“WHAT’S LOVE GOT TO DO WITH IT?”:
ADDRESSING SPIRITUALITY WITHIN THE
CONTEXT OF TRANSFORMATIVE MEDIATION

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In response to the dissatisfaction that many individuals experience as a result of resorting to conventional legal methods of dispute resolution, and in recognition of the growing number of individuals who are becoming increasingly aware of an internal spiritual calling, this thesis proposes that a spiritual approach, within the context of transformative mediation, be developed and offered to help parties address the legal and spiritual issues underlying conflict.

Notions of spirituality are explored and definitions are offered to enable mediators, parties, and other legal professionals to clearly identify common values and to have a starting point from which to ascertain the goals and objectives underlying such an approach.

The model of transformative mediation is defined and explained, and relevant criticisms are addressed in order to accommodate a spiritual framework. A five stage process is utilised to facilitate the identification of spiritual opportunities and issues that arise in the context of transformative mediation and, within each stage, examples of spiritual issues are provided to assist mediators in identifying and capitalising on the opportunities for spiritual growth, empowerment, and recognition within a mediation.
Prologue

While writing this thesis, I have been asked on numerous occasions “what’s your thesis about?” My answer varies, depending on who is asking. When a non-lawyer asks me this question I generally reply that I am seeking to answer the question “Can we talk about our soul in legal conversation?” Not wanting to sound like a teaser for an ‘Oprah Winfrey’ episode, I continue by explaining that I am exploring why the law seems to avoid addressing the spiritual implications of disputes, why it ignores the fact that resolving a particular dispute by using traditional remedies often leaves the parties unsatisfied. I often continue by using the example of how the field of medicine is now acknowledging how a patient’s physical condition is affected by their mental/emotional/spiritual state and is becoming increasingly receptive to incorporating alternative remedies or therapies to treat physical illness. If my audience indicates any interest by asking what interested me in this topic, I continue.

I describe how I tentatively decided to write a mini-thesis at a point in my life when I found myself so far removed from being interested in the law that I thought I would never enter a law library or a lecture theatre again. I had been faced with a series of critical life events (events that sound like biblical challenges almost - death, disease, betrayal, divorce and a few others) that turned my personal world upside down. In response to these events I did what is commonly referred to as “soul searching.” I took a hard, critical look at my life and realised that my apparent successes and achievements offered little solace in times of real crisis.

I admitted to myself that I had increasingly become disenchanted with the law, the legal system, and its ability to resolve in a meaningful way the many problems facing individual
people and disenfranchised groups within society. When I practiced law, the legal remedies I was able to offer and procure for my clients often did not bring significant or meaningful change to their lives. The abused wife who received custody of her children would return with an illegal eviction notice or a problem with receiving public benefits or a dispute concerning access visits. Training students to enter the legal profession seemed like adding to the problem, and my attempts at introducing alternative perspectives on dispute resolution were often met with questions such as “What does this have to do with The Law, or How will this help me get Articles?” Researching issues such as the Stolen Generations or Domestic violence was becoming unsatisfying given the constraints imposed by legal thought, theory, and language. I, like many other lawyers, felt little joy when contemplating anything legal.

My critical life events forced or led me to exploring matters of the spirit and soul. Like many professional people I had lived my life in my head. I thought I could solve any problem if I thought or analysed it long enough. I discounted any feelings (if I acknowledged them at all) as emotional currents that were best ignored or at least controlled. I was for all intents and purposes a very rational person who was adept at appearing level-headed and being able to keep the personal and emotional aspects of her life separated from her professional life. As a lawyer I was trained to look at situations objectively, dispassionately, and “rationally” -- qualities I believed defined and demonstrated one’s professionalism.

When I attempted to apply these professional qualities to the life events facing me, I realised they would not work. I remember asking a counsellor to recommend a book on “grieving,” believing that there were steps and procedures that could be identified and followed to deal with these challenging life events. I was told, while there were such
books, I probably just needed to acknowledge and feel my feelings, that thinking and acting in a prescribed manner would not be very helpful, especially as I had not thought myself into my current situation and would not be able to think myself out of it. I was taken aback, and at a loss as how to simply “feel.”

Thus began my return on the spiritual journey - a journey interrupted by twenty years filled with university, corporate life, more university education, legal practice, teaching, and getting on with it in the real world. I had to learn how to become aware of my feelings, which led to an acknowledgment that as a human being I was more than a body and a mind. I was also a heart and a soul; or to use more sophisticated language, I was a composite of my physical being, my intellect, my emotions and my soul (that which acknowledges a connection to the eternal).

I began reading books (old habits die hard) on philosophy, religion, and spirituality. I dabbled in yoga and meditation. I found a new enthusiasm for learning, this time without a conventional goal in mind. I realised that the majority of the serious and painful problems faced by people have a spiritual dimension to them -- a dimension that can assist in explaining and resolving these problems.

I did not find easy or instantaneous solutions. I did not adopt a traditional religious perspective or decide to blindly follow any particular organised “new age” movement. I merely examined my life by asking different questions and listening to different parts of myself. I gave myself the luxury of taking time to reflect on, rather than reacting to, my life. I stepped outside of my conventional and traditional upbringing, education and training to look afresh at what values and goals and motivations would guide my life.
When faced with deciding upon a topic for a thesis, I had just resurfaced from a self-imposed spiritual exile. I was unsure if I would be able to continue my spiritual journey and remain in the law. I decided that if I could incorporate my new interest with my legal background and skills, I would give law another chance and write a thesis.

To accomplish this task, I would have to use not only my mind, but my emotions and soul as well. What was I interested in? What topic would I feel strongly enough about to spend a considerable amount of time thinking, and reading and writing? Did my spiritual growth and new perspective have any application to the law? If a spiritual approach brought more peace, order and appreciation to my life, perhaps this approach could also be utilised to deal with less threatening problems. If the law is intended to help people resolve disputes and address conflict in society, then why not offer parties and participants in the legal system an opportunity to resolve “legal” problems and to also address the underlying spiritual issues inherent in any conflict.

I knew that the law would be resistant to utilising any spiritual framework. But was there an area of law more amenable than others to such an approach? Was there an area that was already utilising more flexible techniques and comfortable with considering the work in professions outside the legal arena? Alternative dispute resolution, specifically mediation, came to mind and seemed to offer the best opportunity for connecting my interest in spirituality with the law. I knew that the goal of mediation depends on one’s perspective and is affected by what the parties desire as an outcome. Considering that other professional areas, such as medicine and psychology, utilise a spiritual reference point—why not mediation?
So off I went, sending off a proposal, and then chapter outlines, with the intent that it would either be accepted or laughed at. If the topic was too bizarre or not “academic” enough--so be it. But if it was accepted, I would take the risk of sharing my new found spirituality and offering it as yet another approach to dealing with conflict.

I admit my commitment has been shaky. Very little is written on spirituality and the law. When I began researching I found material on the interrelationship between non-secular institutions and the law but generally they were aimed at discussing how specific religious beliefs could be accommodated, or not, by the legal system. The need to maintain separation between Church and State is also considered in the literature. And there is a growing body of material for lawyers who are confronted with the practical dilemma of reconciling their religious or spiritual beliefs with the practice of law. Very little has been written on how or when or whether the law should reflect, incorporate, or acknowledge spirituality.

As have others who are venturing into academic writing with the intent to include their spirituality, I have found it difficult to expose my spiritual beliefs and values to the academic world- especially the legal world. I have found that many academics and lawyers believe that spirituality is not an area that is worthy of intellectual discourse or that it is inappropriate to bring into a University or legal setting. Two years ago when I served on a small grants committee for research, I was taken aback by the negative response and dismissive laughter directed to proposals that sought to utilise a religious or spiritual perspective. I have also been hesitant to enter a debate on the ‘truth’ or validity

1 As Calvin Pang notes in his article “Eyeing the Circle: Finding a Place for Spirituality in Law School Clinic” (1999) 35 Willamette Law Review 241, 244: “Unless the appropriate context exists, people are uncomfortable talking about it [spirituality] in general conversation. The risk of sounding unctuous, irrelevant, “squishy” or threatening may lurk for one who injects spirituality into conversation. There is
of my spiritual beliefs, not because I am afraid to have my values challenged, but because those who are most critical are often those who do not respect diversity in thought or belief.

Recently when a QC asked me what I was writing about, I gave him my lay person's reply (the extended version- after he initially laughed and said, “no really, what's your thesis about?”) He listened politely, and then added that after a recent arbitration that he had conducted, he felt uneasy about the parties' ability to re-establish their familial relationship afterwards. I suggested that there was no reason why the parties legal and relationship issues could not have both been addressed by the process. But instead of utilising a psychological or therapeutic approach for assisting reconciliation, something lawyers are not necessarily comfortable with or equipped to do, perhaps a refocussing of the dispute so that the spiritual implications of the parties behaviour and relationship could be addressed and might prove effective. His interest and non-dismissal of my topic has motivated me to provide a thesis on how this might be approached.

In Part I, I examine the current use of the term spirituality, distinguish it from traditional religions, offer a more inclusive definition that allows for the accommodation of different spiritual approaches, and conclude with suggestions for avoid self-serving or evangelical traps.

In Part II, I review briefly how legal commentators are beginning to introduce notions of spirituality in legal conversation when discussing the practice of law and the education of

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even more discomfort when the subject arises in a law school. One often wonders whether spirituality and the teaching of law students are mutually exclusive."

lawyers. I conclude by suggesting that mediation is an area most receptive to incorporating a spiritual approach in the practice of law.

In Part III, I review the different accounts of mediation that mediators use to describe their practice. I examine the model of transformative mediation and outline its key goals and underlying values. I describe examples of how mediators have acknowledged and incorporated the goals of transformative mediation in their practice. I conclude this section by briefly identifying several critiques of the transformative model.

In Part IV, I describe how a spiritual perspective may enhance the transformative practice and respond to some of the criticisms and problems identified in Part III.

Finally, in Part V, I identify issues that will need to be considered by those who wish to adopt a more spiritual approach to the practice of mediation and suggest future directions for research into spirituality and mediation.
Part I: Spirituality Defined

Let's be honest; the word "spiritual" makes a lot of people immediately think of the "new age", incense burning, vegetarian, horoscope driven old hippies or feral youth chanting the mantra "peace and love". When the word 'spiritual' is uttered, visions of alternative newspapers advertising workshops in colour therapy or feng shui, new age shops selling crystals and vials of herbal essence, and studios containing Reiki, acupuncture, and re-birthing practitioners spring to mind. A whole industry has been born out of the "spiritual" movement and its products are sometimes judged as superficial, lacking in credibility, promising "magical" or unproven results.

For more and more people, however, the word 'spiritual' reflects a much ignored aspect of their lives. The word can be comforting and disturbing as the same time: comforting because it reminds us that there is more to our lives than working and succeeding, and disturbing because our personal lives do not necessarily reflect our spiritual yearnings and striving. If we have not been raised within a non-secular tradition, or on some level have rejected this tradition, we are left to our own devices to define this aspect missing from our lives and seek to fill it. This is a personal journey- seeking meaning and direction for our singular lives.²

² By listing these examples, I do not intend, in any way, to disparage their use.
³ For a more detailed discussion of the personal impetus for spiritual meaning see Elizabeth Lesser, The New American Spirituality- A Seeker's Guide (1999) 30 where she writes: "To long for peace, or God, or spirituality is quite natural. To feel a certain loneliness for a nameless friend or an emptiness that cannot be filled with ways of the world is instinctive... Especially today, with the accelerated pace of human activity and technology, we may feel a deep spiritual hunger. Yet many of us don't know what to do when a longing for spirituality settles briefly in our hearts. To give voice to our spiritual longing is to reveal a side of ourselves that we have become skilled at hiding. We may be ashamed to admit that we feel a kind of helplessness- a need for something that we cannot even describe. "
Our individual journeys are also part of a collective journey. As a society we have traditionally relied on non-secular institutions to guide our individual spiritual journeys. While we have sought to keep these institutions out of the public arena of governance and societal relations, we have implicitly assumed that “right-minded” citizens would act in accordance with their values. Now, as we individually reject these non-secular institutions and seek alternative spiritual paths, we are also increasingly aware of the need for new societal values to govern our relations with each other. This change will require a public discussion of what values we seek to replace and with what.

