

3-2-2016

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Recommended Citation

Kashtan, Miki (2016) "A Blueprint for Collaborative Lawmaking," *Interdisciplinary Journal of Partnership Studies*: Vol. 3: Iss. 1, Article 2.
Available at: <http://pubs.lib.umn.edu/ijps/vol3/iss1/2>



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A BLUEPRINT FOR COLLABORATIVE LAWMAKING

Miki Kashtan, PhD

Abstract

Miki Kashtan, a consultant at the Center for Efficient Collaboration, describes how her Convergent Facilitation method of collaborative decision-making brought together contentiously divided stakeholders in an effort to redraft child custody legislation in Minnesota, resulting in a near-unanimous new bill that completely changes the approach to child custody. This breakthrough surprised many. It depended on reframing the goals of the legislative effort to find legislation that all could wholeheartedly embrace, based on what mattered to all parties. A commitment to those goals carried the group through two years of an intensive and yet non-adversarial process.

Keywords: Center for Efficient Collaboration, child custody, Convergent Facilitation, Minnesota legislature, human needs, noncontroversial essence

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There are three ways of dealing with difference: domination, compromise, and integration. By domination only one side gets what it wants; by compromise neither side gets what it wants; by integration we find a way by which both sides may get what they wish.

Mary Parker Follett (Follett, 2003)

What would it take for legislators to work together across major differences? It's one thing to be cynical about politicians, and a whole other thing to have concrete solutions.

For years, I participated in the prevailing myth that the only path to meaningful social change is large-scale transformation in individual consciousness. Collaborative lawmaking, for example, would require a critical mass of people who embrace a partnership paradigm (CPS, n.d.), out of which pool, presumably, a new generation of

politicians would create a collaborative governance system. More generally, this myth suggests that once enough people embrace a different orientation to life - more collaborative, honest, empathic, or whatever the longing is - the systems and structures will follow, naturally and easily.

Then I became hopeless, because I couldn't see large-scale individual change happening, and I didn't see how systemic change could ever happen without it. How could we ever bring about a partnership social order without everyone first shifting her or his internal orientation?

Experience has changed my thinking. Most recently, working as a facilitator with lawmakers, executives, activists, and many other passionate people, I saw firsthand that when people join together in solving a practical problem, and engage in a collaborative process that is strong enough to contain their differences and compost their mistrust, the results can go beyond what most of us imagine possible. In this article, I share that success story. In addition to inspiring and nurturing faith in the reliability of collaboration for the benefit of all, true to the vision of the partnership paradigm, I hope to engage people in thinking about the concrete conditions that can lead collaborative lawmaking and decision-making to become the norm.

When Minnesota legislators, lawyers, lobbyists, and others in the area of child custody were invited to participate in a collaborative process to work out their bitter differences about child custody legislation, some flatly declined, and others were deeply skeptical. Still, enough of them were intrigued enough that they agreed to give it a try. Today, two and half years after the process I've been facilitating started, these stakeholders are celebrating their extraordinary success. Their collaboratively authored legislation, seen by many as a paradigm shift in how courts are asked to decide custody cases, passed nearly unanimously in the Minnesota legislature (121:0 in the House, 61:3 in the Senate). Along the way, mistrust gave way to co-created breakthrough solutions, and skepticism to a hopeful perspective on the legislative process as a whole. Although stakeholders told me throughout the process and after the legislation passed that they

continued to hold onto their original opinions about what would be best for children and families, they nonetheless identified significant steps they could all take together without compromising their integrity. While some see the changes as insufficient, comments at the last in-person meeting and many subsequent phone conversations confirm that all the participants believe that the new law is better than what was there before.

