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RELIGIOUS DIMENSIONS OF MEDIATION

F. Matthews-Giba, ofm

INTRODUCTION

In thirteenth century Italy, St. Francis of Assisi mediated¹ a dispute between the Mayor and Bishop of Assisi with a spiritual song.² This use of spirituality³ as a mediation technique is worth studying, particularly as it provides motivation for parties to settle.⁴ The song that Francis and his followers sang was not primarily about God, or about being a good Christian, which might have had the effect of making the disputing parties feel guilty. Rather, the song was about the order of creation. The song opened with, "Praise to you God almighty for having given us the Sun. It is beautiful and radiant with great splendor." Then St. Francis continued to sing the praises of all of creation. This song reframed⁵ the context of the parties' dispute from a contentious battle, which caused disorder in the community and to the ordered creation that

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1. See KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 12 (1994) (defining mediation as a "process where the third party neutral, whether one person or more, acts as a facilitator to assist in resolving a dispute between two or more parties").

2. See FRANCIS & CLARE, *THE COMPLETE WORKS* 37-39 (Regis J. Armstrong, ofm & Ignatius C. Brady, ofm, trans., 1982). It states, in part:

Praise be You, my Lord with all your creatures, especially Brother Sun, [w]ho is the day and through whom You give us light. And he is beautiful and radiant with great splendor; and bears a likeness of You; Most High One. Praise be You, my Lord, through sister Moon and the stars, in heaven You formed them clear and precious and beautiful.

3. The author defines spirituality as any transcendent system of beliefs to which a people refer to on a regular basis to order their lives.

4. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV 7 (1996) (citations omitted).

5. See KOVACH, *supra* note 1, at 108 (defining reframing as technique in mediation to "cause the author of the statement to look at the problem or concern in a different light").

surrounded the disputants.⁶ This reframing provided an alternative model to contextualize the mediation.

By pointing to characteristics found in nature, such as gentleness, simplicity and endurance, St. Francis presented to the Bishop and Mayor of Assisi a model of generosity, virtue and peace that the disputants relied upon to settle their dispute. With the value of peace properly identified, reconciliation⁷ is accomplished. St. Francis' song reframed the Bishop's and Mayor's dispute from individual gain to the ordered creation of the surrounding Umbrian⁸ hillside. Reframing the dispute created an atmosphere where the parties could settle thereby allowing the town of Assisi to return to its ordered daily life.

Part I of this Essay will outline the religious roots of mediation, with a particular emphasis on the influence of the Franciscan movement.⁹ Part II will explore the religious roots of mediation in the United States and its application in present day mediation. Part III will discuss the various styles, strategies and goals of mediation and their corresponding results. Part IV will analyze the religious motivation underlying settlement agreements. Finally, this Essay concludes that the proto-religious, creation-centered technique employed by St. Francis is a useful method for a multi-cultured mediation, when one or both of the parties raises religious objections to settlement.

I. RELIGIOUS ROOTS OF MEDIATION

The Popes of the Middle Ages mediated among Catholic sovereigns.¹⁰ In 1226, Pope Gregory IX was one of the most effective

6. See FRANCIS & CLARE, *supra* note 2, at 29 (admonishing the followers of St. Francis to be conscious that only humans create disorder whereas the rest of creation follows the will of God naturally).

7. The author defines reconciliation as the state of a person's soul (interior life) characterized by peace, insight into self and friendship with God. This definition is derived from Catholic Sacramental Theology, specifically the Sacrament of Reconciliation.

8. St. Francis lived and ministered in the Italian province Umbria.

9. See LAZARO IRIARTE, FRANCISCAN HISTORY 9 (1983) (tracing Franciscan movement as established by Saints Francis and Clare of Assisi to integrate themselves into society so that they would contrast with "the new arbiters of society through total detachment").

10. See Henry T. King, Jr. & Marc A. Le Forestier, *Papal Arbitration: How the Early Roman Catholic Church Influenced Modern Dispute Resolution*, DISP. RESOL. J., Summer 1997, at 74-75 (discussing Pope Gregory IX in 1226, to Pope John Paul II in 1984, mediating disputes, to such extent that Rome was established as the conference ground for Europe).