In his recent book “ReEnchantment: The New Australian Spirituality,” Professor David Tacey explores the resurgence of spirituality and its reflection in various disciplines and areas of society in Australia such as the environmental movement, the health professions, the Aboriginal reconciliation movement, and the workplace. He believes the resurgence of spirituality is a result of a “profound disillusionment with the present social system” and is “concerned with discovering new and better ways of conducting life and community, as well as a search for abiding spiritual values that can provide a new stability and unity to society.” His perspective, instead of finding individual self-reflection as prompting a spiritual journey, identifies societal problems, pressures, and out-dated values (and non-secular institutions) as an additional cause of spiritual dissatisfaction and a motivation for seeking new answers to both personal and societal dilemmas.

As a result, we are compelled to find answers or direction for ourselves and for society simultaneously, without the guidance of “established” non-secular institutions and within

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5 Ibid 6.
societal structure that has prided itself on being secular. This asking of questions, seeking answers, desiring more meaningful values is spirituality. Spirituality can be viewed as an internal process of moving toward increased understanding, increased connectedness, increased peace. Spirituality is not about fundamental beliefs. Diarmaid O'Murchu, a social psychologist and priest, explains that spirituality is essentially the human search for meaning:

All of us, all of the time, operate out of a sense of being connected to an inner core of meaning. Throughout life, we humans are exploring meaning, searching for it, and imposing it where we feel it doesn't exist. We're creatures of meaning and the drive toward meaning comes from deep within- not just within ourselves, but also... from deep within creation itself... spirituality is planetary (and cosmic) as well as personal.

In his recent book, *The Spiritual Marketplace*, Professor Wade Roof cites a definition of spirituality provided by a panel consisting of corporate executives, educators, clergy and community leaders:

Spirituality is a very difficult word to define. An adequate definition would include reference to a relationship with something beyond myself that is intangible but also real. It would recognize that spirituality is the source of one's values and meaning, a way of understanding the world, an awareness of my "inner self" and a means of integrating the various aspects of myself into a whole.

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6 As Tacey notes: “The spiritual reawakening will challenge and overturn many of the principles that have governed our society during the long secular period, which has taken its prompting from humanism and the Intellectual Enlightenment. ... We are about to experience what could be called a ‘second enlightenment, a postsecular enlightenment, where religion and spirituality will return to centre stage and where secular materialism will appear out of date and anachronistic. However, with this new religious enlightenment, the sacred will be experienced in radically different ways from the past. The new awareness will not champion premodern religious categories but, rather, will introduce new and altered concepts of the sacred.” Ibid 6.

7 See Lesser above n 3, 30 where she says: “One thing that we can confidently say is that spirituality is Fearlessness. It is a way of looking boldly at the life we have been given, here, now, on earth, as this human being. Who am I? How should I live my life? What happens when I die? Spirituality is nothing more than a brave search for the truth about existence. Nothing more, but nothing less as well.”


Spirituality reflects a belief that there is something more than that which can be perceived by our five senses. Spirituality by its name suggests that there is an essence beyond the physical, which exists and gives meaning and order to human existence.\textsuperscript{10}

Spirituality does not require the identification of a Supreme Being that has power over man and nature, or is necessarily responsible for the creation and ruling of the universe. Spirituality does require, however, a belief that there is something more than a planet filled with physical bodies operating without rhyme or reason. Most non-secular religions espouse a belief in an almighty divine being who is omnipresent, all knowing, all powerful, and exists outside the human realm. I believe that there is a divine essence, spirit, energy, or force that each human being is part of, not apart from. Professor Tacey identifies this essence as

the presence of eternity, a presence that seems to love and nurture us and lead us towards our individual human destiny... [that] the divine is present with us and that it stands within the real, and within the human, as the spiritual guarantor of this reality. What we do matters, our lives have meaning, precisely because the temporal, the spatial is loved and supported by the sacred.\textsuperscript{11}

When we acknowledge and connect with the spiritual part of ourselves, we simultaneously realise that we are connected to all human beings, and through that connection, are part of something which is much larger than the sum of the individual parts.\textsuperscript{12} When we are in touch with the spiritual force within us, we sense that the physical, day to day world or reality that demands our attention and focus much of the time, is but one level of our existence. We sense our belonging to something that is

\textsuperscript{10} Professor Roof notes: "Historically, in many languages and cultures, the spiritual was conceived as wind and breath, that which moves, the force that mysteriously and invisibly animates... The spiritual comprehends but cannot be contained by intellect, cognition, or institutional structure: it reaches out for unity and the ordering of experience; it abhors fixity in the interest of transformation." Ibid 34.

\textsuperscript{11} Tacey, above n 4, 22.

\textsuperscript{12} In fact, Tacey believes that 'interconnectedness' is the key word in describing spirituality. Ibid 19.
eternal and all loving, something that removes fear, something that allows us to quiet the incessant chattering of our personalities, and instead feel and listen to our soul.

My spirituality does not require me to escape the world and meditate twenty-four hours a day or seek refuge in some paranormal state so as to avoid the physical world. Rather, my spirituality asks that I acknowledge that I have a soul\(^\text{13}\) -- containing an eternal spirit, a loving energy that can guide my actions, make sense of my feelings, and focus my attention. Without reference to my soul, my personality (or ego) will run the show and insist that self-protection, self-promotion, and self-aggrandisement are the goals of my life. My ego will convince me that it is "every man for himself", that the purpose of living is to get as much out of life for myself as is possible. When I attempt to challenge my ego by proposing that I also have a soul, my ego will try to convince me that there is no proof of its existence, that I will be taken advantage of, that I will lose. My ego is desperate to stay in charge because otherwise it will have to take second chair.\(^\text{14}\)

A common theme among writers addressing spirituality is this split between the ego and soul. Elizabeth Lesser describes the Buddhist philosopher Chogyam Trungpa's interpretation of ego:

> By ego, Trungpa meant the part of ourselves that feels separate from everything else. It is the part of ourselves that struggles and fears. Ego is not necessarily something bad, nor does it refer only to the aggressive, conceited parts of ourselves. Ego is the part of the self that wants to be unique, unchanging, solid. Ego struggles against reality in an attempt to preserve itself. It is so afraid of looking at the vast, mysterious, untamed, eternal

\(^\text{13}\) As defined by Tacey: "Soul is the centre of the human person, the centre of authenticity and meaning. Soul is the container of the spirit, the dwelling place where spirit is received from the cosmos and integrated into our own individual lives." Ibid 51.

\(^\text{14}\) Tacey describes this relationship similarly: "The human ego at first views the soul and its depths as the enemy and antagonist of life, since the ego cannot see how those depths could actually support and sustain it. However, once the ego acquires maturity and wisdom, it recognises that its own life is completely dependent on a greater, invisible or symbolic life, and that recognition and acceptance of this dependence is a sign of high culture and awareness. The infantile ego that is bound up in itself views the soul as absurd, an embarrassment, but the mature ego realises its indebtedness to a mysterious hidden source." Ibid 44.
By allowing my soul the freedom to operate on a day-to-day basis in the physical world, my personality (or ego) over time recognises that there is more to this particular life than what was previously imagined. My ego acknowledges that operating from a position of being inter-connected rather than disconnected to all others allows it to access feelings of peace, love and empowerment -- feelings that the ego had thought were illusory. The day-to-day business of living becomes the day-to-day business of loving, of accepting all events as opportunities to reflect on the eternal nature of my spirit, of allowing my spirit to remember its natural state. From this perspective, life ceases to be solely about meeting my own individual personality's needs and wants, and enlarges to include listening and acting on the desires and yearnings of my soul. My individual personality or ego does not disappear from the equation, but instead accepts that it will serve as a handmaiden rather than a ruler.

Every human being has a soul with similar yearnings: yearnings to love and be loved, to create, to live in peace, to return to a state of childlike trust, acceptance, and innocence. Each of us, at one time or another, experiences something that stimulates these yearnings. It might be the death of a loved one that reminds us of the fragility of life and its preciousness. It might be waking up in the middle of the night feeling alone, lifeless, or disoriented and wondering how we ended up the life we have. Or the stimulation might arise from a life-affirming event like watching the safe delivery of a baby and

\[\text{Lesser, above n 3, 55.}\]

\[\text{Or as Tacey notes: "The ego is part of a much larger energetic and spiritual system and its life is bestowed upon it by that larger system. Therefore, even for very practical reasons, it is wise for the ego to develop an ongoing relationship with its source and creator. This relationship could be described as sacramental, because the ego must learn to sacrifice aspects of itself to the larger reality, which in turn replenishes and renews the ego. The ego and the soul are interdependent: the soul needs the ego for the}\]
feeling awe at the miracle and beauty of birth, and remembering that we are blessed with being alive and part of something incredible.

When haunting experiences stimulate our quest for explanations, understanding, or provoke deep gratitude, our soul is “calling” us. Spirituality can also be described as a process of acknowledging and listening to these “calls” and allowing our soul to guide our actions. Tacey reminds us that

spirituality should be seen less as an unusual ‘achievement’ of a special or gifted human personality, than as a natural state to which we always have access, if we manage to relax our conditioned defences and resistances long enough to admit the presence of the sacred. Spirituality is our birthright, not some kind of bonus or added ‘extra to life. From this religious perspective, secular or disenchanted ‘normality’ is really the unusual condition, the exception to the rule.17

As stated previously, a key concept to the term “spirituality” is the idea of interconnectedness. In those dark moments of life, we experience feelings of fear, separation, and isolation. We realise that our individual journey is, in fact, one that we take alone. At the same time, however, we can on some level acknowledge that every human being experiences similar feelings, albeit at different levels of intensity and provoked by different situations. We, as much as our ego would like to convince us otherwise, are not unique in our feelings nor are we alone. If we do not react to our feelings of fear and separation and instead listen quietly to our soul, we can experience and become aware of our spirit-- the spirit that is eternal and omnipresent.18

outward living of its life and for the incarnational expression of its spiritual essence, while the ego needs the soul for its energy, its passion, indeed its very existence. Tacey, above n 4, 44-45.

17 Ibid 18.

18 See Tacey: “Spiritual experience replaces the isolation of the individual ego with the unity awareness of the larger or cosmic. .... Spirituality was thus traditionally a goal or product of religious devotion, but increasingly, as we shall see, it is being separated from religion and experienced as a reality in its own right. .... Spirituality is a feeling of being connected to a greater or larger whole, and an awareness that in the part or fragment, the radiance of the whole shines forth.” Ibid 20.
Our ability to listen quietly to our soul without reacting to our emotions and feelings is difficult in practice and in Western culture. From childhood many of us are taught to be self-sufficient, independent, and self-directing. We are encouraged to work hard, achieve, compete and take advantage of all opportunities that come our way. Often those who have not achieved are pointed out for their failures, their weaknesses, and their inability to "make it." As a result, we are motivated often more out of a fear of failing, or of not getting our due, rather than out of a desire to achieve something that is truly meaningful to us.\textsuperscript{19} This type of motivation perpetuates our feelings of isolation and fosters a defensiveness within us that precludes our trying to understand others. Instead, our inclination is to judge and ascribe blame to others for any perceived slight we believe they have inflicted upon us.

Central to my definition of spirituality is my belief that our attachment to explaining events using the dynamic of cause and effect hinders our ability to understand others and recognise our connections and relatedness to them. We analyse many interpersonal relations using a limited cause and effect analysis. For example, if a colleague makes a snide remark to me and I become angry, I will blame him for causing my anger and feel justified in the response I choose to take. This simplistic cause and effect analysis, besides adding little to my understanding of what has transpired, allows me to shirk any responsibility for my own behaviour. I will not be moved to ask myself why the particular remark provoked anger or why I responded with anger rather than dismissal or amusement. I will not question why the colleague chose to make the particular remark to me. However, if I ask these and other questions, I become less defensive and move away

\textsuperscript{19} O'Murchu, above n 8, 65: "One of the most damaging illusions of all is our tendency to view (and understand) things in isolation. In the Western worldview, everything is assumed to be independent, autonomous, and separate. Even when something is clearly dependent on something else for its growth and survival (e.g., how a human being is dependent on the environment) we still persist in treating the
from the position (and perspective) of helpless victim toward a position of strength and action (rather than anger, or hurt, and reaction). I acknowledge the connection between my personality, my personal history, my individual perceptions and how they affect my choice of response. I begin to understand that each experience, each perception, each feeling that I have is not separate, but part of the larger context I exist in.

