TRANSFORMATIVE MEDIATION TWENTY YEARS LATER: AN INVITATION TO DISCUSS POST-TRAUMATIC STRESS DISORDER AND LEGAL ETHICS

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Transformative mediation is substantially based on an ideology of postmodern nihilism and relativism called social constructionism that rejects Enlightenment traditions of science and law. Transformative mediation adopts a relational theory of emotions that teaches emotions are not based in biology, but rather are products of social interaction. Because the transformative model rejects neuroscience in favor of unfounded ideological assumptions, it is unsafe to apply it to disputes involving victims of post-traumatic stress disorder (PTSD), especially returning combat veterans.

The attorney-mediator who has sworn to uphold the law cannot ethically apply the transformative mediation model based on social constructionism that rejects Enlightenment legal principles. Transformative mediation should reinvent itself by jettisoning social constructionism and redefining itself in terms of postmodern pragmatism that acknowledges Enlightenment traditions of science and law. Thus reinvented, transformative mediation, like problem-solving mediation, would be safe to use with victims of PTSD and ethically acceptable for attorney-mediators.

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INTRODUCTION

There are two dominant approaches to mediation: the problem-solving model and the transformative model. The problem-solving model is a product of the Enlightenment ideology’s belief in the individual’s ability to ascertain objective truth through the exercise of reason. In this sense, problem-solving is a profession—like accounting, law, or medicine—that applies the scientific method to its techniques with the assumption that science transcends ideology. Problem solvers do not define Enlightenment principles with their parties when they begin mediation, any more than they would begin mediation by explaining to the parties that the force of gravity is holding them in their chairs and keeping them from flying into space.
Enlightenment principles, including the laws of science, are presumed because they have become a part of everyday life.

The transformative model is both a model of assisted dispute resolution and an ideology.\(^1\) "The transformative framework is based on and reflects relational ideology, in which human beings are assumed to be fundamentally social—formed in and through their relations with other human beings—essentially connected to others, and motivated by a desire for both personal autonomy and constructive social interaction."\(^2\) Relational principles are not presumed at the beginning of mediation and must be explained by the transformative mediator to the parties.\(^3\) Relational principles are based on the work of cognitive and relational thinkers, such as Professors Aaron Beck and Kenneth Gergen,\(^4\) and are at odds with Enlightenment principles.

Problem-solving mediation is foundational and modernist, while transformative mediation is anti-foundational and postmodernist. Foundationalism is "an attempt to ground inquiry or thought on pre-given principles assumed true beyond ‘mere belief or unexamined practice.’" Postmodernists are anti-foundational. They contend that ‘questions of fact, truth, correctness, validity, and clarity can neither be posed nor answered.’\(^5\) Foundationalism embraces objective reality. Anti-foundationalism embraces relativity. The true difference between these views is in believing we discover the truth, as opposed to believing we make the truth.\(^6\)

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4. See infra Part II.


6. As Richard Rorty explained:

About two hundred years ago, the idea that truth was made rather than found began to take hold of the imagination of Europe. The French Revolution had shown that the whole vocabulary of social relations, and
solving mediation adopts the foundational view that reality is objective. Transformative mediation adopts the anti-foundational view that reality is relative: transformative mediation is subjective and relational.\(^7\)

This Article provides a critique of transformative mediation and its reliance on social constructionism. This critique is threefold and concretizes the problems with transformative mediation by considering the deficiencies of the model as applied to mediation in which one of the parties suffers from PTSD.

The first concern is the impossibility of clearly defining a model of mediation with a nebulous ideological basis. Professors Bush and Folger call their version of social constructionist ideology the “Relational worldview,” but they never clearly state whether they are adopting, as a whole, social constructionism.\(^8\) Their discussion of their ideology moves by association, not by logic, and sometimes they seem to affiliate themselves with one of the main social constructionist theorists, Professor Kenneth Gergen. The second concern is whether transformative mediation, with its social constructionist roots, is an appropriate model to employ with individuals suffering from PTSD. The third concern is whether an attorney-

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\(^7\) Professor Bush considers this anti-foundational grounding to be a source of strength that will prevent interactive transformative mediation from being co-opted by the problem-solving court model. Robert A. Baruch Bush, *Staying in Orbit or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades*, 84 N.D. L. REV. 705, 761 (2008) [hereinafter Bush, *Staying in Orbit*] (“[T]he courts and interactional mediation models are based on different underlying views of human nature and society . . . [T]hese models of mediation are firmly anchored elsewhere—in a different, relational vision of society that can stand on its own outside and beyond the individualist vision of the courts.”).

