

## **CONFLICT RESOLUTION AND PUBLIC POLICY: TWO DECADES OF EXPERIENCE**

The invitation to speculate on the impact of the conflict resolution movement is hard to resist, and, given recent developments in the area of public policy--about which more below--the timing couldn't be better. Accordingly, this essay offers some examples to suggest how profound the impact has been in the public domain, in practice, particularly, but also in education (and training) to support and sustain that practice, and, moreover, it analyzes some of the factors that have created the context for that success.

### Public Needs and Political Domains: Creating a Culture for Conflict Resolution

"Conflict Resolution" has had an impact on "organizational culture" in the public domain, on courts, for sure, on the executive and legislative branches of government and, especially, on governance within states. The impact has been considerable, with agencies recognizing that process is critical to result, not only in making decisions in the first place, but also in resolving disputes, and, particularly, given their high visibility and the potential, then, for wider impact, those disputes that are long-standing, costly, and hotly contested.

"Conflict Resolution" is being used with increasing frequency to supplement, and, in some cases, to supplant traditional decision-making processes at all levels of government. By emphasizing process over partisanship, advocates of seemingly irreconcilable political views and conflicting agendas have been able to develop policy and legislation. Agreements have been reached on broad issues such as education and transportation policy and resource management of federal lands as well as on more discrete matters such as highway location, port development, urban renewal plans, and the siting of power-generating plants.

As issues have become, increasingly, local and global, moreover, experience with managing conflict that arises with respect to them reflects the impact of the conflict resolution field. Just as, say, global environmental concerns regarding air and water quality transcend national borders and require cross-national or international forums to deal with protecting and enhancing those elements, (and, as has been shown elsewhere, draw from negotiation and conflict resolution experience to reach decisions that secure higher standards of environmental protection), so it is with sub-national governing units. Major transformations have taken place, in political function and decision-making authority, with centers of power devolving to states and localities. Those structures, frequently, do not "align" with pressing policy and planning issues--land use; energy; water rights; air quality; waste disposal to name a few—thus generating a need for new approaches.

As regional approaches, across state lines, and, indeed, across a multitude of political structures within states--municipalities, counties, and so on—have become increasingly necessary, they have created opportunities for non-

traditional decision-making approaches as well. The need for policies (and decision-making and conflict resolution structures) that take into account the nature and scope of conflicts that arise in these emerging contexts--in order to see that they are managed constructively--has given impetus to and opportunity for conflict resolution initiatives. And, by demonstrating their efficacy, this experience has, in turn, created opportunities for other public issues (e.g. school financing) and public needs (e.g. child welfare reform) to benefit from conflict resolution approaches.

### Research and Practice: Two Decades of Growth

#### *Public Policy and Practice:*

On issues and developments in negotiation and conflict resolution practice, from a public policy perspective, where are we today? To suggest one answer to that question, permit me to back up a little more than a decade. Consider an essay, "Consent of the Governed: Consensus Strategies for Policymaking" (Jaffe and Stamato) that appeared in *New Jersey Reporter*, a publication issued by The Center for the Analysis of Public Issues, a think tank in New Jersey (April, 1990) in its series: *Issues for the Nineties*. This essay was nothing less than a plea for policy-makers to look to conflict resolution practice for ways to handle pressing public concerns:

New Jersey's agenda for the 1990's is clear. The state has urgent needs in the areas of housing, the environment, education, health care, crime and delinquency, social welfare, and transportation, and the ways to finance them. The order of these priorities has shifted over time but the needs have persisted and intensified. New approaches are overdue.

In order to develop and implement policy to address these needs, we must find common ground... Techniques for developing policy affect the quality of that policy, and its effectiveness. What we accomplish in tax and school reform, in improving the quality of social services and health care, in transportation, and in environmental protection and enhancement are measures, in part, of how effective our decision-making processes are...

Recent developments...suggest that there are ways to make decisions and resolve differences with respect to them that are less confrontational and adversarial, and subsequently less protracted and costly, than those of more traditional vintage. They include facilitation, mediation, and other processes that attempt to develop solutions to problems based on common interests and needs....

Some of...these developments in decision-making and dispute resolution may hold particular promise for New Jersey and suggest opportunities for the state's policymakers at...the court, executive and legislative levels.