Papal mediators.¹¹ Gregory IX mediated between the Holy Roman Emperor and the Lombard League. The Lombard League feared the encroaching power of the Roman Emperor who needed the support of the league to pursue the Crusades and to advance higher studies in the league's academies.¹² When the Roman Emperor, Frederick, sent a delegate to negotiate, the league killed the delegate. In retaliation, Frederick placed Lombardy under a ban and ordered their schools to be destroyed. With the dispute worsening, both parties appealed to the Pope for mediation. Gregory IX's predecessor, Honorarius III, resolved the dispute, though the Lombard League refused to acknowledge the decision. As such, Gregory IX was left with the task of obtaining the Lombard League's approval solely through the prestige of his office and the persuasiveness of his moral authority.

Nevertheless, the Pope's title proved to be insufficient. Honorarius III had the same Papal title, but could not bind the parties to an agreement. What Gregory IX offered to the Lombard League was trust, built by his moral authority.¹³ Gregory IX thus opted to reframe the dispute between the Lombard League and the Roman Emperor by referring to principles of Christian charity.¹⁴ Gregory IX maximized the trust given to the papal office by decreeing a peace pact for all of Europe that banned a Catholic sovereign from breaching the peace with another Catholic sovereign. When the political and religious unity of Europe disintegrated, the Papal office replaced the principle of Christian charity with the principle of rationality to provide a basis for mediation.¹⁵

Papal mediation had its problems, the most obvious being that popes mediated among Christian sovereigns exclusively.¹⁶ For example, a dispute did not rise to the heightened importance of Papal mediation if it existed between a Christian sovereign and a non-Christian sovereign,¹⁷ nor if a dispute existed between two Christian commoners.

11. *See id.* at 76.

12. *See id.*

13. *See id.*

14. *Id.* at 77.

15. *See* Paul A. Freund, *The Philosophy of Equality*, 1979 WASH. U. L.Q. 11, 14 (recognizing overarching principles of rationality in United States jurisprudence).

16. *See* King & Le Forestier, *supra* note 10, at 75.

17. The Crusades are an example of this before the Pope became a party in the dispute.

Another difficulty was that papal mediation was costly; for in order for parties to avail themselves of papal mediation, they had to expend a significant amount of capital to simply secure a hearing.¹⁸ In addition, papal mediation offered no opportunity to appeal, and the Pope held both the legislative and the executive powers. Accordingly, papal mediation lacked neutrality.¹⁹

The Friars Minor, a Catholic religious order of men that began in the Thirteenth century, remedied some of the foregoing difficulties.²⁰ One of the distinguishing characteristics of the Friars Minor was that they mixed freely with the people of their day and were well aware of the people's needs.²¹ The Friars Minor popularized piety, as they worked primarily with common folk.

Thus, when the Church identified mediation as a proper focus through papal action and the creation of mediating ambassadors, the friars followed the lead. The Friars mediated between Catholic sovereigns,²² among the sovereigns and commoners, as well as any other city rivalries.²³ In addition to mediating between common Christian folk, the Friars also mediated between non-Christian sovereigns and Christian Europe.²⁴

The Use Of Religion As A Bridge Towards Understanding

As an alternative to the Crusades, St. Francis went directly to the Sultan Yusseff el Mostansir in Morocco to discuss the religious values of their dispute.²⁵ St. Francis and his companion Bernard suggested that the Crusades could end if the Sultan converted. Though the Sultan was not willing to compromise his religious be-

18. See King & Le Forestier, *supra* note 10, at 76 (stating "[t]he Court of Rome is very desirous: it has many needs and one must give many gifts").

19. See *id.* at 75. Though this lack of neutrality could be seen as a difficulty, some scholars argue that neutrality is not an essential aspect of mediation. See John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 463 (1997) (discussing the value of neutrality and disclosing the importance of non-neutral interests); Riskin, *supra* note 4, at 17 (describing two ranges of mediation styles, those who facilitate and those who evaluate); John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 70 (1996) (arguing that evaluative mediation presses the participants to reevaluate their positions).

20. The term Friars Minor is Latin for "lesser brother," signifying the founder's (St. Francis of Assisi's) desire that his followers identify with the lesser members of society.