\(^8\) Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* 236 (1994) [hereinafter Bush & Folger, *Responding to Conflict*] (“Human beings need and construct organizing conceptual frameworks in order to make sense of the world. . . . In the language of contemporary thought, this is a social constructionist view of human nature and society.”); Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: The Transformative Approach to Conflict* 252 (rev. ed. 2005) [hereinafter Bush & Folger, *Transformative Approach*] (“[W]e are works in progress, and as social constructionist thinkers have long argued, social interaction is the process by which the progress is made. . . . This view of human nature and social interaction . . . is often called the *Relational worldview.*”).
mediator can ethically employ a model of mediation based on social constructionism.

This Article will address these three concerns generally in four parts. Part I will first seek a definition for the nebulous transformative model and the Relational worldview. It will then follow-up with a discussion of the inherent flaws within that Relational worldview at the core of the transformative model.

Part II begins by examining the biology of emotions and the neuroscience involved in PTSD. Ultimately, Part II concludes that the transformative model’s rejection of modern neuroscience renders it unable to safely handle conflicts that involve a party suffering from PTSD.

Part III examines a hypothetical case under the transformative model and examines how the inherent problems in this model directly affect a party with PTSD. Part III will demonstrate that, as presently constituted, the transformative model is an inappropriate model to employ with those who suffer from PTSD. Part III will close with a discussion of the ethical considerations present in using the transformative model and will conclude that social constructionism is an inappropriate ideological basis for the transformative model.

Part IV offers an alternative to the social constructionist basis of transformative mediation and suggests that Professors Bush and Folger retool their model in terms of postmodern pragmatism in order to make it ethically acceptable and safe for individuals suffering from PTSD.

I. In Search of a Definition of the Transformative Model

A. Relational Worldview

Mediation must begin with a definition of conflict, because without conflict there would be no disputes to mediate. For transformative mediation, according to Professors Bush and Folger, “conflicts are seen as rich opportunities for growth, and mediation represents a way to take full advantage of these opportunities.”9 The transformative model is both a movement and an institution10 that is ideologically11 based on Professors

9 BUSH & FOLGER, RESPONDING TO CONFLICT, supra note 8, at 84.
10 Id. at 248 (“The process of mediation as used within the contemporary mediation movement, like any organized and regularized process for responding to conflict, is a social institution.”).
11 BUSH & FOLGER, TRANSFORMATIVE APPROACH, supra note 8, at 255–56; Joseph P. Folger & Robert A. Baruch Bush, Transformative Mediation, 1 INT’L J. CONFLICT
Bush and Folger’s “Relational worldview” \(^1^2\) linked with social constructionism. It is also a technique utilizing cognitive theories of emotions based on the philosophical arguments of Professor Aaron Beck, Professor Kenneth Gergen, and other relational, social constructionist thinkers.\(^1^3\)

Social constructionism emphasizes conversation, not definition.\(^1^4\) The social constructionists’ mantra is: “Truth brings an end to dialogue,”\(^1^5\) so one does not expect a lot of truth from social constructionists. In Professors Bush and Folger’s first book, in 1994, the closest they come to a definition of the Relational worldview is the following circumlocution:

[T]he Relational worldview cannot be linked to a familiar philosophy. Because it represents an outlook that is just emerging, it has no widely recognized character or “name” as yet. Similarly, it is hard to point to social institutions, present or past, like the modern marketplace or the premodern caste system, that exemplify what relational social institutions look like. However, the mediation movement, insofar as it follows the transformative approach, could be one such social institution.\(^1^6\)

Fifteen years later, the ideology of their Relational worldview lacked definition, had not become any clearer, and was still a developing hodgepodge.\(^1^7\) The Relational worldview has been emerging for twenty

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\(^{12}\) “Relational worldview” is the name of Professors Bush and Folger’s transformative ideology, so the capitalization of “Relational” is preserved throughout this Article. See Bush & Folger, Responding to Conflict, supra note 8; Bush & Folger, Transformative Approach, supra note 8.

\(^{13}\) See Bush & Folger, Responding to Conflict, supra note 8, passim (bibliography section); Bush & Folger, Transformative Approach, supra note 8, passim (bibliography section).