Diarmuid O'Murchu, in his book *Quantum Theology*, explores the new discoveries in quantum physics and applies them to a new definition and conceptualisation of theology. His application can explain my intuitive rejection of a simple cause and effect analysis. He explains that:

At the heart of the quantum vision is the conviction that all life forces are interdependent and interrelated. In fact, we experience life, not in isolated entities, not in separate units, but in bundles of experience (quanta). Moreover, our human minds are tuned (designed) to receive life and the processing of our experience in wholes and not in isolated segments. ... My perceptions are never isolated, nor can they be separated from the emotions and feelings that are inherent to my human and cosmic reality. Every human action, mental or otherwise, takes place in the context of relatedness. I am a participator in quantum experience, characterized primarily by a capacity to relate, in which case, of course, the object of my perception is no longer an object, but a subject in a quantum dialogue, seeking or expressing connectedness.

Everything I do, everything I am, is the fruit of a relationship, not necessarily the result of a relationship in terms of cause and effect, because the quantum world does not operate in terms of cause and effect. No, the whole is greater than the sum of the parts, yet, mysteriously; the whole is contained in each part (as in a hologram). Cause and effect makes little sense in a world now understood to be fundamentally relational and interdependent in its essential nature.20

Applying this description to the situation of a colleague making a snide remark, I could view the exchange, not in terms of cause and effect, but in a more holistic way. If I can entertain the idea that my colleague did not "cause" my anger (because my anger is a result of something more than the act of hearing the snide remark), then I can

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two as independent entities. We have been brainwashed in individualism and isolationism. We are victims of a cultural ego-trip into estrangement and alienation."
acknowledge that my anger reflects something deeper. I can facilitate this reflection by asking questions that will lead to a greater understanding of myself, the other person, our relationship, and my relationships in general. I might ask how do I currently view my life and how does this view affect the importance I place on a single interaction with a colleague? Is my anger a reaction to something that has occurred in the past that I have failed to resolve? If I feel the remark is unfair, what values am I using to judge the remark as unfair? Are those values my own values, society's values, familial values? Why has the colleague made this remark? Has something occurred between us in the past which has resulted in hostile feelings? Do I threaten this person in some way? Do I remind this person, consciously or unconsciously, of someone whom he dislikes? The list is endless and is not meant to be exhaustive. The questions are merely meant to remind me that there is more going on than the utterance of a snide remark and my response to it. Perhaps it is such a trivial matter that I will let it pass. Maybe it is more significant, and can offer an opportunity for both my colleague and me to explore our relationship to each other, to other colleagues, to our families, or to other people in general.

Recognising this interconnectedness and interdependence allows me to view the world, and its problems and dilemmas, as opportunities for personal growth and spiritual development. Obtaining a specific result or resolution is not as important as understanding how I have constructed the problem and how I can influence its resolution. From this perspective I can now allow myself to be guided by my soul and its divine inspiration.

I have not offered specific doctrines and definitions that must be incorporated into a definition (and application) of spirituality. Developing a spiritual perspective and practice

20 O'Murchu, above n 8, 66.
is personal and cannot be translated into universal theories or given universal parameters. I realise that with the plethora of spiritual practices and directions there might be an inclination for those wishing to incorporate a spiritual perspective in a particular discipline to prescribe a specific technique or set of doctrines to follow. This, however, would only serve to replace one form of dogma with another. Furthermore, our personal definitions of the spiritual and the sacred will evolve as we do; our spirituality will, hopefully, be dynamic and ever changing.

Instead, I suggest that we evaluate whatever definition or practice we adopt by reviewing the questions below which have been developed by Elizabeth Lesser.21 The questions are meant to guide us to finding an authentic spiritual path that is neither autocratic or self-serving. The questions under “Old Spirituality” are intended to point out old traps and ways of thinking. The questions under “New Spirituality” are a starting point for evaluating new paths.

**Old Spirituality**

1. Who has authority? The hierarchy has the authority. Church authorities tell you how to worship in church and how to behave outside of church.
2. What is Spirituality? God, and the path to worship Him, have already been defined. All you need to do is follow the directions.
3. What is the Path to God? There is only one path. It is the right way and all other ways are wrong.
4. What is sacred? Parts of yourself—like the body, or ego, or emotions—are evil. Deny or transcend or sublimate them or they will lead you astray.
5. What is the Truth? The truth is like a rock. Your understanding of it should never waver. Therefore ask the same questions and receive the same answers at all stages of life.

**New Spirituality**

1. Who has Authority? You are your own best authority. As you work to know and love yourself, you discover how to live a spiritual life.
2. What is Spirituality? You listen within for your own definition of spirituality. Your deeper longings are your compass on the search.
3. What is the Path to God? Many paths lead to spiritual freedom and peace. You have a rich array of gems from which to draw illumination: the world’s

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21 Lesser, above n 2, 3.
4. What is Sacred? Everything is sacred—your body, mind, psyche, heart, and soul. The world is sacred, too, with all of its light and darkness. Bring the exiled and unloved parts of yourself back into the fold.

5. What is the Truth? The truth is like the horizon—forever ahead of you, forever changing its shape and color. Let your spiritual path change and diverge as you journey toward it. You live many lives in one lifetime. The truth accommodates your growth.

How we publicly give voice to our spirituality is another question which is beyond the scope of this discussion.22 I raise the issue, however, to briefly address the concern that we must keep religion and governance separate. The non-secular institutions that are most vocal today are rightly challenged by those who believe their instructions to be outdated, sexist, racist, or imbued with political motivations. We have a long history of trying to keep Church and State separate. This does not mean, however, that we should avoid recognising that most political decisions will implicitly require reference to a value system.23 But we must be careful not to confuse spirituality with religion. As Professor Pang warns:

spirituality ... carries a meaning distinct from religion. ... [R]eligion is a man-made instrument that is often organized and institutionalized for the ostensible purpose of nurturing the spiritual lives of its believers. But religion is not spirituality. In fact, religion can be dispiriting, and history is replete with stories of great evil done in the name of religion. While religion waxes and wanes, spirituality remains constant, always with us even if we choose not to give it attention.24

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22 See Tacey, above n 6, 52 where he observes: “Key features of the new Australian spirituality would include its uncertain and obscure nature. It is no too sure of itself, and it does not yet know what to make of itself, because it is not getting any affirmative mirroring from mainstream society. It is also fragmentary, individualist and personal, since there are as yet hardly any collective identifications to which it can be attached. Because the public life continues to be governed by an opposite kind of authority, spirituality is operating mainly in the personal arena, where there are fewer resistances to the reality and claims of the sacred.”

23 For an extensive discussion of this debate in the American context see: Stephen Carter, The Culture of Disbelief (1993).

24 Pang, above n 1, 245. See also O’Murchu, above n 8, 13 where he writes: “Religion is one aspect of our spiritual unfolding, but only one. Our spiritual evolution as a species took place for an estimated seventy thousand years without formal religion, and there are many indications that we are, once more, evolving spiritually into a nonreligious ambience. As a human species we are outgrowing our need for formal religion. It seems important that we differentiate between spirituality and religion. Spirituality is inherent to the human condition—also to planetary and cosmic growth; in my estimation religion is not.
How we keep this distinction clear in public discussion and when attempting to use spiritual values and concerns to address problems is something that will have to be addressed by others. Tacey notes that what is needed is “dialogue and interchange- so that we can integrate the newly rising spiritual contents into our culture, rather than hold them back and condemn them to a marginal existence.”

In the next section, Part II, I look at how notions of spirituality have begun to creep into legal conversation.

_Spirituality has an enduring quality, conterminous with human evolution; religion serves a transitory and temporary purpose._

25Tacey above n 6, 12 where he also continues by recognising the need for both spirituality and rationality to allow for real change and transformation.
Part II: Spirituality in Legal Conversation

When commencing research on spirituality and the law, I began with computer assisted research using search terms such as "spirit and law" or "soul and law" in an attempt to narrow my search to exclude non-secular or religious perspectives. The results were generally unproductive and often included material which might include the word "spirit", in the sense of the "spirit of the law", but did not include articles that addressed spirituality as I have defined it. Additionally, my search located articles that might look at spirituality in a more holistic or non-religious sense, but this consideration was then applied toward a specific substantive legal area such as environmental ethics or focused on the particular spirituality of a specific segment of society such as Indigenous peoples.

There are a significant number of articles that address the problems that practitioners who follow traditional religious practice have with practicing law in an adversarial system. While these articles are interesting, they do not necessarily assist those who choose not to subscribe to a traditional religious practice. Certainly generic problems and conflicts could be extrapolated to address the broader conflict between legal practice and spirituality, but the authors tend to be relying on espoused doctrine to support their solutions.

For example, in his article "The Spirit And The Law", Thomas Porter acknowledges a spiritual crisis in the practice of law, and cites to a legal culture of dysfunctional law firms where profit motivates and directs performance. He reflects on the adversarial nature of our legal system which does not "work to restore relationships that are broken or to

reconcile people." He argues that the profession is in a spiritual crisis because it has forgotten what its true purpose is and supports a new paradigm shift toward restorative justice. He, however, supports his thesis by reference to Judeo-Christian religious traditions. While there is nothing inherently problematic with his approach, it excludes those who fall outside of this perspective but who otherwise might support his conclusions.

There are also a growing number of articles that attempt to discuss the relationship between legal practice and the need to be mindful of spiritual concerns, but they tend to be more inspirational in tone rather than offering concrete guidance. More and more of these articles are appearing in professional law society journals. A recent cover story in the *American Bar Journal* is entitled "Helping Clients Heal: Lessons Lawyers Can teach Clients About Spiritual Growth." In this article, the author suggests that a lawyer's work involves more than resolving legal problems and must address the spiritual problems underlying conflict. The article is inspirational in that it supports lawyers who wish to attempt to address the spiritual dimension inherent in conflict, but it does not define what is meant by spirituality or how to actually incorporate one's own notions of spirituality into legal practice.

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28 Ibid 1155.
29 Ibid 1156.
30 Ibid 1159.
31 See also Reverend Peter Hughes, "Sermon Preached at the Opening of Law Term Service Held at St James' Church, King Street, Sydney on 1 February 1993" (1993) 67 *Australian Law Journal* 688, 690 where he refers to the usefulness of a "spiritual perspective which will afford meaning, and provide the key to an appropriate response and the values we can draw upon to support it" when pursuing our legal goals. While this advice is relevant to all practitioners regardless of their beliefs, realistically those uncomfortable with non-secular traditions would probably not have been drawn to read the copy of his sermon.
Two recent articles written by American legal academics have been more ambitious in their attempts to discuss the growing interest in spirituality and the law. In his article, “Eyeing the Circle: Finding a Place for Spirituality in Law School Clinic,” Professor Pang articulates a working definition for his spirituality and suggests that it is time that legal educators acknowledge that students have a genuine need to have their spiritual concerns addressed while learning to practice law in a clinical setting. He notes that:

Spirituality is embedded in much of law. Our transcending notions of justice, the timeless reach of our constitution, the connectedness of precedence and stare decisis, the defining selflessness of advocacy—all are infused in spirituality, if only we would see it. While the law school culture may allow and even encourage students to nourish their souls and pursue the spiritual in their private lives, it fails to acknowledge spirituality in a formal institutional way, and this failure contributes in part to the perception that our activities in lawyering and the training of lawyers lacks the stuff of life. Legitimizing a place for spirituality in the training and the work of lawyers would institutionally affirm that the professional activities of law students and lawyers can transcend narrow, mechanical, self-interested concerns and become “life-affirming,” not “life distancing” metaphors for life, not death.33

His article goes beyond the inspirational mode of previous articles, it takes a stand by offering a working definition of spirituality, contemplates how spiritual issues can inform good legal practice, and offers specific methods for addressing spiritual concerns in clinical legal education.