21. See IRIARTE, *supra* note 9, at 129.

22. See *id.* at 130 (providing many examples of Friar Minor mediation between the years of 1231 and 1410).

23. See *id.* at 130; see also *supra* note 6 and accompanying text.

24. See IRIARTE, *supra* note 9, at 133-34.

25. See *id.* at 139-41 (recounting Francis' attempted mediation of Crusades with Sultan).

liefs, he was impressed with Francis' openness and courage. Nonetheless, the mediation did not result in a settlement, and the Crusades continued. However, the Friars Minor and the Moslems ultimately reached a mutual understanding and acceptance. Based on early lessons such as this, scholars have identified understanding and acceptance as appropriate goals for mediation.²⁶

Notably, the agreement forged between the Sultan and St. Francis extends to this day as the Friars Minor still retain the right to reside in Moslem countries. Another groundbreaking result of this mediation was that St. Francis inserted an injunction into the Rule of Life for all Friars Minor that when they are with non-Christians, Friars Minor "must not create disputes or arguments, but rather they must submit themselves to all for God's sake, and confess that you are Christians."²⁷

St. Francis' mediation with the Sultan offers many insights for present day mediators. For instance, where no common ground exists among the parties, creating a win-lose situation, exploring religious values may reveal unforeseen commonality. As previously stated, because the Sultan was impressed with Francis' simplicity and sacrifice for the love of God, St. Francis and the Sultan were able to achieve common ground by virtue of their mutual Abrahamic tradition.²⁸

Also, in a typical win-lose position, a mutually respected channel of dialogue may be established with third parties representing both sides of the dispute through exploring the parties' religious beliefs. For St. Francis and the Sultan, this was accomplished by discussing the love of God and the authority of a transcendent power. As a result of this conversation, some Friars Minor remained in Morocco, leaving a channel of communications between the warring parties: Christian Europe and the Islamic countries.

A. The Growth of Papal Mediation

Papal mediation continued to have a positive influence throughout history. In 1917, for example, Pope Benedict XV wrote an armistice proposal to the warring powers suggesting a basis for an

26. See ROBERT A.B. BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994); Zena D. Zumeta, *Spirituality and Mediation*, 11 *MEDIATION Q.* 25 (1993) (discussing understanding and connectedness as goals of mediation).

27. *Rule of Friars Minor* ch. 7, cited in FRANCIS & CLARE, *supra* note 2, at 141.

28. Islam, Christianity and Judaism trace their origins to the biblical patriarch Abraham.

end to World War I, and a lasting peace.²⁹ The proposal consisted of reduction and limitation of arms, establishment of international arbitration, and restriction of the use of military force for the defense of the international order. When Pope Paul VI received U Thant, Secretary General of the United Nations, he stated that "[t]he Holy See has the highest esteem for this international organization. It considered it as the fruit of a civilization to which the Catholic religion . . . has given its essential principles."³⁰

Pope John Paul II also mediated a dispute between Argentina and Chile in 1984.³¹ The dispute concerned which country had sovereignty over oil-rich islands in a channel between the two countries. A panel of judges, composed of members of the International Court of Justice, held hearings in Geneva over the course of six years and rendered the decision in favor of Argentina.³² However, Chile refused to accept the decision, a situation that was reminiscent of the Lombard League's rejection of the decision of Honourous III. With troop movement reported in border towns,³³ John Paul II ultimately mediated the dispute by dividing the islands between the two countries.³⁴ In a visit to the area, he noted that the generosity of spirit of the two leaders was what prevented war.³⁵ Again, an appeal to religious and transcendent values provided the motivation to settle a dispute.

Papal mediation works on the international level much like adjudication works on the national level. As a matter of faith in the institution,³⁶ the disputing parties must submit their authority to settle to a larger institution. Both parties in the Argentine-Chile dispute had recourse to this level of decision-making because negotiations failed or were blocked.