\(^{16}\) Bush & Folger, Responding to Conflict, supra note 8, at 244.

\(^{17}\) As Joseph P. Folger and Robert A. Baruch Bush explained: This relational view of human nature is expressed in many fields today, in different terms. In social psychology, the study of human “happiness” and “well-being” finds that they are the results of having an integrated,
years, yet a precise description still has not arrived.\textsuperscript{18} As Professor Gergen notes, “[T]here is no unified or canonical constructionist position”\textsuperscript{19} because “[n]othing is legislated and nothing is fixed—including the meaning of constructionism itself.”\textsuperscript{20}

The Gospel writer Matthew says that no one can serve two masters.\textsuperscript{21} If the transformative model of mediation does not serve settlement as its direct aim, is the primary concern the welfare of clients or the ideological purity and advancement of social constructionist ideology? As Matthew says, you have to choose between your devotion to God and

relational sense of autonomy and social connection, more than any other factor. In political science, sociology, and law, “communitarian” theory asserts the importance of fostering both individual freedom and social responsibility, linking this to a belief in the relational nature of human identity. In moral philosophy, postmodern and feminist thinkers reject views of moral consciousness as stemming from either autonomy or connection, adopting instead a dialogic conception in which the fully developed moral sense attends equally to both, to the claims of self and other in dialogic relation, however difficult this may be. The overall “relational worldview” implied by these different disciplinary views finds broad support today in many fields.

Folger & Bush, \textit{Transformative Mediation}, supra note 11, at 23; see also Bush & Folger, \textit{Transformative Approach}, supra note 8, at 60.

\textsuperscript{18} Twenty years had passed since the publication of \textit{Responding to Conflict} by the time Professors Bush and Folger wrote their 2014 Article, \textit{Transformative Mediation}, yet they still had not reached a definition for their Relational worldview or their ideology. Rather than give us a clear, concise definition of their Relational worldview as it relates to their ideology, Professors Bush and Folger incorporated by reference a “body of work” to articulate “ideological foundations” of their transformative model. They said: “We believe that this body of work has been quite successful in articulating the ideological foundation of the model.” Bush & Folger, \textit{Transformative Mediation}, supra note 11, at 22. The “body of work” that they reference is composed of the following seven publications: Bush & Folger, \textit{Transformative Approach}, supra note 8; Folger & Bush, \textit{Past Challenges}, supra note 1; Folger & Bush, \textit{Ten Hallmarks}, supra note 3; Dorothy J. Della Noce, \textit{Seeing Theory in Practice: An Analysis of Empathy in Mediation}, 15 \textit{Negot. J.} 271 (1999); Dorothy J. Della Noce, \textit{From Practice to Theory to Practice: A Brief Retrospective on the Transformative Model of Mediation}, 19 \textit{Ohio St. J. on Disp. Resol.} 925 (2004); Dorothy J. Della Noce, James Antes & Judith Saul, \textit{Identifying Practice Competence in Transformative Mediators: An Interactive Rating Scale Assessment Model}, 19 \textit{Ohio St. J. on Disp. Resol.} 1005 (2004); and Designing Mediation: \textit{Approach to Training and Practice Within a Transformative Framework}, (Joseph P. Folger & Robert A. Baruch Bush, eds., 2001).

\textsuperscript{19} Gergen, \textit{Constructionist Dialogues}, supra note 14, at 34.

\textsuperscript{20} Id.

\textsuperscript{21} Matthew 6:24 (King James) (“No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot serve God and mammon.”).
money. Does not the mediator have to choose between her devotion to the health and welfare of her clients and her ideology?

Professor Robert A. Condlin has correctly noted the transformative model has reinvented itself\textsuperscript{22} over the years. He incorrectly views the differences between Professors Bush and Folger’s first book in 1994 and their second book in 2005 as “cosmetic”\textsuperscript{23} when in fact the changes are much more than that.