To explain, in a nutshell, what made it possible, I would point to a few principles and insights that guided our work together:

- It is surprisingly and reliably possible, often easy, to find agreements on *principles* in the midst of disagreements on *positions*.
- When we trust that our needs and concerns matter, and understand the needs and concerns of others, we can feel the difference between *compromise* (in which parties make concessions that “feel” like giving in) and *shift* (in which parties change what they are willing to consider based on a larger understanding of the whole).
- While we may approve a narrow range of solutions on the basis of *preference*, we can embrace a wider range on the basis of *willingness*.
- We become amazingly creative when we transcend *either/or frames* and aim instead for *solutions that work for everyone*.

In this article I discuss each of these principles with examples to show how a group of people with opposing views could come to so much alignment. My aim in doing this is twofold. First, I would like people to be practically inspired to try using such approaches in their communities, workplaces, and the political sphere. Second, I want to provide a powerful example that illustrates my overall experience, with many groups, that bringing unwavering faith to a tightly facilitated process can yield collaborative outcomes without requiring personal transformation of participants ahead of time. (Note that a more positive attitude towards partnership as an approach is a likely outcome, and would count as a modicum of consciousness transformation.)

Since this article doesn't contain the full story line, readers are invited to consult the full case study (CEC, 2015a), especially if child custody legislation is of interest to you. See Figure 1 for the bare-bones timeline and accomplishment of the group.

Figure 1. Timeline of Minnesota child custody project

May 2012: After years of disputatious attempts to craft new child custody legislation, Governor Mark Dayton vetoes legislation that established a 35% minimum parenting time as a default presumption, calling on opposing groups to work together. Advocates of the presumption, which was already diluted from their initial proposal of a 50-50 presumption, are devastated by the results and highly mistrustful about the political process.

November 2012: Judge Bruce Peterson convenes a dialogue group to aim for a collaborative solution to the debate.

January 2013-May 2014: Phase 1. The group produces a set of 26 shared principles. Subcommittees operationalize the principles, leading to unanimous passage of preliminary legislation, along with a new vision and framework for the project and a clear list of open issues that the entire group recognizes need to be addressed.

June 2014-May 2015: Phase 2. The group dramatically revises the legislation containing the "Best Interest of the Child" factors and finds a solution to its core conflict over when and how to keep both parents in their children's lives. A second legislative package passes nearly unanimously, shifting the court process from determining who is the better parent (win-lose) to a holistic search for the best parenting arrangement for the specific child and family (win-win for all).

PRELUDE: HUMAN NEEDS AS AN APPROACH TO CONFLICT RESOLUTION

Convergent Facilitation, the process that I developed for collaborative decision-making in a group, is an application of the principles of Nonviolent Communication (Rosenberg,

2015). One of the core insights of this approach is that every thought, word, or action that any of us engage in is an attempt to attend to an underlying need, and that we all share the same basic set of human needs (Kashtan, 2014). The powerful corollary to this insight is that at the level of needs per se, there are no conflicts. Conflicts arise from differences in our strategies for how we approach our needs, which are made exponentially more difficult because of differences in the meaning that we assign to those different strategies, in our worldviews, and in how we see each other.

There are currently several hundred certified and many more non-certified trainers of Nonviolent Communication who have trained hundreds of thousands of people in dozens of countries. Although not officially documented or researched, people who have been trained report that by using NVC's core insights they have achieved extraordinary results in mediation and conflict resolution between individuals, and sometimes also within and between groups. The reason such remarkable outcomes are so commonplace using this approach is that as people are oriented to their own and others' needs, they tend to relax, and to have more clarity about what's truly important to them, more openness to others, more focus on commonality and compassion, and more of a sense of true choice.

Johann Galtung, Norwegian peace scholar and international conflict negotiator through his organization Transcend, also grounds his approach, both to development and to conflict resolution, in needs. In seeking "very rich, many-dimensional and many-faceted, views of human beings, ranging from the most material to the most non-material aspects," he landed on "the basic human needs approaches [because they] are the only ones that bring that entire range of aspects under the same conceptual umbrella" (Galtung, 1978, p.5).