29. See STANLEY CHODOROW, *CHRISTIAN POLITICAL THEORY AND CHURCH POLITICS IN THE MID-TWELFTH CENTURY* 152-58 (1972).

30. EMILE M. GUERRY, *THE POPES AND WORLD GOVERNMENT* at vi (1963).

31. See King & Le Forestier, *supra* note 10, at 79.

32. See *Argentina and Chile*, *LATIN AMERICA, LAX*, 38, Oct. 1, 1976, at 304 (listing the five judges as Fitzmaurice from Great Britain, Gros from France, Dillard from United States, Onyama from Nigeria, and Petren from Sweden) (on file with author).

33. See *Argentina in LATIN AMERICAN POLITICAL REPORT, LAPR XI*, 48, Dec. 9, 1977 (on file with author).

34. See Associated Press, *Argentina Approves Treaty to Settle Dispute with Chile*, Dec. 29, 1984 (on file with author).

35. See John Reichertz, *Pope Commemorates Major Diplomatic Victory in South America*, Apr. 1, 1987 (on file with author).

36. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (J. Frankfurter, concurring) (observing that "so important to a popular government" is sentiment "that justice has been done").

Both the Papal office and the United States judiciary claim to have the moral and legal authority to settle disputes. They both call for people to build links of mediation that will consciously reassert values to reinforce peace.³⁷ The values that religion asserts to reinforce peace are a reframing of the dispute from individual loss or gain to reparation of a disorder and teachings on compassion and forgiveness of one's opponent. Tapping into the religious motivation to create these links provides a possibility for lay person³⁸ led expansion of mediation.³⁹ However, both institutions share three similar problems: (1) the requirement of a significant expenditure of money to gain access to the highest court; (2) an assumption that parties share faith in the larger institution (United States courts and the Pope) in order to accomplish a mutually acceptable determination of justice;⁴⁰ and (3) the incapability of settling the worrisome number of increasing disputes.⁴¹

B. Historical Analysis of the Religious Roots of Mediation in the United States

A closer look at the history of mediation in the United States illustrates that using religious motivations to achieve mediation settlements is not a novelty. Native Americans, for example, were well-versed in mediation. Traditional Navajo common law fostered

37. See, e.g., NEGOTIATION, *infra* note 41, at 13; JEROLD S. AUERBACH, JUSTICE WITHOUT LAW 115-37 (1983) (tracing the mediation/arbitration movement in the United States); THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE (R. Abel ed. 1982); Warren Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); but see Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 7 (1983) (discussing the fact that "we are the most litigious people in the world").

38. I refer to "lay" in both senses of the term, i.e. non-ordained and not legally trained.

39. See JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 29 (1984) (presenting a mediation guide for lay and lawyer mediators).

40. See Robert N. Wilentz, *Chief Justice Swearing-In Ceremony For Justice James H. Coleman, Jr.*, 49 RUTGERS L. REV. 1173 (1997) (lamenting that African-Americans among other minorities do not have confidence in the U.S. judicial system. Justice Coleman says he looks forward to day when this will change); see also King & Le Forestier, *supra* note 10 and accompanying text.

41. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 379 (1982) (noting overcrowded case docket of U.S. judges); JOHN PAUL II, NEGOTIATION: THE ONLY REALISTIC SOLUTION 13 (1982) (observing that, internationally, an increase of armaments production has been accompanied by a decrease in ethical principles of goodness, friendship and love, rendering dispute resolution an insurmountable task).

a system of justice based on a variety of spiritual values, including clan relations, equality, freedom, responsibility, harmony, maintaining a good reputation, respect, and an emphasis on making victims whole.⁴²

The early Puritan, Quaker and Dutch settlers employed mediation, arbitration and conciliation as a means of ensuring conformity to community norms, and resorted to the legal system only as a last resort.⁴³ In the nineteenth century, Mormons, as well as Chinese and Jewish immigrants, developed their own community dispute-resolution mechanisms as a reaction to perceived hostility from the broader society.⁴⁴ Indeed, the Chinese who immigrated to the United States brought an ancient tradition of mediation with them.⁴⁵ Up until World War II, the Chinese mediated disputes through the Chinese Consolidated Benevolent Association,⁴⁶ an organization that appealed to the traditional Chinese values of harmony in family, clan and village during mediation.⁴⁷

Immediately after World War I, when secular courts in Europe were inhospitable, the Jewish community brought a dispute resolution mechanism from Europe to the United States.⁴⁸ Today members of the Jewish community continue the practice of submitting commercial disputes to a rabbinical mediator selected by the dis-

42. See Tom Tso, *Moral Principles, Traditions and Fairness in the Navajo National Code of Judicial Conduct*, 76 JUDICATURE 15 (June-July 1992) (embodying Navajo Nation's Code of Judicial Conduct adopted on November 1, 1992 based on a system which has been in use for 100 years and which in turn is based on traditions observed by the tribe for centuries before).