Another article that expressly identifies the need for a spiritual approach in the law is “Integrating Spiritual Perspectives with the Law School Experience: An Essay and an Invitation,” by Professor Lucia Silecchia.34 In her article, Professor Silecchia reviews the increasing importance and acceptance of addressing spiritual issues in professional life in various disciplines such as medicine, social work, education, and other traditional service professions35. She also examines the current practice of law, the dissatisfaction many

33 Calvin Pang, above n 1, 269-270.
lawyers experience, and the need for individual spirituality to be expressed in legal activities.\textsuperscript{36} Like Professor Pang, she believes that law schools should assist students in exploring their spiritual depths.\textsuperscript{37} While she distinguishes spirituality from religion and provides a few basic guidelines to enable a discussion of its relevance to legal education, her ultimate decision to leave defining spirituality to philosophers and theologians,\textsuperscript{38} detracts from her argument. By relying on "outside" professionals to tell us at a later time what spirituality is, we risk that spiritual considerations and applications will be relegated to the too hard, too vague, or too impractical basket. Furthermore, this handballing of the task also allows us to avoid the harder work of looking inside for answers and guidance.

Both of these articles make brave inroads into bringing the relationship between spirituality and law out of the closet. The authors are forthright in challenging the legal profession to acknowledge and incorporate spiritual perspectives in education and practice. What is necessary, however, is further discussion on how this might specifically be accomplished in law. Legal writers must be more open and honest about how they use their own spirituality in practice. They must be willing to enter the discussion, risk criticism, and invite collaboration with others. One area where this is beginning to appear, though not always explicitly, is in the area of mediation. The next part of this paper examines models of mediation and outlines the particular goals and values underlying the transformative model of mediation.

\textsuperscript{36} Ibid 181-189.
\textsuperscript{37} Ibid 192-193.
\textsuperscript{38} Ibid 175-177.
Part III: Mediation- A Transformative Approach

The future of mediation is a matter of general and serious concern, because it implicates the future of an emerging relational vision of society as a whole. If the vision cannot be expressed in a concrete context such as mediation, it remains mere theory. Just as that vision contemplates an integration of individual freedom and social conscience, mediation offers a potential means to integrate the concern for right and justice and the concern for caring and interconnection. In short, mediation presents a powerful opportunity to express and realize a higher vision of human life.³⁹

Mediation is a form of alternative dispute resolution. In mediation, an impartial mediator assists parties in reaching an agreement and has no authority to impose or make a decision should the parties fail to reach an agreement. Mediation has become an increasingly popular form of alternative dispute resolution and its use has become an almost routine step in resolving disputes within the legal system.⁴⁰

In response to its widespread use and diversity of practice, the field of mediation has received considerable attention and been subject to extensive examination by the legal profession- practitioners and legal academics particularly. Among the many debates surrounding the practice of mediation, particular attention has been paid to the different approaches used by mediators and the proposed goals of those approaches.⁴¹ Disagreement has arisen over what constitutes mediation, what the proper goals of mediation should be, and which approach most effectively realises espoused goals.⁴²

⁴² Ibid.
In Section A below, I discuss a system that categories these different approaches and will also briefly describe two authors' description of the philosophies underlying these approaches. In Section B, I summarise the values and goals behind the “transformative” approach. In Section C, I identify and describe two critiques of the transformative approach in order to respond to their concerns in Part IV, where I propose that a spiritual perspective can assist practitioners who decide to pursue transformation objectives in mediation.

Section A: Approaches to understanding mediation styles

To assist mediators in understanding and choosing among the different approaches used in mediation, Professor Riskin has developed a grid system which categorises the approaches according to the subject matter and breadth of problems present, and by the particular strategies and techniques utilised by mediators.43

The horizontal axis of this grid represents the type and focus of problems which are the subject of the mediation. This axis represents the spectrum from very narrowly focused problems (where the result of an agreement would produce a result similar to that obtained from a court) to very broadly defined problems (where the issues of a mediation reflect interests beyond those of the parties themselves and the presenting conflict may be viewed more as an opportunity rather than a problem).44

The vertical axis of the grid represents the strategies and techniques employed by the mediator. It reflects the spectrum of mediator behaviour from very evaluative behaviour

43 Ibid 13, 18, 23
44 Ibid 19-23.
(the mediator actively guides the parties toward settlement) to behaviour which is facilitative (the mediator facilitates communication between the parties). The quadrants of the grid represent different types and styles of mediation; "the four quadrants each represent a general orientation toward mediation: evaluative-narrow, facilitative-narrow, evaluative-broad, and facilitative-broad.".

In their book "The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition," Professors Bush and Folger interpret what they see as the different approaches of mediation through the use of stories. The stories are markedly different in their perspective on what mediation should accomplish and the effect adopting a particular style or goal of mediation would have on society. Unlike Riskin's grid, Bush and Folger's stories provide more of an overview of the motivations underlying a mediator's choice of approach rather than a categorisation of styles.

The first story, the satisfaction story, describes what most people would describe as traditional mediation. Adherents to this perspective believe mediation can result in "win-win" solutions that solve the problems the participants want solved and meet the genuine needs of the parties.

The second story, the social justice story, presents a view of mediation as a process that is capable of helping the parties see the larger picture of the dispute. The mediator reframes the issues to identify commonalities between the parties so that the parties can fight the

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45 Ibid 23-24: "At the extreme of this evaluative end of the continuum fall behaviours intended to direct some or all of the outcomes of the mediation. ... At the extreme of [the facilitative] end is conduct intended simply to allow the parties to communicate with and understand one another."

46 Ibid 24.

47 Bush and Folger, above n 39.

48 Ibid 18.
bigger battle against a common enemy. Mediation in this context will strengthen the parties and address larger issues than originally conceived.49

Bush and Folger’s third story, the social oppression story is not exactly a story but more of a critique. Adherents to this perspective believe that mediation has turned out to be a dangerous instrument for increasing the power of the strong to take advantage of the weak. Adherents to this story believe that mediation perpetuates power imbalances between the parties and results in outcomes which favour the stronger party. As a result, social justice issues are ignored and the weak are continued to be oppressed.50

The transformation story offers an approach to mediation that has the “capacity to transform the character of both individual disputants and society as a whole.”51 It offers individuals the opportunity to grow personally by utilising procedures that foster “empowerment” and “recognition.” 52

Riskin’s grid and Bush and Folger's stories can be combined effectively to provide a more descriptive account of mediation styles. Bush and Folger’s stories can assist mediators in locating their underlying beliefs about the purpose of mediation, as well as assist them in locating an appropriate style for mediation by using Riskin’s grid.

If one subscribes to the satisfaction story, then Riskin’s grid is helpful to focus a mediator’s attention on styles and problem definition that will most likely result in a “win-win” situation-- perhaps a problem that is defined more narrowly than broadly, and with a style that is inclined toward being evaluative. If the social justice story reflects the

49 Ibid.
50 Ibid 22-23.
mediator's underlying belief, then the problem definition would by implication have to become more broadly focused and the mediator's style would need to be more evaluative than facilitative to ensure that an effective strategy was developed to address any power imbalances (either between the initial parties themselves, or between the realigned parties and the larger "enemy.") If a mediator believes that the social oppression story is the correct version of reality, then the mediator would probably choose to no longer mediate, or would restrict their mediation to disputes having little social significance.

Within the facilitative-broad quadrant lies what is called the "transformative approach" to mediation and encompasses the style of mediation that I believe is best suited for a spiritual approach to mediation. Within this quadrant, the mediator's conduct could be characterised as non-directive. The parties themselves define the problem or situation to be addressed and create their own solutions. The mediator is available to assist parties in developing their potential to growth through their participation in the process. Riskin places transformative mediation in this quadrant:

by encouraging the parties to develop their own understandings, options, and proposal, the facilitative-broad mediator "empower" them; by helping the parties to understand one another's situation, the facilitative-broad mediator provides them opportunities to give "recognition" to one another.53

Bush and Folger unabashedly proclaim the transformation story to be the most promising approach for both individuals and society as a whole. They believe that:

Transformation is a different kind of goal. It involves changing not just situations but people themselves, and thus the society as a whole. It aims at creating a "better world" not just in the sense of a more smoothly or fairly working version of what now exists but in the sense of a different kind of world altogether. The goal is a world in which people are not just better off but better: more human and more human... The occurrence of this transformation brings out the intrinsic good, the highest level, within human beings. And with changed, better human beings, society as a whole becomes a changed, better place.54

52 Ibid.
53 Ibid 33.
54 Ibid 29.
Because the values espoused by this approach approximate the values underlying the spiritual approach to mediation I will be proposing in Part IV, the model is more closely examined in the next section.

Section B: Transformative Mediation

Underlying the practice of transformative mediation lies a certain worldview. Bush and Folger identify three worldviews which correspond to their transformation, satisfaction and social justice stories. A description of these worldviews is provided here in order to ascertain the basic values and beliefs that underlie transformative mediation. Though Bush and Folger believe that one starts with an underlying and aspirational value (such as transformation) and then determines the necessary characteristics to achieve this value (compassionate strength), I believe the reverse is more accurate: one defines his or her basic perception of human nature and then locates an aspirational value that is achievable.

The individualist worldview (which underlies the satisfaction story) in essence reflects the positivist ideology of our legal system. Individuals are independent, autonomous, self-actualising, and possesses the knowledge and capacity to satisfy their subjective needs and wants. Other human beings are viewed as instruments or obstacles to this goal of finding personal satisfaction in the world. The job of the legal system (and other institutions) is to mediate among the competing interests of individuals.  

55 See Bush and Folger, above n 39, 236 where they explain: “Human beings need and construct organizing conceptual frameworks in order to make sense of the world. Such a framework, composed of a set of beliefs about the nature of the world- including the nature of human beings and their social processes and structures- provides the organized viewpoint from which one interprets the surrounding world.”
56 Ibid 237-238.
The organic world view, though not directly linked to the social justice story, explains why individual parties would join together against a larger, more powerful enemy. The organic worldview posits humans as capable of feeling connected to a community whose ultimate welfare is more important than individual needs and preferences. The individual is willing to forgo certain individual needs and wants in order to preserve and foster this connection. The individual values the larger community (and his or her connection to it) and ultimately realises that it is more important to serve, rather than be served, by this community. A mediator who adheres to this worldview sees mediation as an opportunity to facilitate and guide participants into functioning in accordance with a view of the higher good.

The relational worldview reflects the underlying beliefs of the transformation story. It essentially combines the individualist and organic worldviews into an integrated whole. As Bush and Folger describe:

Human nature includes both the capacity for self-interest-edness and the capacity for responsiveness to others. Individuals are seen as both separate and connected, both individuated and similar. They are viewed as being to some degree autonomous, self-aware, and self-interested, but also so some degree connected, sensitive, and responsive to others.