While distinct methodologies are used by practitioners of Nonviolent Communication (NVC) and members of Transcend, they share this common understanding: Identifying human needs and creating conditions that allow them to be attended to create pathways to a shared future, where previously conflict or war prevailed. When it comes

to group decision-making, I used this insight to develop a tool for reaching commonality, goodwill, and collaborative outcomes.

THE NONCONTROVERSIAL ESSENCE: FROM POSITION TO UNDERLYING PRINCIPLE

Without specific and conscious training in working with conflict, even people who are inspired by the vision of a partnership social order based on care for all life may still fall back, often unconsciously, on win-lose approaches to challenging conflicts. We have been trained to argue for our positions when facing differences, resorting to majority rule when the arguments fail. Whoever get the most votes then wins, a modern-day “sublimation” of fighting it out physically.

The focus on human needs creates a path that is directly aligned with the principles of partnership. My work with NVC has been a profound learning over the years, as I have time and time again seen deep differences being bridged. Simply put, this is because understanding comes more easily the deeper we go and the closer we are to the purest level of human needs: subsistence and safety, freedom, connection, and meaning. People are often surprised to see how much commonality they have on that level despite bitter opposition and mistrust.

Such understanding allows for relief, openness, and growing trust. Still, I have found that going *too* deeply into the needs doesn't provide sufficient information to constrain the universe of possibilities, and the efforts to search for solutions don't easily coalesce when the commonality is only at the level of human needs.

Somewhere in between every disputed position or strategy on the one hand and the deepest human needs it is trying to meet on the other, I have found a sweet spot that I call “the noncontroversial essence.” Like human needs, it is always cast in terms of what's wanted or what's important rather than in terms of opinions, analysis, or concerns. Unlike the deliberately abstract, universal, and general tone that the NVC needs language favors, I identify the noncontroversial essence at a level that is only as

deep as is necessary to reach commonality among the disputants. This essence can be expressed in terms of a principle, criterion, consideration, or guideline that the opponents do agree on, even though they don't agree on the position or strategy.

When I work with a group on finding a solution to a problem, I usually start with creating a list of all the shared principles that capture the noncontroversial essence of each particular position or opinion that's held within the group. Here's an example from an early phone call with the Minnesota stakeholders to see if we could reach agreement about coming together to collaborate.

Ben (fictitious name), a lawyer present on the call, was highly dubious about the process. He had something like this to say about it: "Let's just face it... There's a philosophical difference here, and there's no point in dialogue. Some of us think that a presumption of joint custody is just not a wise thing to do, and that's all there is to it."

At this point, I didn't have enough information to be able to imagine what the noncontroversial essence might be. I asked him to tell me what made the presumption unwise for him. His response gave me just enough information to proceed: "You can make too many mistakes this way, because you end up looking at all families in the same way."

In search of what might be the "noncontroversial essence" of his concern, I discarded any single word like "flexibility" or "adaptability," since those would almost certainly guarantee commonality but lack enough specificity to help the group draft legislation. Instead I tried for something closer to his own words. "Let me see if I got it," I said. "Is the gist of it that you want to ensure that each family is handled according to its specific circumstances?" He said that was indeed what he meant. Now I knew I had the essence. I still didn't know if it was noncontroversial, which I could only know by checking with the other stakeholders on the call. Then I took a risk, because on the phone I couldn't read body language or tell who might agree with Ben. I said, "I'll bet that Jenny would wholeheartedly endorse this principle even though she is in disagreement with you."

Jenny (fictitious name) was representing the opposing view. “Yes, of course I do,” she said, “but...”

I stopped her before the fragile accomplishment would dematerialize. Before hearing any response, it's vital in moments like this to address the whole group and to point out the unexpected agreement between warring parties. This is a moment of noticing and nurturing the energy necessary to counter millennia of either/or thinking. Agitated adversarial energy may take a while to settle down in a group, as its members adapt to an unexpected convergence. Once the group's energy has settled, there is room to hear what is in the “but,” which would almost invariably point to another principle, a consideration that must be held alongside the original one if a solution that works for all is to emerge.

