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CHAPTER 13

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ARGUING, BARGAINING, AND GETTING AGREEMENT

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LAWRENCE SUSSKIND

1. INTRODUCTION

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In the public policy-making arena, stakeholders and decision makers are engaged in a never-ending process of trying to influence each other's thinking and behavior. Sometimes, this is accomplished through option one: conversation in which one party seeks to convince another to do something (i.e. lend support, change their mind) on the basis of evidence or argument. More often than not, though, an exchange of views—no matter how elegantly presented—is insufficient to alter strongly held beliefs. Because of this, many parties resort to option two—hard bargaining—in which threats, bluff, and political mobilization are used to gain the outcomes they want. Particularly if political power is unevenly distributed, powerful parties can often use hard bargaining to pursue their objectives. In many democratic contexts, however, confrontations that flow from hard bargaining lead to litigation (or other defensive moves), which typically generates less than ideal results for all parties.

There is a third option: "mutual gains" negotiation, or what is now called consensus building. In this mode, parties seek to make mutually advantageous trades—offering their "votes" in exchange for a modification of what is being proposed or for a promise of support on other issues. So, while arguing and bargaining—the first two approaches to dealing with conflict in the public policy arena—can sometimes produce the desired results, they often generate a backlash or lead to sustained confrontation. Only when parties feel that their core interests have

been met, they have been treated fairly, and they know everything possible is being done to maximize joint gains (i.e. through consensus building) will agreements be reachable and durable enough to withstand the difficulties of implementation.

The dynamics of deliberation, bargaining, and consensus building in the public arena have been reasonably well documented (Gutmann and Thompson 1996). These published findings suggest that well-organized dialogue on matters of public policy can improve the climate of understanding and increase respect for differences in perspective, but will not lead to changes in policy or shifts in the balance of political power (Yankelovich 1999; Straus 2002; Isaacs 1999). On the other hand, there is some evidence to indicate that carefully structured consensus-building efforts can produce fairer, more efficient, wiser, and more stable results—even when political power is not distributed evenly (Susskind and Cruikshank 1987; O'Leary and Bingham 2003). That is, that negotiation can actually lead to shifts in policy or political alignments. However, obstacles to the organizational learning required to institutionalize consensus building are substantial, and the documentation that does exist points to a relatively small number of successful consensus-building efforts in the public arena (Schön and Rein 1994). Further, attempts by others elsewhere in the world to capitalize on and apply what has been learned in the United States about negotiation and consensus building are only just beginning (Centre for Democracy and Governance 1998).

Most bargaining and negotiation theory postulates interaction between two parties. In the public policy arena, however, policy-related exchanges involve many (non-monolithic) parties represented by agents (i.e. elected spokespeople or unofficial representatives). As such, multiparty, multi-issue negotiations tend to be much more complicated than negotiation theorists suggest. Indeed, getting agreement in a multiparty situation often requires someone (other than the parties themselves) to manage the complexities of group interaction. This has led to the emergence of a new profession of public dispute mediation (Susskind and Cruikshank 1987). Indeed, in many contentious settings, having wasted time and money on recurring public policy disputes that have not been settled effectively, participants have sought mediator assistance to reach agreements through collaboration.

In this chapter, I will describe the three options that I have dubbed arguing, bargaining, and getting agreement. I will also highlight what appear to be usefully prescriptive norms of behavior for "combatants" in the public policy arena.

2. Dialogue and Argumentation

A distinction is sometimes made by those who focus on discourse between dialogue and discussion. The former refers to the exploration of options while the latter refers

to making decisions. Isaacs suggests that dialogue involves listening, respecting what others have to say, suspending judgement (i.e. avoiding the tendency to defend pre-existing beliefs), and voicing reactions. So, the key questions, then, are: how to get others to listen to what we have to say, how to structure a dialogue (or a skillful conversation) to ensure that participants suspend judgement and reflect carefully on what we are saying, and how to control or manage debate to ensure that the most useful exchange of ideas and arguments occurs (Isaacs 1999).

2.1 Getting People to Listen

Some people will listen politely to the views of others, no matter how outrageous, because that's what they have been taught to do—as a matter of manners. In most contexts, however, politeness breaks down when passions run high, core values are threatened, or the stakes are substantial. Politeness also breaks down when those speaking are more concerned about the reactions of their constituents or followers to what they are saying than they are about the reactions of their partners in dialogue. In multiparty dialogue, representatives of faction-laden groups play to their supporters. They are more concerned about "looking tough" than they are about convincing the "other side" to go along with their proposals.