43. See Corinne Cooper, *Justice Without Law? A Search Through History for Contemporary Solutions*, 48 ALBANY L. REV. 741 (1984) (tracing the use of religious fora for dispute resolution).

44. See *id.*

45. See Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1205 (1966) (describing how Chinese immigrants to the United States brought ancient Confucian principles of mediation).

46. See AUERBACH, *supra* note 37, at 73-76 (describing Chinese use of mediation from their arrival to United States until World War II when the traditional controls began to crumble and state courts were more popular to break from Chinese strongmen).

47. See *id.* at 73.

48. See *id.*; see also AUERBACH, *supra* note 37, at 76-94 (tracing the use of Jewish Administrative Courts as a means of dispute resolution).

puting parties,⁴⁹ provided that all parties to the dispute are willing to accept rabbinic authority as binding.⁵⁰

II. THE APPLICATION OF RELIGION IN MEDIATION TODAY

The religious and spiritual pedigree of mediation is quite extensive, and the practice of using spiritual aspects of mediation still continues. Recently, the Christian Conciliation Service ("C.C.S.") established offices to train and provide church mediators for personal disputes.⁵¹ According to the C.C.S., the purpose of mediation is to glorify God through love of one's neighbor and to help disputing parties learn how to change attitudes and behavior so as to avoid similar conflicts in the future.⁵² In addition, the Roman Catholic Archdiocese of New York is in the process of establishing a mediation center for Catholics to settle their disputes outside of court.⁵³

The Mennonite Conciliation Service avoids denominational approaches to mediations. Rather, the goal for Mennonites is to establish proper relationships "that honor mutual human worth, that redress past wrong as far as injuries are able to be redressed, and in which steps have been taken so that neither fear nor resentment play dominant roles."⁵⁴

There is a troublesome history of using religious and spiritual traditions to oppress.⁵⁵ However, if the oppressive nature which created problems can be avoided, employing religious values to encourage settlement can be beneficial. Mediators may increase positive results in conflict resolution if they re-frame the differences of the disputing parties in terms of shared values. These shared values have two sources: (1) the commonly shared values found in

49. See *Kozlowski v. Seville Syndicate*, 314 N.Y.S.2d 439 (1970) (resolving a dispute among stockholders of a closed corporation, the parties signed an agreement to submit themselves to a decision of a named rabbi who was entitled to constitute a tribunal with two other rabbis and to consult with an attorney).

50. See AUERBACH, *supra* note 37, at 89 (noting that Jewish mediation committees are gaining new popularity).

51. O.J. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENTS: A HANDBOOK FOR MARITAL MEDIATIONS* (1978).

52. See INSTITUTE FOR CHRISTIAN CONCILIATION, *CHRISTIAN COALITION HANDBOOK* 15 (rev. 3.2 1994).

53. See ARCHDIOCESE OF NEW YORK, *MEDIATION RULES AND GUIDELINES* § 103 (1993).

54. See John P. Lederach & Ron Kraybill, *The Paradox of Popular Justice: A Practitioner's View*, in *THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES* 357, 361 (Sally E. Merry & Neal Milner eds., 1993).