As I reflect on and then write down the principles I glean from the different positions in the room, I check with others to see that each principle is still noncontroversial, until all that is important has been heard and captured. As a result, when the entire group is invited to take ownership of the collective list, most of the kinks have been ironed out already.

For the Minnesota group, by the end of the first day, we had a list of 25 principles that everyone in the room agreed to - even though it was a chaotic day with people coming and going. The transformation from the hopelessness about anything other than the familiar win-lose fight to an amicable agreement by all was truly miraculous. Two phone calls later, the constituencies represented in the room had been consulted with, principles had been reworded to become even more noncontroversial, and one principle was added. The resulting list of 26 principles (CEC, 2015b) provided the foundation for the group's work and guided it to its biggest milestone ever: the almost unanimous passage of the legislation they co-created.

WHEN EVERYONE MATTERS: FROM COMPROMISE TO SHIFT

In any group I've worked with, using this process uncovers commonality and unleashes goodwill. Part of it is because people see the commonality and relax into it. Another big part is the experience of mattering. When each position, however controversial its content and regardless of how adversarial its delivery, is converted into its noncontroversial essence and included and held by all, each person knows that he or she matters and that others matter.

That sense of mattering in itself is a profound departure from the common ground of domination systems (CPS, n.d.), in which some people matter and others don't. When everyone matters, new possibilities emerge, including the viscerally felt difference between compromise and a true inner shift.

Compromise, for most of us, is the best that we can envision in the context of collaborating across significant differences. Yet we all know that compromise usually doesn't feel very good. When we don't see an alternative, we accept sacrificing some of what's important to us in order to reach agreement, and yet we often remain unhappy. In general, compromise doesn't shift the fundamental sense that we are at odds with each other and, therefore, that we must give up something so that movement is possible. It is probably for this reason that we scrutinize the other side's sacrifices, wanting to ensure that we don't give up more than they do.

In domination systems structured around competition, win-lose, control, and adversarial processes, true shifting is a far less common experience than compromising. Shifting is an organic response that arises when defense and protection subside. It is a sense of willingness to consider or accept something new where previously there was opposition or resistance. What makes shifting possible is knowing that we matter, that we are open to hearing and taking in what matters to another person, even a former opponent - what they care about, what pains them, and what they want to see happen. A compromise tends to arise from calculation of possibility, while a shift usually comes

from the heart. Having experienced what shifting feels like, I would never want anyone to settle for compromise.

Whenever I use Mary Parker Follett's quote (at top of this article), I see around me an intuitive acceptance of this wisdom. People immediately see that negotiation, compromise, and concessions are all rooted in the win-lose paradigm. It's no accident that Follett also bequeathed to us the term "win-win." Perhaps because "integration" is not such a familiar word, people really think about it when they hear it, and can see how much more is possible.

The promise and experience of integration is what made it possible to create so much movement in the Minnesota project. Cautious at first, people caught on to and embraced my faith in what was possible. After being heard over time, they relaxed into trusting that their needs were included because those needs were captured well, and because Convergent Facilitation models integration with no compromise. People develop a willingness to open up and engage from a much deeper layer, without posturing, without defending or protecting. This is the ground from which shifting arises.

In addition, time and again I reaffirmed to the participants that I was not neutral, nor was I identified with any side. My commitment was to all of them - I was an advocate for everyone's needs being attended to. One participant said she saw that I took everyone into my heart, and that the solutions came from my holding people there. This approach also contributed to people trusting their own mattering, and opening to hear others. Gradually, something that seemed impossible began to make sense.

The first inkling that integration would happen in the Minnesota project emerged from the work of small groups equipped with the principles, their fledgling trust, and their commitment to go forward only with what they all could agree to.

Even with intense disagreements, and despite moments in which some groups came close to falling apart, they all found true paths to partnership. In particular, one group created a new vision and framework for the project, building on the principles and on existing research. The entire group agreed to what previously would have seemed impossible, including, for example, that “decisions should promote a child’s healthy growth and development through safe, stable, nurturing relationships between a child and both parents” (Interim unpublished document, October 2013).