Isaacs suggests that the "atmosphere, energy and memories of people create a field of conversation" (Isaacs 1999). Within such fields, he asserts, "dialogue fulfills deeper, more widespread needs than simply 'getting to yes.'" Thus his claim is that the aim of a negotiation may be to reach agreement among parties who differ, but the intent of dialogue is to reach new understandings and, in doing so, to form a totally new basis from which to think and act. In dialogue, Isaacs and others suggest, the goal is not only to solve problems, but to "dissolve them" (Isaacs 1999, 19). The question that must be asked is whether or not dialogue—as opposed to negotiation—can solve problems if nothing is traded and only an understanding of differences (and the basis for them) is enhanced.

2.2 Structuring the Conversation

The goal, according to those who see conversation as an end in itself, is to break down politeness and move to a kind of joint enquiry or "generative dialogue." What motivates such a shift, we must ask, if no decision needs to be made, or no agreement must be reached? The moves necessary to accomplish such a transformation hinge on the capacity of the parties to achieve and maintain a substantial level of self-control. In addition, there seems to be an assumption that the participants care more about convincing others of the merits of what they are saying than they do about achieving

a particular outcome. Unfortunately, this doesn't seem likely to occur in the world of public policy.

Ground rules for constructive deliberation must be internalized or enforced. If the exchange is one-time only, as it often is in the public policy arena, it seems highly unlikely that this can be accomplished (unless each of the participants is an old hand at such exchanges). The conversation must be managed in a way that constantly reminds the participants to listen to and respect each other's views. Often, this is best achieved with the help of a trained facilitator (or by building the capacity of the participants through training). But this only works as long as everyone buys into the idea. It is not clear how to deal with obstructionists who seek only to achieve what they see as a symbolic victory by bringing the conversation to a close. When a key player in the conversation is either out of control or has decided, for strategic reasons, that bringing the exchange to a halt is his or her objective, there is nothing that even the most skilled facilitator can do.

2.3 Avoiding Demonization (and Stressing the Importance of Civility) in Debates over Values

"Interests," as William Ury, an anthropologist and mediator, explains, are "needs, desires, concerns, or fears—the things one cares about or wants. They underlie people's positions—the tangible items they say they want" (Fisher, Ury, and Patton 1983). When conflicts revolve around interests, numerous solutions are possible. Since individuals and groups usually have numerous interests, it is often possible with creativity and hard work to find a deal that satisfies many, if not all of the interests involved. Mutual gains negotiation, or integrative bargaining as consensus building is sometimes called in the theoretical literature, is about advancing self-interest through the invention of packages that meet interests on all sides. However, interests are not always the only thing at stake. Fundamental values may be involved as well.

As mediator Christopher Moore explains, "Values disputes focus on such issues as guilt and innocence, what norms should prevail in a social relationship, what acts should be considered valid, what beliefs are correct, who merits what, or what principles should guide decision-making" (Moore 1986). Values involve strongly held personal beliefs, moral and ethical principles, basic legal rights, and more generally, idealized views of the world. While interests are about what we want, values are about what we care about and what we stand for.

In value-laden debates, to compromise or to accommodate neither advances one's self-interest nor increases joint gains. Compromise, in its most pejorative sense, means abandoning deeply held beliefs, values, or ideals. To negotiate away values is to risk giving up one's identity.

Social psychologist Terrell Northrup details several stages through which value disputes move toward intractability. Intense conflict begins when individuals feel

threatened. The threat is perceived as an awful trade-off: either you survive or I do. In order to maintain belief systems in the face of such threats, the first thing parties do is to engage in a process of distortion. This includes building up the perceived legitimacy of their own claim (in their mind) and tearing down the claims of other(s). Then, individuals (and groups) involved in conflict develop increasingly rigid explanations of their own actions and the actions of others. In order to maintain the integrity of our own belief systems, we stereotype others. Behaviors that we find distasteful in ourselves, we project onto our "enemies." As this process continues, our adversaries become dehumanized and are seen not merely as different, but as inhumane. Such reasoning, carried to its radical end, justifies and supports violent behavior (Northrup 1989, quoted in Susskind and Field 1996).

Northrup's final stage, maintaining the conflict, becomes central to each party's identity. To maintain their own values, the groups in conflict must keep the conflict alive. Ironically, this creates an implicit and often tragic agreement among the parties that Northrup labels "collusion." Over time, groups, cultures, and even nations institutionalize behaviors and beliefs which maintain long-standing conflicts. No wonder dialogue, no matter how skillfully managed, is unlikely to produce agreement in situations in which fundamental values are at stake.

Northrup suggests that there are three levels at which conflicts involving fundamental values and identities can be addressed. At the first level, the disputants may agree on peripheral changes that do not eliminate the ongoing hostilities but alleviate specific problems. For example, in the wake of the killing of two employees at a Planned Parenthood Clinic in Massachusetts, Bernard Cardinal Law of Boston called for a temporary moratorium on sidewalk demonstrations and asked protesters to move their vigils inside churches. At this level, both sides held fast to their basic principles. Pro-life Catholics continued to oppose abortion and support demonstrations. Pro-choice groups continued to support a woman's right to choose abortion. However, when the focus shifted to the goal of minimizing violence, it was possible to reach agreement on specific steps that needed to be taken. Unfortunately, such agreements have little effect on basic value conflicts.

