the information they collect during mediations to make recommendations for changes to law and public policy, both individual and collective interests can be simultaneously advanced by the mediation process. More research should be done to evaluate the applicability of this model of mediation to a variety of settings. Since different social and political environments require the balancing of different individual and collective interests, the ability of mediation to achieve this balance in a variety of contexts needs further evaluation.

The example of The Mediator of the French Republic provides ample evidence of the ongoing tension between individual and collective interests within French society. The data show that there has been a recent emphasis on individual rights in France, as evidenced by the Mediator’s new responsibilities in the areas of prisoners’ rights, the protection of individual litigants from judicial abuse, and the protection of all members of French society from institutionalized discrimination. These pressures have led to significant changes in the charge to The Mediator of the French Republic, such as a new responsibility to oversee prisons and greater power to hold public administrators and judges accountable through investigation, injunction and proxy disciplinary powers.
The protection of individual and minority group rights against abuses of the majority has always been a challenge for democracies. DeTocqueville warned against the tyranny of the majority and the U.S. Constitution addressed the same danger through the Bill of Rights. However, mediation is different from adjudication precisely because of its attention to individual, rather than group needs. This means, therefore, precedent will not be relied upon nor set by mediation, nor will a whole class of individuals stand to benefit as they would from a landmark court decision. As such, mediation is not well suited to meet the needs of the few against the many. Instead, traditional methods of resolving issues of abuse of power or institutionalized oppression may be more appropriate tools to use for this purpose. Advocacy group intervention and private lawsuits, on behalf of either individuals or a class of individuals, have proven themselves effective in meeting this need to fight institutionalized discrimination. It is interesting to note in this regard that the French have recently, with the Mediator’s guidance and assistance, instituted a national advocacy group to fight discrimination. Further research would be useful to fully explore the key elements of such groups, as well as other types of conflict resolution techniques, including traditional adjudication, in order to evaluate their effect on community and their effectiveness in balancing both majority and minority needs.

Further research is also necessary to fully evaluate whether the power of a mediator to use equitable remedies that may be inconsistent with the rule of law can damage community by creating inconsistent results which are perceived as unfair or arbitrary. While the data show that creativity in crafting resolutions of conflict is an important advantage of using mediation instead of traditional legal or administrative
remedies, there should be an assessment of potential damage to community if this causes inconsistent results among similarly situated individuals. While in the French model it is clear that equitable remedies cannot be used to establish precedent, this may only protect against further erosion of the rule of law and may not protect against the use of different equitable remedies in similar situations. Further study could evaluate whether or not the desired flexibility and creativity in crafting resolutions might by accomplished through different means, such as policy reform proposals with limited retroactive effect.

The power of the Mediator to investigate and request injunctions or disciplinary action is, as evidenced by the data, inconsistent with the elements of mediation. While public trust is an important element in building community and there is, therefore, a need for accountability for wrongdoing, there is also a need for a forum for full disclosure and open communication. Therefore, the investigation and punishment of offenders may be a more appropriate function of watchdog commissions, inspectors general or the criminal courts. Successful mediation requires that there be open disclosure of information and a focus on future-oriented solutions rather than on determination of culpability or punishment for past wrongs. Having injunction and proxy disciplinary powers may impede the Mediator’s ability to foster open dialogue among the parties. When the power to investigate and punish is included in a mediation program, it may be perceived as what Grillo called “a wolf in sheep’s clothing” (1991). It may present itself as a safe place for dialogue and as a future-oriented process for the fair resolution of complaints without findings of fault or an emphasis on punishment, but may deliver something different. If this occurs, community members may no longer trust that it is a safe way to resolve differences and its value may be lost. Further research is, therefore, necessary to
determine the effects of investigatory, injunction, and disciplinary powers on utilization rates and other indicators of public trust.

The model of The Mediator of the French Republic shows that when the integrity of mediation programs is maintained and there is also a meaningful link to policy reform, then the ongoing process of working through conflicts, one at a time, can lead to better outcomes for individuals and for communities. Glen Tinder alludes to the need for this kind of sustained, hard work in order to make incremental progress toward community. He writes:

I suggest that the kind of community that is within our reach consists less in the common realization of righteousness than in the common search for righteousness. Understanding of the good, as the whole history of philosophy shows, requires sustained and disciplined inquiry and is never perfectly achieved. And embodying the good in the life of a human being or a society even partially (full embodiment is no more possible than full understanding) depends on intense and prolonged effort. Accordingly, righteousness might better be thought of in terms of intellectual and moral striving rather than final accomplishment (1995, p. 105).

In a time of dwindling civic engagement and increasing social division, the community building potential of public mediation programs should be recognized and used to their full benefit. The example of The Mediator of the French Republic, while not directly transferable to other social and political environments, can still teach valuable lessons to public administrators who are committed to building community.
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