From this conception of human nature, the relational worldview looks at human behaviour as having the potential to actualise both individual and interpersonal interests; they are not mutually exclusive as in the satisfaction story or social justice stories. Instead, human beings are capable of internally reconciling their individual and collective interests, and acting (externally) in a manner that demonstrates a connection to humanity in general. Human beings will seek to behave in this manner because

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57 Ibid 239-241.
58 Ibid 246.
59 Ibid.
60 Ibid 243.
[what] ultimately makes our existence meaningful is not satisfying our appetites but developing and actualizing our highest potential... the highest human need is to be fully developed, fully human. A smoothly working world of satisfaction and equity leaves this need untouched. Only a changed world, of changed individuals, fulfills it. In this respect the goal of transformation is unique because it involves a supreme value that the other goals to not encompass.61

Instead of pursuing personal satisfaction or sublimating one's desires for the good of a collective, the relational worldview sees achieving moral growth as its core value: "Valuing moral growth ... means valuing behaviour that integrates strength of self and compassion for other... Achieving this kind of behavior, to any degree is what is meant by moral growth or transformation within the transformative vision."62

Transformative mediation is one way of assisting the transformation of people and encouraging the development of behaviour that displays strength and compassion. Instead of looking at disputes as problems requiring a solution that maximises personal satisfaction or requires the sacrifice of personal needs for the collective good, transformative mediation looks at disputes as opportunities for personal transformation.63

Two key objectives of transformative mediation are empowerment and recognition. Empowerment of the parties occurs when “disputing parties experience a strengthened awareness of their own self-worth and their own ability to deal with whatever difficulties

61 Ibid 30.
63 Ibid 81-84: “In the transformative orientation, the ideal response to a conflict is not to solve “the problem” Instead, it is to help transform the individuals involved, in both dimensions of moral growth. Responding to conflicts productively means utilising the opportunities they present to change and transform the parties as human beings. It means encouraging and helping the parties to use the conflict to realise and actualise their inherent capacities both of strength of self and for relating to others. It means bringing out the intrinsic goodness that lies within the parties as human beings.” Ibid 83.
they face, regardless of external constraints." Recognition occurs when the parties “voluntarily choose to become more open, attentive, sympathetic, and responsive to the situation of the other party, thereby expanding their perspective to include an appreciation for another’s situation.” The recognition implied here is beyond the mere acknowledgment that the other party has his or her own side of the story. In transformative mediation, recognition does not occur in a meaningful way until one feels empowered by the mediation and willingly chooses to give recognition to the other party:

The hallmark of recognition is letting go—however briefly or partially—of one’s focus on self and becoming interested in the perspective of the other party as such, concerned about the situation of the other as a fellow human being, not an instrument for fulfilling one’s own needs.

A successful transformative mediation does not necessarily result in “solving” the parties problems. A successful transformative is one in which the parties are transformed in some meaningful way. Bush and Folger suggest that

mediation is successful (1) if the parties have been made aware of the opportunities presented during the mediation for both empowerment and recognition; (2) if the parties have been helped to clarify goals, options, and resources, and then to make informed, deliberate, free choices regarding how to proceed at every decision point; and (3) if the parties have been helped to give recognition wherever it was their decision to do so.

While Bush and Folger offer a specific methodology for implementing a transformative approach into a mediation practice, it is beyond the scope of this paper to examine their methods in detail. They describe the overall patterns of the approach as including three distinct practices: “microfocusing on parties’ contributions, encouraging parties’

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64 Ibid 84. This would include empowerment as to the goals, options, skills, resources, and decision-making.
65 Ibid 89. This would include desiring to give recognition in thought, words, and actions.
66 Ibid 97.
67 Ibid 95.
68 Ibid 189-226.
deliberation and choice making, and encouraging perspective taking.\textsuperscript{69} These patterns enforce the underlying objectives of their mediation: empowerment and recognition.

The first pattern, of focusing on the parties’ contributions, requires the mediator to concentrate on the parties’ behaviour during the mediation and seize any opportunity which would allow the participants to become empowered (for example, make a choice) or give recognition to the other participant.\textsuperscript{70} Encouraging parties’ deliberation and choice making requires the mediator to avoid directing the mediation, for example by suggesting a proposal for resolution, but instead supporting the participants as they define problems and propose solutions.\textsuperscript{71} A mediator encourages perspective taking by translating and restating what a participant has said, not to reshape the content of the statement, but to allow for greater opportunity for recognition by the listener.\textsuperscript{72}

Overall, a transformative mediation session might appear to be more unstructured than a problem-solving session. Bush and Folger describe the overall pattern of this type of mediation as requiring a "certain cycling back and forth between empowerment and recognition... because each to some extent sets up and flows from the other."\textsuperscript{73} The session ends when all opportunities for transformation are exhausted, whether or not a settlement has been reached.

In the following section I identify and describe two critiques of the transformative approach so that I can respond to their criticisms in Part III, where I describe how one might incorporate spirituality into mediation.

\textsuperscript{69} Ibid 100.
\textsuperscript{70} Ibid.
\textsuperscript{71} Ibid 100-101.
\textsuperscript{72} Ibid 101.
\textsuperscript{73} Ibid.
Section C: Critiques of Transformation

Bush and Folger's view of transformative mediation has sparked much debate within legal circles. While the purpose of this thesis is to provide support for those wishing to incorporate a spiritual perspective into their practice, and not whether a transformative approach is a valid one, some of the criticisms must be addressed and will be of assistance in developing a spiritual framework.

Carrie Menkel-Meadow, in reviewing Bush and Folger's work, raises several concerns and identifies areas within transformative mediation which will need to be addressed, if not in this paper, then by further research and debate.\textsuperscript{74} An initial concern is that Bush and Folger have "psychologized" disputes rather than acknowledge that disputes can be political; she is apparently concerned that by making the focus of mediation on individual moral growth, larger issues such as power imbalances within society will not be addressed and will be ultimately ignored.\textsuperscript{75} While proponents of mediation should be mindful of this issue, Bush and Folger are not unconcerned, as Menkel-Meadow believes, rather they argue that "with changed human beings, society as a whole becomes a changed, better place."\textsuperscript{76}

Menkel-Meadow also accuses Bush and Folger's form of mediation as being manipulative and fears that the procedures they propose are "potentially more dangerous for the almost New Age-human potential movement-religious fervor which seems to inspire it."\textsuperscript{77} She interprets Bush and Folger's model as valuing individual growth over other


\textsuperscript{75} Ibid 235.

\textsuperscript{76} See above page 29.

\textsuperscript{77} Menkel-Meadow, above n 74, 236.
results—such as settlement, changing the relationship between parties, or changing the relationship of parties to the conflict. Again, Bush and Folger’s model does not necessarily negate the occurrence of these events, it merely does not judge the success of a mediation solely on these terms. Rather, their model declares that a mediation has been successful when the parties are transformed in some meaningful way, which may or may not be evidenced by the parties accomplishing what Menkel-Meadow argues should be the hallmark of success.

Menkel-Meadow also takes issue with the worldviews Bush and Folger describe. She asserts that their relational worldview is a “simplistic and polarized philosophy derived from combinations of New Age aphorisms ...and feminist and critical legal theory.” However, by calling their approach “dualistic and polarised,” she misinterprets their description of the underlying worldviews. Bush and Folger are emphatic in their rejection of either/or thinking, and promote a relational worldview that is explicitly defined as blending both the individual and organic worldviews.

Menkel-Meadow is not entirely dismissive of a transformative model and, in fact, concedes that it is desirable, but only if “we define our terms more clearly, state our goals more modestly and inclusively, and remain sensitive to the social and political situations and institutions in which we do our work.” She reminds us that mediation, like therapy, is not successful in transforming all people. These are legitimate reminders and will be addressed in the final part of this paper when concluding recommendations are offered.

78 Ibid.
79 See above page 33.
80 Menkel-Meadow, above n 74, 238.
81 Ibid.
82 See above page 31.
83 Menkel-Meadow, above n 74, 238.
Another interesting and thoughtful critique of the transformative model, by author Jeffrey Seul, argues that transformative mediation should be "informed by a theory of human development that covers the entire lifespan, and practices should be responsive to the particular developmental resources and limitations of the specific parties they seek to assist."\(^{84}\) In his article Seul uses the psychological theory of constructive-developmentalism to analyse whether Bush and Folger's model can actually influence moral development.

Constructive-developmentalism categorises humans' ability to understand and make sense about their relationships with other people. It looks at how individuals perceive and think about their life's experiences and analyses their behaviours and ability to be self-reflective about their interpersonal relationships.\(^{85}\)

There are five stages, three of which adults can generally be categorised into: the interpersonal stage; the institutional stage, and the interindividual stage.\(^{86}\) Adults at the interpersonal stage are highly influenced by their relationships; their identity and their ability to define who they are and what they want is made by and through their relationships with other people. A person at this stage of development is unable to "think for himself" or to be capable of "articulating and asserting 'their own' interests and perspectives, because the person's interests and perspectives are not fully self-originating, but largely received from others."\(^{87}\)

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\(^{85}\) Ibid 141.

\(^{86}\) Seul explains that 12% of adults are not yet at the interpersonal stage; 14% are at the interpersonal stage; 32% are growing into the institutional stage; 34% are at the institutional stage; 6% are growing into the interindividual stage, and less than 2% are at the interindividual stage. Ibid 140.

\(^{87}\) Ibid 145-146. They also "often appear to be indecisive, impressionable, or to lack self-esteem"
To shift to the next stage, the institutional stage, a person must be able to recognise that one is not a composite of his or her relationships, but an individual with a self-authored identity who has relationships.\textsuperscript{88} Making this shift allows an individual to be less dependent on other people's expectations in favour of following his or her own desires and needs.\textsuperscript{89} Instead of reconciling and weighing other people's perspectives and beliefs to determine what is appropriate, an individual must first consult his or her own inner framework of values, beliefs, and desires.

At the institutional stage of development, the individual has developed a separate identity and perspective and is able to assert it. This perspective is defined as an "institutional ideology", a framework one uses to interpret and evaluate one's social world and to which one thinks the world should conform.\textsuperscript{90} As one might imagine, having overcome an over-dependence on the opinions and beliefs of others, individuals at this state will, by necessity, hold tightly to their new identity and adhere strictly to their perspective or framework. They will be flexible enough to compromise if it is in their interest, but will not challenge their underlying perspective or framework to do so.\textsuperscript{91}

In order to shift into the interindividual stage, individuals need to become less rigid and less dogmatic about the framework they have adopted. They must become willing to have the confidence to become self-critical of the framework they have so carefully created and realise that it is just one of many such frameworks utilised by human beings to make sense of their world.\textsuperscript{92}

\textsuperscript{88} Ibid 147.
\textsuperscript{89} Ibid.
\textsuperscript{90} Ibid 148.
\textsuperscript{91} Ibid 148.
\textsuperscript{92} Ibid 148.
The interindividual stage, in which less than 2% of adults belong, is reflected by a openness to “experiences that expose, and facilitate correction or expansion of, one’s present perspectives and preferences. One becomes capable of a level of interpersonal attunement and genuine, nonjudgmental curiosity in social encounters.”

The relevance of constructive-developmentalism to transformative mediation is its ability to assess the potential for people to grow from one stage to another as a result of participating in transformative mediation. Seul contends that it is not only the process used in mediation that influences this type of growth, but the individual capacity of the parties to grow as a result of participating in a particular process.

An individual’s ability to deal with and grow from conflict will depend on which stage of development he or she has reached. At the interpersonal stage of development, an individual will be heavily influenced by other’s perceptions of what a conflict is about, and how they should respond:

The interpersonal self’s ambivalence or personal conflicts are not really conflict between what I want and what someone else wants. When looked into they regularly turn out to be conflicts between what I want to do as a part of this shared reality and what I want to do as a party of that shared reality.

A person at the institutional stage will view conflicts as an external problem to be solved, not a problem that implicates the relationship between the parties. To fix the problem the parties may have to compromise, but this will be done through cooperation where “a good resolution is one in which all parties “win” to the maximum extent possible in light

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93 Ibid 152.
94 Ibid 155.
95 Ibid 145-146.
of the parties' finite resources, relatively fixed interests, and any value-creating possibilities presented by the conflict.\textsuperscript{96}

Adults at the interindividual stage will view conflict as an opportunity for growth and an indication that they may be "holding on too tightly to a cherished perspective... conflict "resolution" does not involve efforts to come quickly to an agreement that leaves one's current self-understanding, and the assumptions which support it, unexamined."\textsuperscript{97}

Seul believes that an individual’s stage of development and his or her reaction to conflict also roughly correspond to the worldviews espoused by Bush and Folger.\textsuperscript{98} The organic worldview corresponds to the perspective held by someone at the interpersonal stage; the individualist worldview to someone at the institutional stage; and the relational vision to someone at the interindividual stage. Seul then asks whether the transformative model of mediation can, in fact, assist and support individuals in moving from one stage to the next, and ultimately to the interindividual stage.\textsuperscript{99}

As has been discussed, Bush and Folger emphasise building empowerment and recognition as the key objectives of a transformative mediation.\textsuperscript{100} Seul analyses how these objectives can be realised by parties in the interpersonal and institutional stages of development and asserts that, in some instances, "transformative mediation's dual emphasis on empowerment and recognition may be operating at cross purposes."\textsuperscript{101} Implicit in his criticism is the acknowledgment that Bush and Folger's model assists individuals who already possess a "relational" worldview (those at the interindividual

\textsuperscript{96} Ibid 148. 
\textsuperscript{97} Ibid 153. 
\textsuperscript{98} Ibid 160. 
\textsuperscript{99} Ibid. 
\textsuperscript{100} See above pages 32-34.
stage) by encouraging their continued growth through the functions of empowerment and recognition.