55. See *supra* note 46.

society as a whole, including, fair play, restrictions on unjust enrichment and equity; and (2) religious values (our concern here), including love of neighbor, a belief in an ultimate reckoning, and personal sacrifice.⁵⁶ It is important to note that religious values and other commonly shared values are not mutually exclusive.⁵⁷ A mediator can strategically present values as either commonly shared or religious, depending on how the parties identify their value orientation.⁵⁸

III. RELIGION AS PART OF A BROAD STRATEGY TO PROMOTE SETTLEMENT

When using spiritual traditions as a motivation to settle disputes, the mediator must use broad goals and strategies.⁵⁹ A narrow goal of mediation is to arrive at a settlement based on the claim as brought by the claimant, usually a dollar sum.⁶⁰ This approach uses the likely court decision as a criteria.⁶¹ A broader goal, however, addresses more personal issues, such as the animosity the parties may feel towards each other, or the possible loss of self esteem if one of the parties settles.⁶² More explicitly spiritual, the personal issues to be addressed as goals of mediation include moral growth, the ability to forgive,⁶³ love of one's neighbor,⁶⁴ empathy⁶⁵ and increasing the inter-connectedness of all of humanity.⁶⁶

For court-based mediation, the parties should receive notice of the mediator's option of employing a religious-based mediation. This can be accomplished in several ways. One is to present the option of using a religious context as a re-framing device to the parties at some point during the mediation. This may be done

56. See Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 AM. U. J. GENDER & L. 269 (1996).

57. See, e.g., Bernard Haring, *Ten Commandments*, in 4 NEW CATHOLIC ENCYCLOPEDIA 7 (1967) (illustrating that the Ten Commandments were largely based upon commonly held values in the Ancient Near East); see also Kenneth Pennington, *The Spirit of Legal History*, 64 U. CHI. L. REV. 1097, 1105 (1997) (discussing how development of codified law in Europe relied upon Code of Canon Law).

58. See Savage, *supra* note 56, at 292.

59. See Riskin, *supra* note 4, at 17 (providing a grid for a mediator to access her mediation).

60. See *id.*

61. See *id.* at 19.

62. See *id.* at 20.

63. See Kenneth Cloke, *Revenge, Forgiveness, and the Magic of Mediation*, 11 MEDIATION Q. 67, 67 (1993).

64. See INSTITUTE FOR CHRISTIAN CONCILIATION, *supra* note 52, at 7.

65. See BUSH & FOLGER, *supra* note 26, at 81-112.

66. See Zumeta, *supra* note 26, at 25-26.

within various re-framing options: an on-going relationship between the parties; a reputation that the parties maintain within the community; or the time required to receive a hearing by the judge. Another way is through self disclosure on the part of the mediator. Mediators may share personal religious beliefs with the parties and then reflect with them on the impact of religious beliefs on this mediation. This religious reflection, however, should go to the religious beliefs of the parties rather than those of the mediator. These options would need to be discussed beforehand with the officers of the court.

Both the narrow and broad mediation strategies influence the outcome of the settlement.⁶⁷ A narrow strategy ascertains and evaluates the facts of the case, and applies the mediator's knowledge of how courts resolve this type of case.⁶⁸ A broader strategy, on the other hand, invites the parties to explore their own beliefs and behaviors that facilitate settlement.⁶⁹ This strategy would assist the parties in determining the underlying issues in their dispute, as well as provide opportunities to change themselves, their institutions, and their communities.⁷⁰

When St. Francis of Assisi mediated between the Mayor and Bishop of Assisi he used a broad goal and broad strategy of mediation.⁷¹ His goal was to bring peace to Assisi and not simply to reach monetary agreement.⁷² St. Francis' strategy was broad in that it led the parties to consider a larger context within which to frame their dispute: the ordered creation surrounding the disputants.⁷³ As such, the parties were inspired to locate a different motivation to settle other than a higher monetary sum.⁷⁴

IV. RELIGIOUS MOTIVATIONS TO SETTLE

In early American history, harmony and the protection of group identity provided the motivation for parties to settle a dispute.⁷⁵ Today, if the dispute is inter-cultural, the mediator's challenge is to find common ground between the disputing parties in order to ar-

67. See Riskin, *supra* note 4, at 24-34 (evaluating four categories of mediation techniques and strategies and their potential influence and goals on case settlement).

68. See *id.* at 27-28, 33.

69. See *id.* at 24.

70. See *id.* at 32.

71. See FRANCIS & CLARE, *supra* note 2, at 37-39 and accompanying text.

72. See *id.*

73. See *id.*

74. See *id.*

75. See Cooper, *supra* note 43, at 745-746 and accompanying text.

rive at a settlement. A court does not provide a common ground. It simply applies a supposedly neutral criteria for settling disputes, where one party loses and the other wins. Spiritual values, however, create the possibility of providing a common ground upon which disputing parties may be motivated to settle their dispute through mediation.