Professor Carrie Menkel-Meadow was the first, in her original review of the 1994 book, The Promise of Mediation, to observe that the transformative model focused on “changing people” \textsuperscript{24} and seemed “potentially more dangerous [than the problem-solving model] for the almost New Age—human potential movement—religious fervor which seems to inspire it.”\textsuperscript{25}

In 1996, Professors Bush and Folger responded with their Ten Hallmarks Article, which denied that their 1994 book advocated changing the individual, and implied that Professor Menkel-Meadow either confused, conflated, or misinterpreted their transformative theory.\textsuperscript{26} With their Ten Hallmarks Article, Professors Bush and Folger shifted focus from individual change to changing the quality of conflict interaction. That focus continues to the present day.\textsuperscript{27}

The focus of the 1994 book was individual change in terms of the moral improvement of the individual\textsuperscript{28} in order to advance Professors Bush and Folger’s vision of their ideological Relational worldview. The 2005 book built on the Ten Hallmarks’ focus of improving conflict interaction between the parties but retained the 1994 goal of advancing the Relational worldview. Professor Condlin attempted to generate a master theory of transformative dispute resolution based on the writings of Professors Bush


\textsuperscript{23} Id. at 625 n.8.


\textsuperscript{25} Id. at 237.

\textsuperscript{26} See Folger & Bush, Ten Hallmarks, supra note 3, at 277.

\textsuperscript{27} See TRANSFORMATIVE MEDIATION: A SOURCEBOOK passim (Joseph P. Folger, Robert A. Baruch Bush & Dorothy J. Della Noce eds., 2010); Folger & Bush, Transformative Mediation, supra note 11.

\textsuperscript{28} See Menkel-Meadow, Many Ways of Mediation, supra note 24, at 235–39.
and Folger, 29 but this proved impossible because the substantial inconsistencies in their writings, spanning the past twenty years, were not reconcilable. The change in focus from personal change to improving conflict interaction was a material alteration in the theory of the transformative model, and Professors Bush and Folger should simply recognize and address this change.30

Professors Bush and Folger must clarify the relationship of their ideology with social constructionism, specifically their view on science and neuroscience in relation to social constructionism. The closest we can come to understanding the Relational worldview is by examining the social constructionist theory of knowledge that Professor Bush adopts in its entirety in writing his forty-year history of mediation.31 It is, in fact, this relational theory of knowledge, extracted from social constructionism, that serves as one of the core components in the training technique of transformative mediators.32

B. Inherent Limitations of Relational Worldview in Transformative Mediation

Professors Bush and Folger are correct in asserting that ideological differences are responsible for Professor Condlin’s critique that the

29 See Condlin, supra note 22, at 623 n.4 (“B&F limit their discussion of the Theory to mediation, but even on their own terms they have produced a general theory of dispute resolution, and I will discuss it as such.”).
30 BUSH & FOLGER, TRANSFORMATIVE APPROACH, supra note 8, at 233–34 (regarding Professors Bush and Folger denying that the transformative model ever sought to change people). But see BUSH & FOLGER, RESPONDING TO CONFLICT, supra note 8, at 81–112 (regarding changing people).
31 As Professor Robert A. Baruch Bush explained:
According to current views on the nature of “knowledge,” historical study is never purely objective and involves a substantial measure of interpretation. Indeed, it is common today to find very different historical accounts of the same set of events, because of the different interpretive lenses used by historians who present them. History, in short, is one kind of narrative, and all narrative involves interpretation. That is certainly true of the history offered here. . . . Therefore, there is no implied claim of purely objective, scientific accuracy in the narrative offered here.
Bush, Staying in Orbit, supra note 7, at 708.
32 Folger & Bush, Transformative Mediation, supra note 11, at 23 (“The first third of the basic mediation training is focused solely on understanding the relational view of conflict and its implications for understanding the challenges people face in addressing difficult conflict issues. The training delves into the ideological premises behind the model.”).
transformative model is “shape-shifting.”\textsuperscript{33} Professor Condlin’s critique is an understandable characterization, because Professors Bush and Folger never actually define social constructionism or their Relational worldview. Nor do they ever distinguish between the two in any meaningful way. In response to Professor Condlin’s critique, Professors Bush and Folger, in true anti-foundational fashion, merely reassert their Relational worldview as being just as true as Professor Condlin’s “individualistic vision of conflict and human nature.”\textsuperscript{34} They adopt Professor Gergen’s version of social constructionism as the authority for their reassertion of their Relational worldview. They say, “[T]he relational premises about human nature are indeed highly idealistic and optimistic. . . . This is the heart of a constructionist approach to social institutions, which holds that the view we take of the world affects and constructs the world itself, negatively or positively, either limiting it or improving it.”\textsuperscript{35} Must the body of Professor Gergen’s social constructionist ideology—with its rejection of the Enlightenment traditions of reason and science—follow?