Second-level changes alter some aspects of ongoing relationships, but fundamental values are not challenged or transformed at this level either, at least in the short run. Agreements reached at the second level focus on how the parties will relate to one another over time as opposed to merely how one specific situation or problem will be solved. For instance, in Missouri, the director of an abortion clinic, an attorney opposing abortion, and a board member of a Missouri right-to-life group agreed to meet to discuss adoption, foster care, and abstinence for teenagers. Surprisingly, these groups agreed to support legislation to pay for the treatment of pregnant drug addicts. They also established an ongoing dialog that transformed the way they dealt with each other. They began to meet individually, on a personal basis, to work on problems they had in common.

Third-level change is far more difficult. This kind of change involves shifts in the identities that people hold dear. Not only are working relationships changed at this level, but the way people view themselves is altered. Northrup uses the example

of psychotherapy to illustrate. In psychotherapy, an individual's core constructs are examined, faulty constructs are discarded, and the individual develops a transformed sense of self over time. Changes at the first and second levels frequently set the stage for third-level changes (Northrup 1989, cited in Susskind and Field 1996).

2.4 Can Anyone be Convinced to Do Something That is Not in their Best Interest?

The key question for those who believe that "differences" can be worked out through conversation is whether or not anyone can be convinced to do or support something that is not in their own best interest. It seems unlikely. Rhetorical methods, however, can be very powerful. They basically boil down to (1) argumentation with reference to logic; (2) argumentation with reference to emotion; (3) argumentation with reference to history, expert judgement, or evidence; and (4) argumentation with reference to ideology or values. In each case, the person who is trying to do the convincing is basically asking the object of their persuasion (their audience) to hold predispositions in abeyance and remain open to new ideas, new evidence, or new interpretations.

2.5 Influencing the Opinions of Others Through the Use of Rhetoric

It is useful to think of rhetoric in terms of a speaker, an audience, and a message.[1] At the outset, the speaker needs to convince the audience that he or she is trustworthy and knowledgeable. This gives the audience a reason to listen to and, perhaps, believe what the speaker is saying. An audience that ignores the speaker cannot be reached. Thus, establishing some emotional connection with the audience is important. Of course, there is a danger the audience can become too emotionally involved. This can lead to the blind acceptance of arguments. While such persuasiveness might seem advantageous in the short run, concurrence reached in this way will likely be temporary, evaporating once emotions are no longer running high and more thoughtful analysis takes place.

A rhetorical message must be articulated in a language an audience can understand. The most successful rhetoricians try to argue a viewpoint that is usually mildly discrepant with what an audience believes. An audience doesn't want to look foolish—holding an opinion that is demonstrably wrong—but they aren't going to swing across a wide spectrum either. While they usually search for evidence that

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[1] Many thanks to Noah Susskind for offering suggested language for this section of the chapter.

verifies what they already believe, most people spend more time scrutinizing an argument that differs radically from their own (Kassin 2004). If the speaker is preaching to the choir, the choir tends to expend less effort finding fault with the message.

Context and expectations are obviously important. The choice of a rhetorical approach must match the situation. In some instances, it makes sense to lean more heavily on emotion than on logical proof, while in other situations the reverse is true. If there is a clash of ideas or viewpoints, it sometimes makes sense to build upon an opponent's foundational beliefs, but draw different conclusions— pointing out how the other side has misinterpreted the situation or made incorrect leaps of judgement. Convincing an audience that you are right and your opponent is wrong can take several forms. In a dialogue, one side can try to convince the other that they are being a hypocrite because their beliefs, actions, or conclusions contradict each other. They can claim that the other side's beliefs will lead to dangerous outcomes or that their beliefs are fundamentally wrong. They can take a milder course claiming that the other side's beliefs are correct, but their conclusions are wrong. Finally, they can make reference to a conventional body of wisdom, arguing that everybody agrees that they are right so that their opponent must be wrong.

2.6 Using Evidence to Make Arguments on "their Merits"

In the context of public policy debates of various kinds, advocates are very likely to utilize scientific or technical information to bolster their arguments (Ozawa 1991). There are many analytic tools and techniques, including cost–benefit analysis, risk assessment, and environmental impact assessment, that are often used to justify one interpretation of what a particular policy or proposal will or won't accomplish. While these techniques are fairly well developed, they are not immune from criticism. So, if one party doesn't like the evidence offered by an adversary to justify a particular public action, he can either challenge the relevance of that particular technique or suggest that the technique was applied incorrectly. Since almost all such studies hinge, at least in part, on non-objective judgements of one kind or another (i.e. geographic scope of the study, timeframe for the study, etc.), it is possible to accept the relevance and the legitimacy of a study, but show how key assumptions could have been made differently, and if they were, how the results would vary (Susskind and Dunlap 1981).