The final success of this phase of the work was the passage of an initial legislative package. As Mike Dittberner, one of the lawyers in the group, said, “The legislative changes were not earth-shattering, but they were confidence-builders” (CEC, 2015a). That package passed unopposed, buoying the spirits of the group to continue with its work in addressing the deeper and more difficult issues still ahead.

INVITING STRETCHING: FROM PREFERENCES TO WILLINGNESS

I wrote above that people continued to hold their original opinions on what the best outcome would be with the same strength even though they all embraced the solutions they co-created. This illustrates what often remains unnamed: that, for each of us, the range of solutions that we can willingly accept is far wider than the range of our preferred outcomes. A strong commitment to having a practical outcome, coupled with a reliable and consistent sense of mattering, creates a willingness to stretch further away from our narrow preferences, embracing what may be the only possible solution that includes everyone.

Most people in the group were representatives of larger constituencies, and needed to become ambassadors for whatever proposals were agreed to within the group. This was no small feat, because the work of engaging with constituencies is delicate. The trust built within the group rested on being heard and on hearing others, which constituencies never saw in action. Their level of trust was lower, and engaging them required effort and care.

Here's how the group defined agreement in its charter for Phase 2, which yielded the impressive legislative success in 2015:

“The group will reach consensus on an issue when it agrees upon a single proposal and each member can honestly say:

- I believe that other members understand what is important to me and my constituency.
- I believe I understand what is important to other members and their constituency.
- I believe the process as a whole has allowed for all needs and concerns to surface and be included in the development of this proposal.
- Whether or not I prefer this decision, I support it because it attends to more needs and concerns than any other proposal we explored, and because I trust the process that brought us to this point.” (Interim unpublished document, June 2014).

Along the way, the group also accepted another operating principle: Any proposal that didn't make things worse would be accepted if it was important to another person or constituency within the group. This principle turned out to be difficult for people to retain despite agreeing to it, and the question, “Why do we need to make this change?” came up often. Each time, when the principle was brought up, people willingly stretched, albeit sometimes moaning, to accept something even when the principle or its wording didn't make sense to them. Each time this happened, I felt the bonds within the group strengthening, because those on whose behalf others stretched would relax a little bit more, knowing that their concerns were held by all. A number of times this mutual commitment went as far as someone expressing concern about a proposal they themselves favored because they weren't sure it would work for those with a different position.

At times, I needed to work very hard with some individuals before they could accept the invitation to stretch. Each time, the willingness emerged from the recognition that

their own preference was truly not acceptable to someone else, and therefore a less favorable and yet fully acceptable solution would end up being the one that would work for all. This was clearly not about making everyone happy, because preferences do not align; it's more about ensuring that no one stretches beyond her or his capacity to the point of giving up and compromising, and yet everyone is stretching as far as they can truly stretch.

Because this work is so demanding for the people who participate in it, I make it a point to shower everyone with appreciation whenever I see them making a stretch. It's not simply a technique; I only do it when it's genuine. Although I bring tremendous faith that a solution will be found, I am not the one finding it; it's always the group, through the remarkable work of each individual who stretches. I am moved whenever I see people do it, and call it out to them. I often see that the appreciation nurtures a sense of mattering, and thus supports the very source of what makes the stretching possible.

Aside from yielding impressive practical results, all this stretching and opening also created a different atmosphere in the group. As Carolyn Laine, one of the legislators, said, "We started with deeply entrenched views and distrust, and ended up with friendships and understanding" (CEC, 2015a). Indeed, I was often in awe remembering that some of the people who were joking together, dedicating hours and days to working together, and expressing care for each other's concerns, had not even been speaking to each other in the past.