Social constructionism, as articulated by Professor Gergen, rejects the scientific method of the Enlightenment. Professor Gergen believes the Enlightenment’s principle of objective truth, that can be ascertained through an individual’s capacity to reason, has caused untold suffering to humans and should be rejected as just another tradition.

It is science that has reduced the enormities in human variation to a handful of racial categories, informed society that certain races are more intelligent than others, and has supported the idea that one’s fundamental motivation in life is to sustain his/her genes. By interpreting nature in just these ways, many believe society is ill served. In contrast, by understanding scientific claims as human constructions, lodged in cultural traditions as opposed to objectively “revealing nature’s secrets,” we open spaces for dialogue in

\textsuperscript{33} See Robert A. Baruch Bush & Joseph P. Folger, Response to Condlin’s Critique of Transformative Mediation, 15 CARDOZO J. CONFLICT RESOL. 231, 240 (2013) [hereinafter Bush & Folger, Critique of Transformative Mediation]; see Condlin, supra note 22, at 674 (showing that Professor Condlin himself agrees that “all dispute resolution is grounded in ideology.”).

\textsuperscript{34} See Bush & Folger, Critique of Transformative Mediation, supra note 33, at 236 (“However, his disagreement is not proof that his views are right and that the transformative model is wrong.”).

\textsuperscript{35} See id. at 236–37 n.17.
which *all people* can voice the truths and values of their traditions.\textsuperscript{36}

Professor Gergen fails to distinguish between pure science and ideologies masquerading as science, such as Nazi eugenics,\textsuperscript{37} that pervert the Enlightenment’s scientific tradition. Beliefs about scientific facts may be false, but validated scientific facts regarding our physiology cannot be. The Greek physician Claudius Galen believed that “blood originated in the liver and was consumed in the other organs . . . [H]e denied that [the heart] was a muscle. He insisted, contrary to visible evidence, that the heart lay in the exact centre of the body.”\textsuperscript{38} Opinions are not the product of the scientific method. Penicillin works in the bodies of humans regardless of our belief in whether it works.

The social constructionism of Professor Gergen holds that “psychiatry creates mental illness, and the medical establishment creates illness.”\textsuperscript{39} Professor Gergen’s view is hostile to science generally and to neuroscience specifically.

In order to “read the brain scan” the neuroscientist has to import a vocabulary and set of beliefs for which there are no other foundations than cultural tradition. Brain scans do not speak for themselves. To propose they are evidence of depression, deceit, trust, empathy, morality, and so on is little more than an exercise in cultural beliefs.\textsuperscript{40}

To the social constructionist, the findings of neuroscience have no objective relevance but rather are only cultural and the subjective results of “one tradition out of many.”\textsuperscript{41} The more pervasively a phenomenon like neuroscience is shared across cultural traditions,\textsuperscript{42} the more likely it is that

\textsuperscript{36} Gergen, Invitation, supra note 15, at 23.


\textsuperscript{38} Robert Youngson & Ian Schott, A Brief History of Bad Medicine 31 (2001).

\textsuperscript{39} Gergen, Invitation, supra note 15, at 24.

\textsuperscript{40} Id. at 222.

\textsuperscript{41} Id.

\textsuperscript{42} An Internet search reveals that neuroscience is also studied and applied in Japan, South Korea, China, India, Turkey, Iran, Africa, South Africa, Indonesia, Arabia, Thailand, Latin America and the Caribbean, and even in North Korea. See David Turner, Asia’s Scientific Trailblazers: Professor Suh Yoo-Hun, Asian Scientist, http://www.asianscienti
Professor Gergen is mistaken in his assumption that there is no single ascertainable objective reality regarding it. The Federation of European Neuroscience Societies has “23,000 European neuroscientists with a mission to advance European neuroscience education and research.” Neuroscience is overwhelmingly accepted cross-culturally as science that is objectively true.

Professor Gergen wishes to replace the concept of a reality of objective truth with socially constructed “realities” that come into existence when people use words in conversation with one another and agree upon their meanings. According to him, as we use words to describe reality, there is no single objective interpretation of the world—no privileged

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44. GERGEN, INVITATION, supra note 15, at 9–10, 19–20 (showing that social constructionism is based in large measure on the language theories of Ludwig Von Wittgenstein and Jacques Derrida).
relationship of the world and word. The rules can change within the game, and the rules can vary among cultures. The existence of atoms is no more true or false than the existence of souls, because “each is a reality within a particular form of life.” Professor Gergen believes that, like science, the concept of universal truth has been used to enslave mankind, and he wants to replace that with multiple, subjective truths.