Advocates of "improved" public discourse press all sides to make arguments "on their merits," that is, to put aside claims based solely on ideology or intuition and to rely, instead, on arguments built on "independent" scientific evidence. Unfortunately, all too often, this leads to the "battle of the printout" as each side appropriates carefully selected expertise to support its a priori beliefs. In the current era, in which relativism appears to trump positivism, the prospect of "dueling experts" leads

some to suggest that scientific or technical evidence might just as well be ignored entirely.

2.7 The Prospects of Joint Fact Finding

If all the parties in a public policy dispute felt they could rely on a particular bit of shared scientific or technical analysis, and agreed to use it to inform a public decision, it would probably have to be generated in a way that all parties had a hand in formulating, by analysts all sides were willing to accept. That is pretty much the idea behind joint fact finding. Since partisans in public policy disputes are unlikely to defer to experts selected by their opponents, and since the idea of unbiased or independent expertise is more or less unconvincing, the only alternative—if technical input is going to be considered at all—is analysis generated by experts chosen and instructed jointly by the partisans.

Joint fact finding can most easily be understood in the context of the consensus-building process (that will be described in more detail below); however, it can also be presented on its own terms and can be used in a dialogue process that it is not necessarily aimed at achieving agreement, but only at enhancing understanding. Joint fact finding begins with the framing of a set of questions. The choice of analytic methods, the selection of experts, even strategies for handling non-objective judgements (including key parameters like timeframe, geographic boundaries, and strategies for dealing with uncertainty) must all then be made in a credible fashion. While joint fact finding rarely settles policy debates, it ensures that useful information, in a believable and timely form, is considered by the parties (Susskind, McKeavner, and Thomas-Lovmer 1999).

Unfortunately, even when joint fact finding is used as part of carefully structured public deliberations, dialogue—no matter how well facilitated—is unlikely to lead to agreement on public policy choices. Argumentation, no matter how skillfully presented or corroborated by expert advice, will rarely cause partisans in public policy debates to put their own interests (as they see them) aside.

3. Hard Bargaining

Hard bargaining refers to a set of classical negotiation tactics. In an effort to convince someone to do "what you want, when you want, the way you want," hard bargainers try to limit the choices available to their negotiating partners by making threats, bluffing, and demanding concessions. In a hard bargaining context, it also helps to have more "political power" than the other side. These classical

negotiating techniques are still very much in vogue even though consensus-building or mutual gains approaches to negotiation have emerged as a highly desirable alternative.

3.1 Hard Bargaining in Two-party Situations

Most prescriptive advice about negotiation assumes a two-party bargaining situation modeled on traditional buyer–seller interaction (Cohen 1982). That is, it assumes two monolithic parties engaged in a one-time-only face-to-face exchange in which each party seeks to achieve its goals at the expense of the other. Such a "zero-sum" approach assumes that the only way one side can get what it wants is by blocking the other's efforts to meet its interests. Note that this presumes that each bargainer is monolithic, or at least has the power to commit (regardless of how many people they might represent). So, agents are not involved.

Hard bargaining follows a well-established pattern. First, one side begins with an exaggerated demand (knowing full well that it will not be acceptable to the other). This is followed by an equally exaggerated demand by the other side. Openings are sometimes coupled with bluff and bluster—indicating that if the initial demand is not accepted, negotiations will come to an immediate halt. Of course, this is not true. Concessions continue to be traded as each side reduces its demand in response to reductions offered by the other. Along the way, each attempts to convince the other that the prior concession was the last that will be offered. They also plead their case on occasion, trying to gain sympathy. During such exchanges, little or no attention is paid by either side to the arguments put forward in support of the other's demands. After all, if one side admitted that the other's claims were legitimate, they would have to make the final (and probably the larger) concession. Finally, the parties either slide past an acceptable deal or reach a minimally acceptable agreement.

3.2 Using Threats to Win Arguments in the Public Arena

In a public policy context, it is not clear that the use of threats is very effective. Hard bargaining in the public policy arena only succeeds when the other side(s) agree(s) to go along. Threats undermine legitimacy, and in the absence of legitimacy, large numbers of people tend to refuse (actively or passively) to comply with whatever agreement is worked out by their representatives. Since threats are usually viewed as illegitimate (or, at the very least, unfair), this can create opposition and instability, requiring larger investments in enforcement to achieve implementation or compliance with whatever public policy decision is ultimately made. In addition, threats set an undesirable precedent. They encourage retaliation by others the next time around.