The following are three scenarios where spiritually-based motivation for settlement would be appropriate: (1) a dispute within a culture; (2) a dispute between institutional bodies whose spiritual values are either non-existent or unspoken; and (3) a dispute between two cultures.⁷⁶ Each case will employ a broad strategy paradigm.

1. *Jewish Booth Renter v. Jewish Convention Corp.*

The claimant brings this suit to recover rental fee from the defendant claiming that the defendant prohibited the claimant from distributing the claimant's propaganda in violation of previous agreements where claimant had rented the booth space and was allowed to disperse propaganda. The claimant alleges that this censorship was specific to the claimant's political beliefs in that other booth renters were allowed to disperse their propaganda. The Defendant alleges that the contract neither states nor implies that booth renters may distribute propaganda. Furthermore, the defendant alleges that if other organizations did distribute propaganda, they did so out of area where the defendant had control. Both parties agree that it is the content of the claimant's propaganda that makes this dispute so insoluble outside of court.

At first, reading this hypothetical could indicate that religious values only serve to complicate objective mediation processes, and show that entering the quagmire of religious dispute is entering a futile, no-win mediation. A narrow goal, fee resolution, and a narrow strategy, a close look at the contract and the possibility of implied obligations, seems to be in order. And yet it is possible that religious values could help resolution by offering a broader goal, a sharing of Jewish values of community and justice, and a broader strategy, asking the parties to empathize with each other's shared belief system.

76. These hypotheticals are based on actual cases mediated by the author in Manhattan Small Claims Court, which are on file with the author.

The first possibility is to ask the parties if they know of functioning Jewish mediation committees.⁷⁷ Assuming that the religious differences of the parties would prevent them from having recourse to a Jewish mediation court, a mediator could explore the parties' understanding of how their own deeply held religious beliefs could help settle disputes.

Before exploring the intricacies of how a Jewish mediation court may solve the dispute, it would be helpful to explore the communal experience of being Jewish to elicit a measure of empathy between the parties.⁷⁸ This empathy could be further explored by the mediator directing questions to tap into the Jewish understanding of community.⁷⁹ If the mediator is not Jewish, this might be explored by having both parties describe commonly accepted Jewish beliefs on peace and justice. The common Jewish tradition holds the possibility of re-framing the parties' dispute from the religious/political dispute to religious teachings on making peace with one's sister or brother.⁸⁰

2. *Hospital v. Insurance Company*

A hospital claims that an insurance company implicitly gave permission for the hospital to authorize medical examination by approving a primary physician who only uses this type of medical examination. The hospital alleges that the insurance company knew of the primary physician's exclusive use of this examination. The insurance company claims that the policy with the hospital clearly prohibits the use of non-explicitly approved medical tests.

This hypothetical appears to offer a case that is void of any spiritual or religious tradition. The only viable option is identifying a narrow goal—whether the defendant/Insurance Company should pay the plaintiff/Hospital for services provided, and pursue a narrow strategy—to explore the insurance policy and past behavior of the hospital with the insurance company. However, larger values may be operative. Perhaps both parties may be angry by the other's behavior in addressing the matter.

Assuming that the two parties must work together closely for years, broader goals of mending the relationship would be helpful.

77. See *supra* note 49 and accompanying text.

78. See AUERBACH, *supra* note 37, at 86.

79. See *id.* at 79 (describing the Jewish value of community as *kehillah* derived from European institutions).

80. *Id.* at 89.

The ideals of community and creating order, effective in non-corporate disputes, may be translated into establishing a broader goal that both parties maintain a good public reputation. The broad strategy to achieve this goal would be to direct questions for the parties to explore their mission statements. More value-based statements are often found in a corporation's mission statement.

Such statements have the potential to re-frame the dispute from maximum profits to promote healing, for the Hospital, and to help people feel secure for the Insurance Company. In either case, broadening the goals and strategies of the mediation allows for more transcendent values to enter the process and increases the possibility of the parties finding common ground. This hypothetical provides an illustration of how commonly held values, derived from religion or secular society, may be employed to help resolve a dispute.