“In other words, it is from our relationships with others that the world becomes filled with what we take to be ‘death,’ ‘the sun,’ ‘chairs,’ and so on.” For Professor Gergen, there is no gender, no mental illness, and no established power. Therefore, language, for the postmodern social constructionist, is inseparable from culture. For them, we create culture when we speak with one another and agree as to the meaning of the words.

While we may see the same world according to social constructionists:

[W]hat this world means to us is different. In this sense, we approach the world in a different way. This difference is rooted in our social relationships. It is within these relationships that we construct the world in this way or that. Through participation in relationships the world comes to be what it is for us.

According to social constructionists, “nothing is real unless people agree that it is.”

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45 Id. at 10 (“[M]ultiple constructions are possible, and there is no means outside social convention of declaring one as corresponding to the nature of reality more than another.”).
46 Id. at 11 (“Rather, we are saying that the words have come to function as ‘truth telling’ within the rules of a particular game—or more generally, according to certain conventions of certain groups.”).
47 Id.
48 Id. at 11–12 (“In the name of universal truth the world has witnessed torture, murder, and genocide. Let us abandon the idea of Truth (universal, for all people at all times), and replace it with multiple truths, useful ways of communicating for various people at various times.”).
49 Id. at 6.
50 Id. at 11.
51 Id. at 6 (“As we speak together, we can also bring new worlds into being. We could, for example, construct a world in which there are three genders, the ‘mentally ill’ are ‘spiritual healers,’ or where ‘the power’ in the organization lies not with the leaders, but the workers.”).
52 Id. at 4.
53 Id. at 5.
II. HOW TRANSFORMATIVE MEDIATION EXACERBATES CONFLICTS INVOLVING A PARTY WITH PTSD

A. Overview of PTSD

All of us, as biological organisms, employ the same fight-flight-freeze response to stress, and most of us suffer a serious event of traumatic stress at least once in our lives. Approximately one in five individuals suffers from PTSD because of rape, child abuse, physical assaults, natural disasters, serious accidents, surgeries, or crimes against persons and property. Because the nation has been engaged in a perpetual war against terror since September 11, 2001, the number of cases involving PTSD among our returning combat veterans has been growing.

Contrast for a moment the treatment that a combat veteran with PTSD would receive from a mediator who shares the relational view of dealing with emotions as articulated by Professors Bush and Folger in their *Ten Hallmarks* Article, with a neuroscience-based approach that a problem-solving mediator would utilize. Consider the following hypothetical. Our veteran’s name is Paul Anderson. He is the only person in this simulation who suffers from PTSD. After an attempted suicide, on the eve of his tenth deployment to Afghanistan, Paul retired early from the U.S. Army. On July 5, during his ninth deployment, Paul was the spotter on a Ground Mobility Vehicle (GMV). A roadside, improvised explosive device

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58 Obviously it is possible that two or more people in mediation could have PTSD including the mediator. It is also possible that the individuals could have complex PTSD, which is PTSD caused by overlapping traumas. It is possible that one or more or all of the individuals could have “infantile amnesia” by itself or in addition to other PTSD. See Joseph LeDoux, *Emotional Brain: The Mysterious Underpinnings of Emotional Life* 205–06 (1996). These complexities are beyond the scope of this Article.
(IED) in Zabul destroyed the vehicle and killed everyone except Paul, who was thrown clear.

Every year on July 5 at 6:30 a.m., Paul robs a convenience store by pretending that he has a gun in his pocket when it is only his finger, collects a few dollars in change, and then hangs around until the police come to arrest him.\(^{59}\) Paul is suffering from a form of survivor’s guilt, acting out the pain from his guilt because he was the spotter and did not see what he now thinks must have been an obvious roadside IED.

Paul is divorced, alienated from his ex-wife and children, and lives in the Phinny neighborhood in Seattle in a walk-up apartment. He is a member of the Phinny Neighborhood Association, which has become his sole source of social support. He takes advantage of the Association’s Hot Meal Program on a regular basis. He attends the Plant Clinic at the Association and is convinced that the noise in his apartment is, among other things, killing his plants.