However, given that the majority of adults operate at the interpersonal or institutional stages, Seul’s warning must be considered more carefully. The challenge facing individuals at the interpersonal stage of development is to develop a distinct identity free from the undue influence of relationships. Seul rightly points out that, because the recognition objective requires a party to consider the perspective of another person, “one must be able to focus genuinely on oneself before one can ‘let go’ of that focus.”

Seul argues that while a party at the interpersonal stage could be empowered by transformative mediation, the mediator needs to be mindful that for a person in this stage “there is a fine and often porous line between taking another’s perspective and sacrificing one’s own interests.” Seul warns:

the type of “recognition” that one asks of a party at the interpersonal stage of development must not invite the party too far into the other’s experience; it must take care to emphasise the parties’ distinctiveness at the same time it invites a party at the interpersonal stage of development to consider and demonstrate an understanding of the ways other might see things, all the while reinforcing the parties’ distinctiveness.

The challenges faced by parties at the institutional stage are different. Individuals at this stage already have a strong sense of self and are capable of seeing things from another person’s perspective; they just are not willing to let go of the identity they have so carefully constructed to make sense of the world. To achieve transformation, individuals need to be assisted in not only “gaining a better understanding of another’s perspective,

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101 Seul, above n 84, 161.
102 Ibid 162.
103 Ibid 163.
104 Ibid.
but to an expanded understanding of oneself." The mediator needs to be able to create a desire in individuals at this level to expand their ability of recognition by challenging their own institutional ideology (worldview). The individual would hopefully come away saying: "I now see parts of myself that I've never seen. I recognize features of myself that previously were hidden or denied." 

Two important lessons must be taken from Seul’s analysis. First, individuals cannot skip developmental stages; Bush and Folger's relational worldview corresponds to the interindividual stage and cannot be chosen but must be developed. The form of empowerment and recognition that is achievable within a mediation will be dependent on the parties present capabilities. As Seul explains, "[w]hen it comes to developmentally-supportive empowerment and recognition, one size does not fit all. Mediator moves and responses that provide development support to one party may provide no support to another, or they actually may confound development." 

The second important lesson that Seul provides is that a successful mediation is not dependent on whether a party actually moves into the interindividual stage; obviously the majority of parties will not be transformed into someone possessing a "relational" worldview. They might, however, gain the ability (through empowerment and recognition) to view themselves and the conflict differently, indicating genuine development. 

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105 Ibid 165.
106 Ibid 166.
107 Ibid 163-164.
108 Ibid 164.
109 Ibid.
With this overview of transformative mediation, and the attendant criticisms, a foundation has been laid to begin exploring how a spiritual perspective can be utilised within "transformative" mediation.
Part IV: A Spiritual Approach to Transformative Mediation

For many of us, when we even entertain the idea that a spiritual perspective may assist us, we are also admitting that the spiritual is somehow missing from our present life. An inclination to refer to the spiritual when approaching problems is nothing more, and nothing less, than an acknowledgment of the lack of spirituality in our day to day life.

As I have discussed, a spiritual journey is both an individual and a collective journey. This journey involves a search for greater meaning in our lives and recognition that this meaning will ultimately be found within us--within our souls. This internal process forces us to ask questions, seek answers, and find connection with the divine essence contained in our souls. As we find this connection we recognise that this guiding essence is also within every human being, and its whole is also something larger than the sum total of our collective spirits.

We begin a spiritual journey in hopes of gaining increased understanding of our lives, of finding peace, of bringing more love into our lives. We want to feel less isolated and more connected to others. We want to feel that our lives matter and that there is a reason for our existence on this earth. As we listen to our soul we begin to feel the eternal and divine within us. We become more self-reflective and learn to discern between our ego's and our soul's wants and desires. We begin to understand that our ego is that part of us that wants us to be unique, autonomous, independent and special. We begin to see how our ego resists change and clings to finely crafted self-deceptions. The more we listen to our soul, the more we move toward a different perception--one that reconnects us to our spiritual dimension and offers us a larger and more powerful perspective. Hopefully
we will enter a truce with our ego-- we will use the ego to get the job done, but our soul will tell us what the job is.

When interacting with people on a day to day basis, we will seek to connect with their souls rather than their egos. When conflict arises, we will respond to problems by first taking responsibility for our initial feelings or reactions. We will seek not to blame but to understand. We will avoid accusing others of causing the conflict, and instead look to how our own perceptions, actions, and feelings contributed to the situation becoming a conflict. We will use situations of conflict as opportunities for further personal growth and greater understanding of ourselves and others.

Obviously, this use of an internal and personal spiritual perspective will not result, in all circumstances, in a resolution of the problem or in further interpersonal growth. When people become “stuck”, when they remain in conflict and need to move forward (either from a personal longing or from external pressures), then the assistance of an impartial person may be required. One of the aggrieved parties may seek help from a friend, a member of the clergy, a psychologist, a counsellor -- someone who can help the person look at the problem in a more objective manner. A party may decide to let go of the problem, seek legal assistance, resort to self-help, use a court annexed or community mediation service, or decide to use adjudication. Each one of these choices will have different ramifications on the parties and the problem.

When faced with a legal problem requiring outside intervention, Bush and Folger's transformative model of mediation offers the most promising opportunity for those wishing to acknowledge the spiritual dimension of a conflict. As I have described, transformative mediation allows a broader range of issues to be addressed than other
more traditional forms of adjudication or alternative dispute resolution methods. Transformative mediation, using the descriptions contained in Riskin’s grid, allows the problem to be broadly defined and addressed by facilitating communication between the parties. Additionally, instead of focusing only on reaching a resolution of the problem, Bush and Folger’s model recognises that people desire at a deep level to reach their highest potential— that of becoming a fully developed human being. Their goal of transformation and moral growth, through empowerment and recognition, will allow the parties to address the conflict and remain focused on the spiritual opportunities for growth that it holds.

Specific procedural recommendations for using a spiritual approach will be addressed in Part V, but it is imperative at this point to strongly emphasise that the use of a spiritual approach in mediation must be fully disclosed to the parties before a mediation begins, and the parties themselves must desire and understand that this approach will be utilised. The mediator and the parties will, by necessity, have to disclose to one another what they mean by spirituality and discuss what their underlying beliefs are. While they do not have to share a specific definition or belief system, at a minimum they would have to share a general belief that there is a divine essence within every human being (whether they call it soul, spirit, God, or some other name), and that their individual and collective journeys involve strengthening this divine essence, and finding more peace, more love, and more connection with other human beings.

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110 See generally above pages 28-29.
111 Bush and Folger, above n 39, 30.
112 Ibid 81: “Strengthening the self, through realizing and strengthening one’s inherent human capacity for dealing with difficulties of all kinds by engaging in conscious and deliberate reflection, choice, and action.
113 Ibid 81: “Reaching beyond the self to relate to others... through realizing and strengthening one’s inherent human capacity for experiencing and expressing concern and consideration for others.
The parties must likewise indicate a willingness to acknowledge and address spiritual concerns throughout the process. The mediator’s role then will not be to “convert” or “teach” the parties, but to facilitate each party’s ability to consult and be guided by their own spirituality.

In his article “Negotiation as a Healing Process,” \(^{114}\) Professor Gerald Williams describes negotiation as a healing process in which parties can be transformed, healed from the conflict, and can move on with their lives. \(^{115}\) He utilises five stages to demonstrate the steps that clients must go through to achieve healing. While his article is directed at the process of negotiation (where a client in consultation with his solicitor works to resolve a problem with the other side), the stages are useful to identify steps that parties in a mediation can experience with the assistance of a skilled mediator. \(^{116}\)

The five stages he describes are denial, acceptance, sacrifice, leap of faith, and renewal or healing from conflict. Williams acknowledges that these stages have features similar to the stages a clients might experience with a therapist, doctor, or clergy and suggests that in some cases professionals in these areas might consider cross-referrals with lawyers (and vice versa). \(^{117}\) Because these stages describe a multi-step process through which client move, they are useful to help explain how a spiritual perspective can be utilised in transformative mediation.

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\(^{115}\) Ibid 35–36.

\(^{116}\) Ibid 55: “It is important to stress at this point that mediation is an exceptionally effective procedure for assisting the parties through the steps of the negotiation ritual. Its greatest strength may be its ability to facilitate leaps of faith, but it also permits the parties to tell their side of the story. This often has a cathartic effect, helping disputants let go of their anger and to begin searching for means of resolving the conflict.”
Denial

The first stage is denial. In this stage the party does not want to acknowledge that he or she may be part of the problem. A party might even deny that there is a problem in the first place, or try to blame circumstances or people outside of the conflict.\textsuperscript{118} Williams believes that conflict can serve as a mirror to a party -- a mirror that reflects back to the party how their behaviour may have contributed to the problem in the first place.\textsuperscript{119} In this regard, conflicts are opportunities for increased self-awareness if a practitioner is able to assist a party in taking an honest look in the mirror and supporting him or her in this process. Until a party is willing to take this step of self-reflection, he or she will stay in denial and the opportunities for healing or transformation will remain limited.

Acceptance

The next stage, acceptance, requires only that the party be willing to admit that they may be part of the problem. At this point, the party does not have to be willing to do anything about it but accept that, because a problem exists which affects him or her, he or she might have a role in it. Williams points out that in some situations the other party may in fact be the one at "fault", but this does not preclude the aggrieved party from recognising that there is something he or she can do now to move the dispute toward some form of resolution.\textsuperscript{120}

Williams does not describe how this might be accomplished. Bush and Folger's model would suggest that overcoming denial and reaching this level of acceptance involves both aspects of empowerment and recognition. If a party's sense of self and self-worth are strengthened sufficiently, he or she might be more willing to have the courage to reflect

\textsuperscript{117} Ibid 42.
\textsuperscript{118} Ibid 44.
\textsuperscript{119} Ibid 46.
critically on his or her own part in a conflict or begin to recognise actions he or she could take that would respond to the dispute (for example, deciding to talk calmly, instead of in anger, with the opposing party). If a party feels more empowered, he or she may feel more inclined to look at the situation through the other party's eyes (give recognition) and as a result would be able to expand his or her own limited perception of the dispute.

Using a spiritual perspective to remind the parties of their connection to each other and the dispute is essential at this stage. Because the parties have self-selected, so to speak, into a process that uses a spiritual approach, the mediator can initially use the mediation session to encourage the parties to remember that they share the belief that each has a soul that contains a divine spirit. This shared belief will reinforce their connection as spiritual beings. What is in conflict is not their souls, but their egos. This reminder is not intended to reproach the parties, for as I have discussed the ego is not something that is "evil" (it is merely is our mortal "personality"). What the mediator can introduce, however, is the idea that perhaps their "egos" are separated from the guidance of their souls and are feeling threatened in someway by the conflict. Both parties, if they can accept this proposition, will be empowered by this simple realisation. They can be reassured that their individual souls are available to guide them, and that the other party, similarly, will be accessing guidance from a common shared divine source. In other words, the parties will try to "check their egos at the door."

Additionally, the mediator can propose that the parties refrain from examining the conflict in terms of cause and effect. By suggesting to the parties that their anger (or other emotion) was not caused by the other party, but was perhaps a reaction to

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120 Ibid 48.
121 See above pages 15-17.
something larger (the ego feeling threatened as a result of past experiences), they might be more willing to take a step back and disengage from the particulars of the conflict long enough to consider the possibility that they have overreacted, or are reacting to something more than what has transpired during the dispute. The parties would then be able to take individual responsibility for whatever feelings have been provoked within the dispute. This slight movement opens up significant possibilities for both empowerment and recognition. The parties would feel empowered by their ability to disengage from their egos' reaction and at the same time, provide some recognition to the other party by reinterpreting what has transpired, for example by not ascribing vindictiveness to past behaviour.

