

## IN THE BEGINNING

By Paul Wahrhaftig

I want to put some of the materials I am depositing with CRInfo into a context. I am trying to transfer materials about the beginnings of the community dispute resolution movement – particularly unpublished or locally distributed “fugitive” materials. A good example are the two items by Michael J. Lowy, *Basic Assumptions of Bail Reform and Pretrial Diversion – Some Alternatives* and *Presentation of Michael J. lowy to Pittsburgh Government Study Commission* both written around 1972.

These two talks were a major part of my introduction to the then unheard of concept of Community Dispute Resolution programs. Lowy is the one who convinced me to help build this field. Note, especially in the second article, Lowy envisioned CDR as just one step in decentralizing the criminal justice system.

To further contextualize these documents, I am pasting in, below, excerpts from a book I am writing covering the beginnings and growth of CDR as a social movement. Let us go back to 1972. If we did a literature search then we would have found virtually nothing about community dispute resolution. I was working for the American Friends Service Committee (AFSC) to reform the bail system in criminal court.

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The failure of bail reform illustrates the “liberal’s dilemma.” That is: liberals are fine at analyzing systems and defining the problems. However, when they invent solutions, those solutions depend on the authorities in power agreeing with them.<sup>1</sup>

The case of bail reform illustrates the liberal’s dilemma because the judge always makes the final decision on bail. In making this decision, the judge may not agree with the risk assessment of the bail agency, even when community members knowledgeable about the likelihood that their neighbor will appear in court. In the end, behind the

window-dressing of these reformed bail agencies the community was no more empowered than it was before.

It was time to focus on a project that could work regardless of the opinions of the criminal justice authorities – a process that would actually shift decision-making power away from the courts and into communities. Michael J. Lowy, an anthropologist and member of the steering committee for the AFSC Pittsburgh Pretrial Justice Program had a concept that had the potential to work independently of the criminal justice authorities. In a keynote address to a Pennsylvania statewide pretrial justice conference that I arranged in 1972 he challenged the concept that so many disputes that turn up in courts are criminal in nature and ought to be judged on the basis of fault. Instead, he proposed that an informal process, similar to the “moots” he had studied among the Ashanti, in Ghana, might be used by neighborhood groups in this country to help residents deal with conflicts that arise within their own communities. Neighbors and friends in conflict should be able to settle their differences in an informal setting, focusing on the future – “how can we live together in peace,” rather than battle over blame finding in the formalized court system.<sup>2</sup>

Lowy’s presentation was so impressive and thought provoking that it did not seem right to go on with the rest of the conference agenda. Instead, I brought out the jugs of wine I had intended for later socializing, and those present talked and worked out a new agenda for the conference which would help them think through his proposal.

This address and subsequent brainstorming marked the beginning of my, and AFSC’s, role in the Community Dispute Resolution (CDR) field. Using student researchers, I had done a study that, when we looked back to it, helped confirm that it would be possible to convert seemingly criminal situations into problems subject to informal settlement. In 1971 I conducted a research project to determine how

Pittsburgh courts use bail. I used college students as court watchers. We compared bail-setting practices in a centralized downtown Magistrate's Court, in Pittsburgh, and in District Justices' offices in three ethnically distinct neighborhoods. The court watchers observed how bail was set for people charged with assault and battery or drug possession. The findings indicated that higher bail was set for blacks versus whites and for poor versus affluent citizens.

An unanticipated finding was that when the case appeared in a District Justice's small courtroom, the parties were much more likely to find a way to settle the case out of court rather than continue to process it as a criminal complaint. The frequency of these informal settlements did not vary significantly by either race or economics. However, although "informal settlements" were worked out frequently in the small neighborhood District Justice's office-courtroom, they were rare in the crowded magistrate's court downtown. As we considered Lowy's "moots" we drew the conclusion from this study that it is possible to bypass the criminal justice system by helping the parties find a mutually acceptable settlement.

As we examined this new idea, reformers within the criminal justice system were also examining the possibilities of using informal, neighborhood dispute mechanisms to increase the efficiency of the court system. In 1965, a presidential Commission on Law Enforcement and the Administration of Justice focused national attention on the overburdened judiciary. Its findings helped build consensus around the need for reform and experimentation in the court system, with particular focus on minor criminal cases involving neighbors, relatives and other acquaintances.<sup>3</sup>

Soon, prominent criminal justice officials also began calling for a community role in handling minor disputes. Chief Justice Warren Burger, in a 1977 address to the American Bar Association National Conference on Minor Disputes Resolution drew on the observations of legal anthropologists and pointed to the need to consider adopting

informal, neighborhood-type alternative dispute mechanisms, be they arbitration, mediation, or conciliation to avoid expensive and lengthy legal proceedings in minor neighborhood disputes.

*“The consumer with \$300 in controversy ...[is] more likely to go to a local neighborhood tribunal and would prefer one lawyer surrounded by two non-lawyers rather than a black-robed judge. The decision-makers must be trained or natural, practical psychologists, with an abundance of the milk of human kindness and patience.”<sup>4</sup>*

Thus, from the beginning two different philosophies drove efforts to establish community dispute resolution centers. Reformers based outside the criminal justice system thought in terms of empowerment of individuals and/or the community. Those within the criminal justice system saw it as a way to clear overburdened court dockets. This divergence of philosophies led to an internal conflict, within the field, that continues to today.

That conceptual division was not just theoretical. It existed from the very first CDR projects. In 1973 as we digested Lowy’s moots and planned a pilot project to test whether a CDR center designed to empower the community could work, we discovered that there were three programs already in existence. They ranged from purely community based to an agency model and finally one run entirely from within the criminal justice system. Once we discovered that these three models existed we decided not to establish our own center. Rather we would study the three existing programs, write up our findings and encourage others to develop CDR programs.

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<sup>1</sup> I heard this analysis in a talk given by Stanford Law Professor Richard Danzig, speaking at an informal colloquium, University of Pittsburgh Anthropology Department in 1972

<sup>2</sup> Lowy, Michael J., *Basic Assumptions of Bail Reform and Pretrial Diversion – Some Alternatives*, Mimeograph by American Friends Service Committee, Pretrial Justice Federation (1972)

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<sup>3</sup> Bradley, Scott and Melinda Smith ,” Community Mediation: Reflections on a Quarter Century of Practice, *Mediation Quarterly*, Summer 2000, Vol. 17 No. 4 p. 315

<sup>4</sup> Warren E. Burger, “Our Viscous Legal Spiral”,. *The Judges Journal*, Vol. 16, No. 4, Fall 1977, p 48