Paul is not paying his rent, greatly angering his landlord and owner of the building, Dennis Saito. Dennis is a Japanese-American citizen by birth whose father had taught as a visiting professor in the Far East department at the University of Washington. Dennis’s family has returned to Japan, but he has remained. Dennis is very proud that he has obtained a Master of Business Administration degree from the university where his father taught. Dennis is equally proud that he received a basketball scholarship from Seattle Pacific University. When Dennis was playing football and basketball at Nathan Hale High School, he excelled both as a wide body and an enforcer. He had caught the eye of Jeff Hironaka, the basketball coach at Seattle Pacific, who was in the stands. Dennis has not aspired to be a professor of Japanese language and literature like his father, but has decided to go his own way by making a career in real estate, in true American fashion.

Paul claims that he is refusing to pay the rent because his apartment is too bright and too loud. Dennis needs the money for his cash flow and feels insulted because, although his units are clearly not high end, he prides himself in providing clean, livable units for people who otherwise might not have any place to go. Dennis expects some gratitude and is extremely angry because there does not appear to be anything Dennis can do to remedy the

\(^{59}\) Peter A. Levine with Ann Frederick, Waking the Tiger: Healing Trauma 127–28 (1997) (I have borrowed this July 5th part of my simulation).
situation. Dennis respects Paul for his military service, but is at his wits’ end, and thinks that Paul is unsettling to some of the more established tenants. A lot of Dennis’s tenants are members of the Phinny Neighborhood Association and a few are older tenants whom the Association is helping to stay in their units. The Association supports Dennis as a local businessman.

You are the mediator, a lawyer who chose to live in Phinny because it is in the city, but also has a neighborhood feel. You studied building science at the University of Washington, but you went to law school at Seattle University and have a job with a downtown firm in construction law. You, like Paul and Dennis, are a member of the Phinny Neighborhood Association. You wound up mediating by volunteering at the Association’s tool library where people would sometimes get into arguments over who got to use the limited amount of tools in the inventory. It quickly became apparent to you that people did not actually perceive what their own needs were and did not know what the right tool for the job was. Often it was just a matter of acquiring the right information.

You have read a lot about mediation, including the 1994 and 2005 books by Professors Bush and Folger, and their Ten Hallmarks Article. The community orientation of transformative mediation, with its Relational worldview, appeals to you, but you are not sure exactly what it means beyond the fact that you should pay more attention to the participants’ relationship as opposed to settling the dispute directly. The question that presents itself to you is whether you should try to work that old transformative magic on Paul, a combat veteran who is incredibly withdrawn, and Dennis, who is, quite frankly, a hothead.
B. The Emotions Involved with PTSD

1. Professor Beck’s Cognitive Primal Thinking vs. Goleman’s Emotional Hijacking. Professors Bush and Folger adduce the work of Professor Aaron Beck, the founder of cognitive therapy, to prove that all cerebral response to conflict is cognitive.\(^{60}\) Professor Beck combines the reflective\(^{61}\) and the reflexive\(^{62}\) in his definition of primal thinking. Professor Beck includes fight or flight as part of his primal thinking and does not distinguish it as autonomic and wholly reflexive.\(^{63}\) Rather, he says that “primal thinking . . . occurs at the earliest stage of information processing—and also [is] apparent in the early developmental phases, when children think largely in global evaluative terms, such as good or bad.”\(^{64}\) Qualifying the fight-flight-freeze syndrome as the same cognitive process with the global aspects of early childhood development\(^{65}\) is not supported by over eighty years of neuroscientific research, beginning with Hans Selye’s seminal work on stress in 1936.\(^{66}\) Professors Bush and Folger are mistaken when they suggest\(^{67}\) that Goleman’s work with the neuroscience of fear-based emotion supports Professor Beck’s theory of a cognitively based fight or flight system.\(^{68}\)

Professor Beck’s primal thinking is subject to reflective interpretation but the fight-flight-freeze response is a reflex and the product of the autonomic nervous system.\(^{69}\) Fear is generated through the orchestration of the amygdala and the hippocampus in the limbic

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\(^{60}\) Bush & Folger, Transformative Approach, supra note 8, at 48–50 (citing Aaron T. Beck, Prisoners of Hate: The Cognitive Basis of Anger, Hostility, and Violence (2000)).

\(^{61}\) Paul Ekman, Emotions Revealed: Recognizing Faces and Feelings to Improve Communication and Emotional Life 32 (2d ed. 2003) (“Reflective appraisal gives your conscious mind more of a role. You have the opportunity to learn how deliberately to guard against the likelihood of misinterpreting what is happening.”).