There were precious few examples in New Jersey to use at that time; we looked to Wisconsin, Massachusetts, Colorado, New Mexico and Washington State--to nascent efforts in consensus-based approaches to writing legislation, for example, and collaboration in rule-making. Now, just over a decade later, most states, including New Jersey, (a) provide, routinely, in courts, access to options other than traditional adjudication for resolving disputes\*; (b) incorporate options for managing disputes into proposed legislation; and (c) rely on consensus-based approaches for decision-making in a host of areas.

States have created frameworks that encourage and support negotiation and mediation so that public institutions have a capacity to make decisions that last and to resolve disputes that arise in ways that build confidence in the system. And, beyond the process of institutionalizing, the culture has been affected: policymakers and agency heads, and organized citizens as well, look for ways to reach consensus, to involve those who are affected by and need to live with given decisions. A receptive climate for conflict resolution has developed, one that creates an informed, active and participating citizenry. There has been an educative effect, moreover, that appears to be sustainable.

### Research and Teaching

Generating interest from a wide variety of disciplines and professional practices, and, involving interdisciplinary efforts across psychology, anthropology, economics, sociology, law and policy, the field has seen enormous growth in the last decade. Indeed, the Center for Negotiation and Conflict Resolution is at the Bloustein School of Planning and Public Policy at Rutgers because, in essence, it is increasingly recognized that public policy decisions need to be made and differences managed in ways that advance public needs and social purposes. Negotiations among interested individuals, and among groups, in legitimate contention, and resolving those conflicts over differences, are at the core of policy-related work (e.g. allocation of resources, say, whether over dollars or water) and planning processes and decisions (e.g. siting essential but unwanted facilities).

\* In this regard, an article in a recent issue of The New York Times' Sunday magazine section, "Untying the Knot" by Melanie Thernstrom (8/24/2003, pp. 38-44), makes the point, as follows: "Although mediation began in the 1970's, it is now beginning to reach critical mass. In California, Maine and other states, mediation is mandated in custody disputes in divorces, and other states re considering similar legislation. Oklahoma, which has one of the highest divorce rates in the country, has recently instituted a program that refers couples to free or low-cost mediation. If the trend continues, someday soon people may look at litigation as a last resort only for unusually contentious divorces (cases in which one partner is abusive or absent), rather than the norm."

This work, at the intersection of law, policy, and planning, incorporating scholarship that focuses on understanding the dynamics of the process, has generated a good deal of interest, and has led to a significant demand for applied work--primarily training and process design--intended to improve the negotiation and decision-making dynamic in order to effectuate optimal outcomes in multiple settings. Applied work also involves helping to create (and to provide neutrals to serve in) processes that assist negotiation (e.g. mediation; consensus-building) as well as those that substitute for such efforts when negotiation fails (e.g. arbitration; neutral evaluation). The domestic landscape has changed considerably as a result.

It doesn't surprise me anymore when assistance is requested in, say, designing programs for state departments of transportation (and training managers) to implement "context sensitive design"; in helping research laboratories (in universities and in pharmaceutical companies) deal with the impact of colliding professional judgments; or a state agency calls to request advice and technical assistance in incorporating mediation into land use decision-making to achieve "smart growth"; or an institute for gerontology calls to talk about programs to aid managers of nursing homes in communicating and negotiating with providers and residents; or an organization representing apartment owners want to create on-site mediation programs for its owner-members and tenants, and a variety of folks want help facilitating decision-making processes, and so on. And, then, there are the dispute-specific requests: land use controversies; policy differences; allocation of resource challenges. And, there are also organizational and cultural challenges in workplaces and community settings that are, increasingly, seen as contexts for conflict resolution.

Indeed, the attention focused on understanding negotiation has generated a significant gain for the public, not-for-profit, and, private sectors. Much of the attention in teaching and research and practice focuses on understanding the dynamics of that process, what affects it and the actors in it, what accounts for failure in negotiation and what constitutes effective negotiation strategies and tactics, and so on, and, thus, provides, in public policy domains, a rich literature to assist in the world of practice, and, "translated" by practitioners, it is doing just that.

We know from the recent Nobel prizes awarded in economics--to Daniel Kahneman--who never took an economics course, by the way--and Vernon Smith, that consumer decisions may not be rational and we know as well that negotiators do not necessarily act rationally (indeed, they may act against their own, objectively perceived, interests). Herb Simon (another Nobel winner, several years earlier) sought to understand why bargainers left so much value on the table--issues not negotiated; values not allocated--as rational beings presumably would not do that. So, as a result of their inquiries, and those of others, efforts to understand what factors impede rational negotiation--one major aspect of negotiation inquiry--has yielded insight into the relationship between how issues in contention are "framed" for negotiation; the operation, and impact, of psychological factors (e.g. risk aversion, loss aversion, reactive devaluation;

dissonance, etc.); the role of empathy and the effect of relationships on the process (and results) of negotiation, and, also, on the compliance rates and the impact of agreements over the long term. And, of course, there are countless other perspectives that have yielded to intellectual analysis and research that have added value to the world of policy and have had a considerable impact on practice.