Finally, as Williams notes, a party does not have to “do” anything at this stage except consider the possibility that he or she may be part of the problem or that there is something that he or she can do now to move the conflict toward resolution.122 This might be, in a spiritual sense, merely acknowledging that one's ego has been wounded by the conflict (not the soul) and that adopting a spiritual perspective might be helpful.

During this stage, mediators should be mindful of the concerns expressed by Seul in his critique of transformative mediation.123 During the acceptance stage, individuals who are at the interpersonal stage of development may not be able to clearly acknowledge their role in the conflict because of their inability to define who they are or what they want. Because their identity is shaped largely through their relationship with others, the mediator will have to be cognisant of the risk that this person may only be able to point to other people as the source of the problem. A person at this stage may not be able to

122 Williams, above n 114, 55.
123 See above pages 37-43.
see their role in the conflict because the conflict, in their eyes, is caused by their inability to respond equally to the demands of the relationships that define them.

The challenge faced by people at the institutional stage of development will be to acknowledge that the identity they have so carefully constructed in accordance with their framework (worldview) may be contributing to the conflict in some way. Because of their general inclination to view problems as external to themselves, parties at this stage of development will need to entertain the possibility that their perceptions of the conflict (and their role in it) may be coloured by their particular worldview.

_Sacrifice_

After this shift has occurred, participants face the stage of sacrifice where they will be asked to contemplate what they might be willing to do that could help address the conflict. Williams uses the term sacrifice, instead of concession or compromise, to reflect this contemplation:

> Compromises and concessions do not require a change of heart. They may be made in anger, with a vindictive spirit, and even in bad faith. Any of these might be sufficient to rope the other side into a settlement agreement, ... but they would have failed at the larger task of helping the parties to heal from the trauma of the underlying conflict. The word “sacrifice” also suggests that the process of working through conflicts has a transcendental aspect; it has the potential to take people beyond ordinary or common experience; in dealing with the pain of conflict and conflict resolution, they are approaching a more sacred realm.¹²⁴

Sacrifice, used in this sense, allows the parties to reflect more broadly on what sort of change in behaviour might move the mediation forward. As in the acceptance stage, the parties are not required to explicitly state what sacrifice they are willing to make. All that is required is that they begin to conceive of specific actions that they could take to help improve the situation.
In some mediations, the sacrifice may simply be that the parties are willing to consider discontinuing an unproductive pattern of behaviour (silence, name-calling, avoidance) so that the mediation can continue or become more productive. For others, the sacrifice might be “letting go” of their need for the other side to like or approve of them. If in the acceptance stage a party has realised that in the past he or she has made concessions to keep the peace or to be liked, during this stage the party might be willing to consider “letting go” of this victim role. While this is not a sacrifice which will necessarily “help” the other side, it is a sacrifice of behaviour that the party may have used in the past to rationalise their inaction or unassertiveness.

Conversely, the “bully” may have acknowledged, in the acceptance stage, that getting his or her own way has contributed to the problem. He or she may be willing to consider letting go of the part that wants to get its own way at any cost, and begin to consider the needs and desires of the other party instead.

As in the acceptance stage, the parties are not required to explicitly state what sacrifice they are willing to make. All that is required is that they begin to conceive of specific actions that they could take to help improve the situation.

The mediator’s role in this stage seem to be more intrusive than at other stages because the mediator may have to assist a party in identifying specific actions that will assist the parties’ spiritual growth and help move the mediation along. A party may understand how a specific behaviour (or personality/ego trait) has contributed to the problem, but not be able to formulate specific changes that he or she is willing to make. A mediator

\[^{124}\text{Williams above n 114, 49.}\]

\[^{125}\text{Ibid.}\]
would have to be supportive of a party as he or she recognises parts of his or herself that are causing difficulties in his or her own life and others. This support requires the mediator to acknowledge the existence of this dark side without judging it, help the party evaluate the impact of this part of his or herself, and consider ways in which the party might be willing to change. These activities correlate to Bush and Folger’s empowering activities and would result in individuals feeling less threatened by the negative qualities within themselves and becoming able to make meaningful choices to address these qualities.

Finally, the mediator must be willing to allow the parties to stay exactly as they are: “there can be no requirement that the client have a change of heart. It is fundamental, that as lawyers, we implicitly and explicitly declare to our clients that they can stay just the way they are.” A party’s willingness to change (or make a sacrifice) must be authentic, voluntary, and self-directed, not as a result to please the mediator or the other side.

A mediator can best facilitate growth in this stage by initially reminding the parties that everyone is on a spiritual journey and that journey takes people as it finds them. If people were “perfect” or spiritually centred, there would be no need for a journey. Everyone has to start the journey from the place where he or she is currently, not where he or she would like to be. The dark side within, while perhaps frightening, only represents a side of a person- not the whole person.

Once a party has recognised that his or her behaviour (or personality trait) may be interfering with a relationship or contributing to the problem, the next challenge facing a party is to formulate prospective changes that he or she would be willing to make to
ameliorate the difficulties of the present situation. A mediator can help a party here by asking him or her to reflect on other situations where he or she has responded similarly and try to determine whether there are any common characteristics to these situations. This reflection translates into a form of silent recognition which Bush and Folger acknowledge can occur without explicit communication to the other side.\(^{127}\)

For example, assume a party has verbally attacked the other party in the course of a dispute. If the party can admit that the verbal attack may be part of the problem, and that this behaviour is not unusual for him or her, the mediator can help the person discern why he or she choose to respond in this manner. The person may admit that his or her natural tendency is to respond to any form of criticism or disagreement by retaliating with a personal judgment against the other person. A mediator could help this person uncover the feelings that precipitate the behaviour and discover that the person’s tendency to strike back comes from a fear of being found inadequate, or from an inflated ego, or a need to be perfect. Once these underlying feelings are identified, the mediator can help the party to acknowledge the beliefs which underlie the feelings (for example, I am inadequate) and then challenge them. The party can then be helped to formulate specific alternative responses when faced with the same or similar feelings.

As an end result, using the above example, when a conflict arises, the “attacking” party might be willing to refrain from immediately judging the other person and instead decide to ask questions to clarify the cause of the disagreement or grounds behind the criticism. As a result of this clarification he or she may be able to depersonalise the situation and respond to the problem instead of reacting to the feelings that the conflict produces.

\(^{126}\) Bush and Folger, above n 39, 51.

\(^{127}\) Bush and Folger, above n 39, 92.
While some mediators might feel that this sort of approach resembles psychotherapy,\textsuperscript{128} in essence it is merely helping people recognise the part of themselves that is in conflict with their "better half", their soul. It does not take a psychologist to help someone realise that verbally attacking someone is not conducive for finding peace or building a spiritual connection with another person. Simply stated, that sort of behaviour is from the ego, not the soul. For healing (or transformation) to occur, the person must recognise the contradiction between their behaviour and their intent to lead a more spiritually satisfying life. More significant, however, will be the change of heart that can occur when a person realises that he or she is attacking in response to underlying feelings (of inadequacy, superiority, etc). When these feelings are acknowledged and worked through, meaningful change will occur.

Again, Bush and Folger's objectives of empowerment and recognition come into play. The stage of sacrifice, if successfully completed, allows individuals to feel empowered through the acceptance of all parts of themselves and their ability to make new choices. Once empowered, they are then more able to freely recognise that their behaviour may have aggravated the situation and that the other party's perspective may have some validity or merit.

The concerns about an individual's constructive-developmental stage and their ability to participate in transformative mediation must be explored. For individuals at the interpersonal stage, the risk at this stage of sacrifice is that they may very well attempt to do too much to help address the conflict. If the party has not been sufficiently

\textsuperscript{128} Bush and Folger note that the "connection between mediation and some forms of therapy should be seen as problematic. If the objectives of empowerment and recognition as defined make sense and are of real value, and if an approach to doing mediation exists that can attain them, then we should not be concerned if mediation encompasses some of the same objectives as some forms of therapy. Many
empowered by the mediation, he or she may still not have enough sense of self to be able to overcome balancing other people's perspectives, and will be unable to determine what sort of resolution he or she might want. The mediator will need to emphasise the parties' distinctiveness (for example by acknowledging that there are many ways to perceive the conflict) and help a party at the interpersonal stage to see the value in claiming his or her own individual perspective.

For individuals at the institutional stage of development, the risk at the sacrifice stage will be that the party will make a strategic sacrifice based not on a meaningful acceptance of responsibility in the previous stage, but in hope of achieving some form of reciprocity with the other party. A mediator needs to be mindful of this possibility and seek to ensure that a sacrifice here involves some movement toward the party acknowledging his or her role in the conflict.

**Leap of Faith**

Up to this point, neither party has been obligated to act. They have only been required to admit that there is a problem, and that they may have a played a role in the creation or perpetuation of the problem (or that there is something they could do now to help resolve it). They have also been asked to consider whether there is anything they would be willing to do to help address the conflict. The next step, leap of faith, requires a party to actually act, rather than contemplate: "A leap of faith is an expressed willingness to make a sacrifice in the hope of moving a conflict toward a meaningful and appropriate resolution."\(^{129}\)

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\(^{129}\) Williams, above n 112, 52.
Williams gives several examples of what constitutes a leap of faith:

I acknowledge that I was really angry at myself, but I was shouting at you; I can see that made the problem worse; I am sorry that I was so accusatory when I talked with you: I was wrong to say you were completely at fault: I see now that I really misunderstood your intentions; ... I am sorry I overreacted; I can see now that it made things worse.\textsuperscript{130}

However, he does not explain how the parties shift from merely considering to actually taking action.

Bush and Folger's descriptions of how a party gives recognition in mediation are similar to Williams' examples of parties taking a leap of faith.

A party give recognition in mediation when:

He openly acknowledges his changed understanding of the other and/or decides to communicate it to her.

He accompanies a statement of new understanding with an apology of some kind.

He apologizes for having thought the worst about the other party in the past and/or for "retaliatory" conduct of his own that was based on his harsh interpretation of the other's behaviour toward him.\textsuperscript{131}

Beyond the definition Williams provides, a leap of faith might also be behaviour that demonstrates achievement of Bush and Folger's ultimate goal of compassionate strength: conduct that combines both strength of self and compassion to others.\textsuperscript{132}

While Bush and Folger recognise the connection between a party feeling empowered and becoming more inclined to giving recognition, and believe that a skilled mediator can take advantage of this relationship,\textsuperscript{133} they do not explore how this transition can be

\textsuperscript{130} Williams, above n 112, 54.
\textsuperscript{131} Bush and Folger above n 39, 91.
\textsuperscript{132} Ibid 30.
\textsuperscript{133} Ibid 102: "Thus there can be a symbiotic relationship between empowerment and recognition in practice, with each aiding in achieving the other, and a skilled practitioner can take advantage of this to build a momentum in the mediation session that maximizes achievement of both objectives."
facilitated. Neither do they describe how the integration of empowerment and recognition occurs to create compassionate strength. Instead they suggest:

it is almost always not natural but rather the product of individual effort to change and refine a natural reaction that tends toward either weakness or selfishness or both. Both the contrast with the lesser forms of conduct that it transcends, as well as the element of moral effort required to transcend them and attain it, reinforce the sense that the expression of compassionate strength has immense value.\textsuperscript{134}

Obviously in some situations, making a leap of faith will be an almost natural response to the self-realisation of “wrong” doing (or “wrong” thinking). In fact, this stage might occur simultaneously with the acceptance and sacrifice stages. For example, when a party realises that his or her behaviour is a result of misinterpreting another’s conduct (during the acceptance stage), he or she may immediately choose to divulge this misinterpretation and apologise for his or her behaviour.

If a party is hesitant, however, to make this leap of faith, a mediator using a spiritual approach, may utilise several means to move a party from thinking and reflecting to acting. Without resorting to the banal adage “actions speak louder than words”, a mediator can help lessen a party’s inhibition to act by suggesting that the sacrifice contemplated in the previous stage may in fact reflect a change of heart or guidance from the soul. The party’s reluctance to make the sacrifice should not be judged, but should be studied further.