Summoning Creativity: From Either/or to Solutions that Work for Everyone

One of the principles that becomes almost like a mantra in a project like this is that nothing short of a solution that works for everyone will suffice. One particularly dramatic instance occurred in the first round of the work, when the group came up with an initial bill that had minor and yet significant changes. One group of stakeholders could not agree to one of the provisions in this proposal. The back and forth was intense enough that I went to Minnesota for an unscheduled extra meeting to attempt a

resolution. It became apparent that the depth of opposition to that one provision was so major that it was asking for more stretching than that group could do with integrity. There could be no true willingness for that provision to be part of the package at that time. What the large group then did was to remove that one provision from the bill, and pass only those provisions that everyone agreed to.

After that bill was passed, the group expanded its scope and ambition, and attended to the deeper issues that weren't addressed in the previous round. By then, the group had fully shifted from a collection of advocates for particular positions to a group of people working together to find a solution that would attend to everything that was important to the various constituencies. The complexity of the issues, especially the challenge of working with people who were representing constituent groups that were not in the room, and keeping everyone focused on togetherness, demanded a level of creativity that was far more exacting than that required to achieve compromises.

The group gradually recognized that the core provisions of the child custody legislation - the "Best Interest of the Child" factors - would need to be entirely revamped for a true solution to emerge. That fundamental overhaul would turn out to be the only way to achieve a collaborative solution. Still, as the group came together to examine the revised factors that one subgroup had created, the possibility of collapse was still present in the room. Throughout that intensive two-day process, one problem after another was solved by the creativity of one individual or another. As each person proposed something, I could see how they were stretching to come up with a solution that would indeed work for everyone, not just their constituency.

Part of the reason this level of creativity emerges is because I always ask people to come up with an alternate proposal to the one they oppose, thus preventing a back-and-forth that leads nowhere. Everyone who opposes is given the task of finding something that attends to the original purpose of the proposal they are opposing as well as to their own concerns. Since all the needs are already shared by all, eventually a solution will emerge.

The most dramatic moment was when one person who was strongly opposed to any move towards the 50-50 presumption solved the biggest remaining obstacle by including a factor that specifically spoke of “The benefit to the child in maximizing time with both parents and the detriment to the child in limiting time with either parent.” I knew then that the hurdle in the group was overcome, and that the legislation was pointing the courts in a direction that would likely be as collaborative as the process that would get the group there. I am not surprised that this partnership both required and resulted in “a complete overhaul of the custody and parenting time factors in Minnesota” (Brown & Brown, 2015). I find it hopeful and heartening to see that in order to bring opponents together in full, the necessary creativity often requires a change in the terms, not only in the details.

This level of creativity, and the resulting agreement, is what led one lawyer who had initially been reluctant to participate in the project to say, “This could be a model for resolving complex legislative issues, possibly even on the federal level.” (Name withheld, comments given at closing circle, October 25, 2013)

CONCLUSION: COLLABORATIVE MEANS LEADING TO COLLABORATIVE RESULTS

Like abortion and gay marriage, child custody is often a battleground in the culture wars of our time. Mutual accusations are rife, not only between couples in court but also in legislative debates across the U.S. (Jones, 2015). The pressure of high divorce rates intersects with passionate arguments about the treatment of fathers, the handling of domestic abuse claims, and men’s and women’s evolving roles and rights. This Minnesota group showed a path forward that honors everyone involved, and that demonstrates that partnership is possible - between opposing parties in a legislative debate, between parents in a custody dispute, and beyond. Not only did they manage to collaborate; in the process, they created a more collaborative process for future custody cases, focusing on what’s truly best for the child and family rather than who is the better parent.

Indeed, this could be a model for how to bring partnership and collaborative processes to the wider political field, at state, federal, and even international levels, wherever gridlock, polarized positions, and mistrust are the norm. Wouldn't this be a powerful way to contribute to the kind of transformation we so want to see in the world?

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community groups. Her third book, *Reweaving Our Human Fabric: Working Together to Create a Nonviolent Future*, explores the tools, practices, and systems needed for a collaborative society. She holds a PhD in Sociology from UC Berkeley.

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