Applied work focuses on improving the dynamics of negotiation--through training; structural design--in order to effectuate optimal outcomes. How? Efforts at Harvard, MIT and Stanford particularly produced training modules and frameworks to give practical insight and provide guidance. We've adapted some of this, as have others. Certain points tend to be common: Getting negotiators to focus on their interests (not solely their positions) which allows interests to be met without compromising critical needs; second, framing issues for constructive negotiation: how one presents/frames/structures an interest can affect how, indeed, if, negotiations can go forward (e.g. consider the dispute between New York and New Jersey over Ellis Island: framed as who OWNS the Island, it becomes a property issue, the positions become adversarial, legal, rooted in history; framed as HOW BEST TO MANAGE, PRESERVE and DEVELOP the Island, it becomes a management issue, a resource allocation issue, a problem to be defined, managed and perhaps, guided through a bi-state organization, with resources from both states and the federal government, to produce a plan that meets the interests of the citizens of both states, the region, and, indeed, the nation.) A third focus is on the psychological factors that operate in negotiations: if one understands the fact that buyers tend to lower the value of what is to be purchased while sellers tend to raise the value of what is to be sold (and expectations match both positions), one understands that some objective criteria are essential to aid in negotiations. And so on.

Fundamentally, we are getting people to understand that negotiation is not, or need not be, a zero sum game and this acknowledgement challenges people to seek options that meet interests without sacrificing critical needs, that maximize outcomes, and, generally, at the same time, this informed negotiation dynamic tends to preserve and, in some cases, to enhance relationships. (This can be an enormously important element obviously, in families, neighborhoods, communities at interest and in political conflict, within organizations and institutions and between and among nations—as we have seen over and over).

### Public Contests and the Impact of Conflict Resolution: Some Examples

The impact, then, in the policy arena, emanating from work in our field, is considerable. Indeed, the more institutions in society use mediation and other dispute resolution processes that focus on consensual decision-making, the more likely it is that significant issues will be raised and managed well. Some elaboration, by way of case examples, makes the point: Two major settlements in the last few months, in New Jersey, one dealing with school finance and the other with child welfare, underscore the importance of--and, as a result, enhances the visibility of--negotiated outcomes and, particularly, the use of

mediation to advance public policy goals and participative public decision-making processes. Valuable recognition is accorded those who work in the field, directly, (we are mediating the school funding case), but, the indirect effect is considerable: attention is focused on the importance of finding consensual means to resolve thorny, difficult and frequently, long-term state policy and funding issues. And, to be sure, mediated settlements underscore the importance for students in planning and public policy to become knowledgeable regarding the processes that produce them and lead to their effective implementation. In this way, public policy and planning schools educate the next generation who will extend (and perhaps expand) the impact of conflict resolution.

### *The Child Welfare System: Reform and Conflict Resolution*

In the first instance, the focus is on a settlement between the State of New Jersey and Children's Rights Inc., the result of a lawsuit against the Division of Youth and Family Services (DYFS), that exposed New Jersey's child welfare system as an abysmal failure despite all previous attempts at reform; it is dramatic in scope and impact as it will require remedies, particularly "process remedies", that create unprecedented change at DYFS. For the first time, a group of national experts will monitor the requirements set forth in the settlement, will articulate benchmarks, including operating procedures and budget decisions, and, virtually unique in these matters, the panel's work will be funded and staffed by a national foundation whose sole focus is child welfare reform, the Anna E. Casey Foundation. The federal court will retain its interest as well.

A settlement such as this, aiming to fundamentally alter the way a public agency functions, is the result of a collaborative, problem-solving approach, guided, in this case by a mediator, a former supreme court justice, and the commitment of all parties, including the governor of the state, to make it work, in brief, to improve the conditions and outlook of children in the state's care. The scope and quality of this agreement reflects not solely a compromise between positions of the parties but rather an effort to come to terms with the needs and interests of those affected and involved. Rather than simply ending a lawsuit with a winner and loser, it continues the relationship among those at interest to implement the creative settlement they have produced.