For example, if a party contemplated offering an apology, he or she might feel apprehensive that it will be rejected, or be interpreted as weakness, or relieve the other side from acknowledging their part in the dispute. These apprehensions indicate that the party is not willing to freely give recognition without expecting something in return. A

\textsuperscript{134} Ibid 233-234.
skilled mediator can explore this apprehension and suggest it is irrelevant whether or not the other side accepts the apology. As Williams notes:

... the reason for apology is not only to give the person we have wronged the solace and comfort they may need in order to heal from the wrong, but also to relieve ourselves of the burden of having wrongly or unwittingly harmed another- to obtain, in a word, forgiveness that will contribute to our own psychic or spiritual healing.135

If a party is still angry, and as a result is hesitant to admit that he or she may have contributed to the dispute, a mediator can help this party distinguish between his or her justifiable feelings of anger and blaming the other side. Anger, in and of itself, is healthy and a normal reaction. It can also be, however, a symptom of underlying feelings of hurt, fear, or frustration. Blame, however, is “to hold onto anger as though it could compensate for what we have lost. Nothing can. Only grieving can heal us and blaming obstructs the mourning process.”136

If a party is angry, the mediator can help the person realise that feeling anger and admitting one’s part in a dispute are not mutually exclusive. The mediator can also help the party investigate if there are any other feelings underlying the anger. These underlying feelings might uncover other issues that need to be resolved by the mediation. If, however, the party is still blaming the other side, then the opportunity exists for the mediator to help the party move away from the role of passive victim to feeling empowered to make other choices (essentially a visit back to the acceptance stage).

A leap of faith for someone who wants to demonstrate that he or she has moved past blaming would be to forgive the other side. While some people might not view this as an example of giving recognition unless it responds directly to a request from the other side,

135 Williams, above n 114, 53.
136 Ibid 54.
forgiving can be an indication of compassionate strength. True forgiveness requires inner strength and compassion for the other. It allows the forgiver to move past the prior hurtful conduct and indicates a willingness to move forward without carrying blame. The person being forgiven, in fact, does not even have to desire forgiveness for it to be meaningful for the forgiver. Because forgiveness is from the soul, not the ego, the party offering forgiveness does not need anything in return. The soul's reward will be that the forgiver will have seen beyond their ego's temporal desires and acknowledged that peace and connection with the divine are more worthy.

A leap of faith implicitly requires trust-- in the mediation process and in the decision one has made to make a sacrifice when there are no guarantees that it will be "appreciated" or will actually help move the conflict toward resolution. A mediator can address this uncertainty by expressly admitting and discussing the issue of trust. If the party has been appreciably empowered by the mediation process, it will not require great effort to help him or her to acknowledge that his or her soul is available to provide guidance, and has in fact guided the individual during the previous stages. More elementary is the trust that we have in our spirituality, in our acceptance of the eternal and the divine as part of us and every other human being. When we focus on our spirituality and become attuned to the directions our soul can give us, we will learn to trust that our decisions are aligned with something sacred. With this sense of sacred affirmation, we can make sacrifices not out of fear, but out of love.
As discussed above, a transformative mediation involves a certain cycling back and forth between empowerment and recognition. Using Williams' steps, it involves both parties accepting, sacrificing, and making leaps of faith to resolve the myriad of issues that will surface during a mediation. If the process works well enough the parties may actually reach a resolution and/or experience a change of heart, be reconciled to one another and healed and feel renewed as human beings. Renewal or transformation in this context means not simply they are as good as they were before the conflict, but they are better—they are more whole, or more compassionate, or less greedy, or otherwise changed in an important way from their attitude or condition before the crisis began.137

This final transformative result is similar to Bush and Folger's ultimate goal of transformative mediation: to engender moral growth toward both strength and compassion.

In a mediation that utilises a spiritual approach, the hallmark of a successful mediation is whether the parties have grown spiritually. Spiritual growth might be reflected by increased feelings of peace, or love toward others, or an increased recognition of the interconnectedness of all things sacred. It may be signified by a greater understanding of how one's ego can interfere with leading a spiritual life, or by a change in the shape of one's awareness. A spiritually successful mediation might be one where the parties learn that they can trust their souls' guidance and that relating to each other as fellow spiritual beings results in more loving and productive relationships. If a resolution has been reached, perhaps the outcome is one that neither party could have imagined and reflects the benefit of calling on the divine for assistance.

137 Ibid 56.
Whatever the end result of the mediation, the parties may leave the mediation with the confidence to meet new challenges and to be open to new experiences. They may define conflict in a different way than before, and they will have developed the tools to respond to it in a more meaningful way. Choosing to seek spiritual answers or to follow a spiritual path does not mean that they will never face conflict again. Besides that being impossible unless they retreated to some self-imposed exile, conflict (and the feelings it provokes) is too valuable an opportunity to forego. Conflict identifies for us where we need to grow and change.

In the next, and final part, I make several recommendations for mediators who wish to consider using a spiritual approach in their mediations.
Part V: Recommendations and Concluding Remarks

When mediators choose their approach to practice... they are doing more than that. They are also choosing which worldview they want to enact and what kind of world they want to construct and inhabit... The case for the transformative approach to mediation is the case for the Relational worldview and for a human reality construct on that basis rather than on the basis of the Individualistic outlook.138

In this part, I identify issues that will need to be considered by those who wish to adopt a more spiritual approach to the practice of mediation and suggest future directions for research into spirituality and mediation. I have implicitly assumed that these practitioners would also be using some form of transformative mediation. This may or not be the case, however it is beyond the scope of this thesis to attempt to offer suggestions for use in other types of mediation practice.

The issues identified below are by no means inclusive of all the issues that can be addressed when evaluating or proposing different forms and methods of mediation. They are, however, the most obvious issues that need to be faced before a spiritual approach can be introduced into transformative mediation.

- The promotion of a spiritual approach to transformative mediation must be in the context of a promotion of a variety of approaches in mediation in general. A spiritual orientation should be just one of many approaches that are available to parties choosing to use mediation.

Bush and Folger describe the institutional context as the “demand” side in the market of mediation processes.139 Obviously, for a mediator to use a spiritual approach, there must be a demand (presently existing or one that can be created) for such an approach. The

138 Bush and Folger, above n 39, 251.
demand side is made up of “the courts, the legal profession, the business sector, government agencies and private disputants.”

Bush and Folger believe a demand for transformative mediation already exists, and that supporters of the approach must become more active in advocating its use and persuading those within the institutional context (the demand side) to support its implementation. I believe that because many individuals have begun a spiritual search for meaning in their lives, an approach to mediation that supports this journey would be well received.

Professor Lande has described the debate in the mediation field over the different styles of mediation available for participants. He identifies two distinct schools of thought within the institutional context. One view, the “single-school”, believes “there should be a single, relatively pure, conception of mediation that is appropriate for all mediators.” The other view, the “pluralist” view, believes that a variety of conceptions can be accommodated. Lande supports the pluralist view because he believes:

there is a positive value in having a diverse market that offers a wide variety of legitimate options for both mediation buyers and sellers. As a practical matter I doubt that it is possible either to limit the style of mediator practices or to enforce a single-school usage of the term “mediation. Rather than trying to maintain distinctions about what is and isn’t “real mediation” it would be more productive to try to concretely define distinct varieties of mediation in ways that are clearly recognisable by participants in the mediation market.

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139 Ibid 272.
140 Ibid.
141 Ibid.
142 John Lande, above n 40, 854.
143 Ibid.
144 Ibid 855.
145 Ibid 856. See also Leonard Riskin, above n 41, 41 where he advises: “mediation programs may wish to select mediators with diverse backgrounds so as to make available mediators with varying approaches to match with appropriate cases.”
Using a spiritual approach within transformative mediation can be looked at as another variation on the theme of facilitative mediation. Some mediators may already be utilising this perspective. Instead of trying to fit it within an established category which could be confusing to the unwary client, it would be far more beneficial to explicitly divulge any spiritual framework and acknowledge and study its usefulness.

- Training for mediators desiring to use a spiritual approach should be available and tailored to develop the skills and knowledge necessary to effectively address spiritual issues in a mediation session.

In a recent article, Sally Pope and Robert Bush outline how training in transformative mediation can be assisted by addressing the underlying premises of the transformative approach. They believe training should allow mediators to develop a common language and rationale for their approach. Effective training in the premises of transformative mediation allows mediators to more fully understand its goals and to apply this understanding in the mediation setting.

A similar training orientation should be available for those wishing to utilise a spiritual approach. The training might focus on helping mediators learn how to assist parties to acknowledge, articulate, and reflect on their own spirituality, how to recognise opportunities for addressing spiritual issues, and how to support parties in their search for spiritual answers to specific issues that arise during a mediation. The training should also include opportunities for mediators to learn how not to impose their own spiritual values in the mediation context.

• The issues of case selection, mandatory versus voluntary mediation, assessment and evaluation, and information provided to potential participants must be studied before a spiritual approach can be offered.

Not all cases will be appropriate for using a spiritual approach in transformative mediation. While Bush and Folger believe that transformative mediation can be effectively utilised to address all types of disputes, it is unrealistic to make the same assumption about using a spiritual approach. Obviously the parties must be willing to look at spiritual issues and only a method of allocation that allows the parties to self-select will be appropriate. Even with a process of self-selection, some form of monitoring might be necessary to ensure that any issues involving power imbalances are appropriately addressed. Moreover, given the predisposition of our society to maintain the legal divide between state and religion, any requirements for mandatory participation in a method of dispute resolution that addresses the spiritual would be met with great resistance and should be avoided.

Methods of assessing and evaluating the effectiveness of utilising a spiritual approach within mediation would also have to be studied. Just as different criteria and methods of evaluation have been suggested for the assessment and evaluation of transformative mediation, a method that employs a spiritual perspective would require a revised system of evaluation.

Finally, full disclosure of the practices, values and goals behind a spiritual approach would be necessary to ensure that participants were fully aware of the style of mediation

147 Ibid 41.
that would be employed. The parties’ expectations about what will be addressed and resolved with the mediation must be determined to help them choose the most appropriate form of mediation. To this end, the courts, their personnel, and the legal profession would have to be educated about the particular benefits, the procedures, and the ramifications behind a spiritual approach.

**Concluding Remarks**

Our legal institutions exist to address conflict in our society and to assist people in resolving disputes. While people have legal interests that they wish to protect, they also have spiritual interests that need attention. These interests are not mutually exclusive and their interrelationship affords parties a meaningful opportunity to grow individually and collectively.

Mediation, in any form, addresses legal interests and seeks to resolve disputes. It can also be used effectively to help transform the individual parties. In this thesis I have suggested that a spiritual approach can be effectively utilised by mediators in transformative mediation. Some readers may feel I have crossed the line by recommending behaviour that is inappropriate for mediators; others may believe I have not gone far enough and am too being timid in asserting my call for addressing spiritual issues in dispute resolution.

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149 See generally, Patricia Franz, "Habits of a Highly Effective Transformative Mediation Program" (1998) 13 Ohio State Journal on Dispute Resolution 1039.

150 See generally, Lande above n 40.
At a minimum, a spiritual approach to transformative mediation will provide parties with the opportunity to reflect on their lives and how their behaviour affects their ability to achieve their goals and dreams. It has the potential to empower individuals to make new choices and form different relationships that will more closely align with their overall spiritual yearnings.

What I hope I have accomplished is to demonstrate that spiritual issues can be addressed, along with practical issues, without a mediation session becoming a forum for conversion of the unwilling or unsuspecting. As an increasing number of people are becoming aware of the spiritual in their lives and are looking for new solutions and new perspectives to old problems, it seems only natural that this inclination receive acknowledgment and encouragement by the legal system.
Bibliography


Reverend Peter Hughes, "*Sermon Preached at the Opening of Law Term Service Held at St James' Church, King Street, Sydney on 1 February 1993*" (1993) 67 Australian Law Journal 688.


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