3. *Presbyterian Client v. Catholic Owned Moving Company*

The defendant owns a moving van company which offers services to clients on a one-to-one basis at set rates. The plaintiff claims that the defendant scratched the plaintiff's furniture and stained the plaintiff's couch after agreeing to an insurance policy which guarantees full replacement on any injured materials. The plaintiff is suing for full re-purchase value of the couch. The defendant concedes that an insurance policy was agreed upon with plaintiff but the full replacement value was only guaranteed for such incidents as the destruction of the truck during the move, not incidental damages. After extended negotiations, the defendant makes what both parties seem to agree is a reasonable offer. However, the plaintiff refuses to settle, because he claims it is "God's law" that damages should be repaid.

This case presents a clash of cultural and class values. The defendant is a Dominican Catholic who lives in the Bronx, and the plaintiff is a White Presbyterian who lives in Westchester. The Plaintiff, relying on God's law not to settle, presents a strong case for the argument that religious values impede settlement. Following a narrow goal in the form of a settlement sum, a narrow strategy and explaining the agreement once again appears to be the most prudent option in pursuing the meditation.

However, the plaintiff's beliefs will not dissipate merely because the mediation process claims religious neutrality. The mediator could help the parties identify broader goals, such as learning how to change attitudes and behavior in order to avoid similar conflicts

in the future.⁸¹ Perhaps the mediator could suggest a broader strategy of mediation by directing both parties to explore 'God's law' as love of neighbor.⁸² Through discussing shared religious beliefs, they might build consensus and lower the "God's law" barrier to settlement.

With either of these alternatives, raising a religious factor would not be the death blow to mediation. In fact, an honestly stated religious belief may provide an opportunity for the parties to achieve greater mutual understanding. The plaintiff could explain that "God's Law" for him meant that those who damage other people's goods should make full restitution of damaged goods.⁸³ After a similar discussion of who wronged who, the religious discussion might incorporate their shared Christian values, in which they may discover that their greatest commandment is to love one another.⁸⁴ Though this religious discussion does not guarantee a negotiated settlement, it would foster mutual understanding which is a goal of mediation.

CONCLUSION

Religious authority has a long history of promoting mediation. Since the Middle Ages, Papal mediation, relying upon shared religious values, has advanced settlements among intransigent parties. However, Papal mediation was only accessible to the highest echelons of society. The Friars Minor popularized and broadened the use of mediation. Presently, United States courts are facing overcrowded dockets, time and expense of litigation, and the reality that the justice system is most easily accessible to the privileged in society.

Value-based mediation presents a vehicle to popularize and broaden the use of mediation. Mediation in the United States has roots in religious identity emphasizing values such as stepping into the shoes of your adversary,⁸⁵ and assuring peace in the commu-

81. See *supra* note 52 and accompanying text.

82. See *id.*

83. See, e.g., *Numbers 5:7*, REVISED STANDARD VERSION OF THE BIBLE ("[t]he person shall make full restitution for the wrong, adding one fifth to it, and giving it to the one who was wronged.").

84. See *John 13:24* (Jesus decreeing that "I give you a new commandment, that you love one another. Just as I have loved you, you also should love one another.").

85. See Tso, *supra* note 42 and accompanying text (discussing Native American use of mediation in legal codes).

nity.⁸⁶ Since World War II, religious groups have proceeded to set up mediation centers in order to mediate disputes from an explicitly religious context.⁸⁷ Mediation provides an opportunity to employ religious values as a positive force toward reconciliation, thus continuing an unbroken tradition of using shared transcendent values to motivate settlement. This reconciliation is characterized by inner peace of the parties.⁸⁸ Thus, it is only natural that we return to these roots in the ongoing development of mediation in the United States legal culture.

86. *See supra* notes 43-45 and accompanying text (discussing various communities in the new world preferring mediation rather than resorting to legal system in order to preserve unity).

87. *See supra* notes 46-54 and accompanying text (discussing various religious groups offering mediation).

88. *See supra* note 7 (defining reconciliation).