### *Funding Schools: Law, Education, and Conflict Resolution*

In the second instance, an agreement was reached between the State of New Jersey and the Education Law Center in Newark, an advocacy group for urban schools, which had sued the state in the latest round of a case (Abbott v. Burke) that has been before the New Jersey Supreme Court for 22 years. The settlement was reached with the aid of a mediator, a sitting judge, and while the major issue of supplemental funding levels was not resolved, several issues were and, what is virtually unique with respect to this settlement as well, is that it provided for a process for the parties to work collaboratively on the critical issues that remained, notably regulations to implement court decisions regarding,

among other things, school supplemental programs, administrative matters and classroom instruction in 30 of the state's poorest districts, a daunting task to say the least. Committee responsibilities, as well as those tasks assigned to the mediator/facilitator, were set forth in An Order from the Supreme Court which also contained language that strongly encouraged the parties to use the collaborative process to write the regulations. The "collaborative regulation committee" includes teachers, parents and legislators as well as State Education Department officials, researchers and representatives of the Education Law Center. The work of the committee is being mediated by the Center for Negotiation and Conflict Resolution at Rutgers University, that is, by its director, Sanford Jaffe and, deputy director, Linda Stamato

The prospect for reaching consensus on regulations among those who are affected by them, including those who serve the public interest, is significant, not only for the immediate task at hand, but beyond it, to other venues, school related and not. Quality in the design of regulations and effective implementation is more likely to be achieved with participation by those who know best, administrators, teachers, agency personnel and researchers and parents. The process for working collaboratively is no small piece of the problem-solving puzzle. More than twenty years in litigation, and, finally, the momentum is gaining for consensus through mediation.

The State of New York faces school funding issues, with respect to New York City, that New Jersey confronted, statewide, decades earlier. The former attorney general of New York, Eliot Spitzer, in an op-ed piece in the New York Times (July 20, 2003, page 11), called for a commission to "bring together all the relevant parties, to reach consensus on the financing and other reforms needed to meet the court (of appeals) mandate.... all interested parties--including the governor, the legislature, the city, parents, teachers, business leaders and the plaintiffs--have a strong interest in developing a remedy that works. Face-to-face negotiations will expedite efforts to find a solution, particularly because all parties know that failure to reach consensus could result in a court-imposed solution that no one supports...."

The impact of conflict resolution in the policy arena is notable: Consensus-building, problem-solving processes are, increasingly, seen as the way to go.

### Public Policy, Applications to Practice and Education

There is the impact on the role of the courts in society as a result of the court entering the policy arena by incorporating new ways to resolve disputes into the court system (e.g. multi-door courthouse); and the impact, in planning, on traditional "home rule" concepts as the new processes lead to regional approaches in developing (and managing) complex land use plans and resolving disputes that arise. And, given my vantage point in a university, how could the impact on curriculum be overlooked? "Conflict Resolution" has become an integral part of many higher education programs, in planning, policy, law and management and the interest in (and scholarship on) negotiation has led to more

courses on negotiation, in a variety of forms and contexts, in departments as diverse as political science, education, social work, public health and history. (We had a cell biologist in our Negotiation, Law and Public Policy class this year, joining the usual--and diverse--collection of law, public policy, planning, political science, social work and international students.)

The publishing world may not be thriving on sales of books in the field, but there are considerably more of them, considerably more than I dare say anyone would have anticipated two decades ago. Journals specific to the field and special editions of "mainstream journals" add to the increasingly rich literature in the field. Newspapers and popular magazines regularly give attention to aspects of the field and its practice.

### Conclusion

"Conflict Resolution" has come a considerable distance in the public domain. There are problems, of course, and there are daily reminders of missed opportunities--for conflict resolution initiatives that go unrealized. But as we lament the lost opportunities, and the costs associated with them, and, as we wrestle with problems in the field (e.g. the downside of court connections; ethics; training; practice; and so on; and, too, implementation challenges; sustaining our work through the next several generations) we need to acknowledge what Paul Wahrhaftig has given us: the opportunity to reflect on the difference we have made and the incentive to extend our reach.

The impact of two decades, in the policy and planning domains, has more than touched scholarly direction, teaching and practice, and altered traditional ways of governance, it has fundamentally affected, in notable instances, the ways communities take form and function, the nature and scope of civic engagement. We are connected to the main forces shaping the world, domestically and globally, by processes we understand a good deal better because of the experience and scholarship of the last several decades, a good deal of which has had its genesis in what we call the conflict resolution field.

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September 15, 2003