\(^{62}\) See Sapolsky, Zebras, supra note 54, at 20–23 (regarding the operation of the autonomic nervous system).

\(^{63}\) See Beck, supra note 60, at 30–34 (regarding primal beliefs and primal thinking).

\(^{64}\) Id. at 72.

\(^{65}\) See id. at 71–74.


\(^{67}\) Bush & Folger, Transformative Approach, supra note 8, at 49.

\(^{68}\) Id. at 50 (citing Daniel Goleman, Emotional Intelligence: Why It Can Matter More Than IQ (1995)).

(emotional) part of the brain, the part of the brain that predates the development of the neocortex in our evolutionary history. Fear begins as an automatic reaction in our nervous system, and the trick to managing it is to acquire cognitive (neocortical) control of it.

Automatic response and cognitive activity are controlled by different brain systems and occur in different parts of the brain. The brain has two circuits when it perceives we are threatened: an intricate, long-way around, that includes the neocortex; and a quick-and-dirty, short-way around, that excludes the neocortex. When the brain operates in response to a threat with the circuits on the short-way around, the thalamus in your brain trips a switch that shuts off the neocortex and sends all information directly to the amygdala. Your amygdala drives your reaction based on fear alone without any conscious or cognitive thought. It is not until after your brain has been emotionally hijacked, and you have survived, that the emotion of fear subsides. Only then, you are able to neocortically appraise what has happened and what your situation is.

Sometimes when confronted by great danger, our brains are not emotionally hijacked. The thalamus allows the neocortex to join the party. Scientists still do not know why this happens but hypothesize that it relates to the brain’s perception regarding our ability to control the situation of the threat. If the thalamus determines that we can control the situation, the value of the neocortex, with its problem-solving abilities, being invited to the party is obvious. However, if the thalamus determines that we cannot control the situation, it initiates an automatic response, and there is no cognitive component to the automatic response.

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70 See LeDoux, supra note 58, at 128–34, 163–66, 168–70, 298; Goleman, Emotional Intelligence, supra note 68, at 14–16.
71 See Goleman, Emotional Intelligence, supra note 68, at 17–19.
72 See McEwen with Norton Lasley, supra note 55, at 72–73.
74 E.g. Rick Hanson, Is the “Fight or Flight” Response the Functional Part of the Primitive/Reptile Brain or the Emotional Brain?, RICK HANSON, PH.D. (Feb. 21, 2016), https://www.rickhanson.net/faq/fight-flight-brain/.
75 Id.
76 See Goleman, Emotional Intelligence, supra note 68, at 20–23.
77 Id. at 21–23.
78 Id.
79 Id.
2. **Professor Gergen’s Relational Theory of Emotions vs. the Neuroscience of Emotions.** According to Paul D. MacLean’s triune brain theory, the brain has three integral systems that advanced in stages through our evolutionary history. First came the reptilian or instinctual brain, then the limbic or emotional brain, and most recently the cortex or rational brain. Competition, avoidance, and accommodation are driven by the fight-flight-freeze syndrome that is regulated by the emotional brain located in the middle of the brain atop the instinctual brain that is supported by the brain stem.

The transformative model assumes collaboration and cooperation—in neurobiological terms, the application of the working memory in the neocortex, whose job is reasoning and general problem solving. Competition, avoidance, and accommodation are not countenanced by the transformative model, yet they are the methods at which victims of PTSD excel.

The neocortex, the last part of the brain to develop in neurological evolutionary history, wraps around the reptilian and limbic parts of the brain and is responsible for abstract thought, language, imagination, and our general ability to problem solve in abstract terms. All emotions in social constructionist ideology are relational and the product of culture. There are no such things as universal emotions to the social constructionist.

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80 See LELOUX, supra note 58, at 91–103.
81 LEVINE WITH FREDERICK, supra note 59, at 25.
83 Through the process of evolution the primitive brainstem generated the limbic emotional brain, which in turn generated the thinking neocortical brain. GOLEMAN, EMOTIONAL INTELLIGENCE, supra note 68, at 10 (“The fact that the thinking brain grew from the emotional reveals much about the relationship of thought to feelings; there was an emotional brain long before there was a rational one.”).
84 BUSH & FOLGER, TRANSFORMATIVE APPROACH, supra note 8, at 62 (“The most important premises of the transformative theory are that parties have both the desire and the capacity for conflict transformation.”).
85 See LELOUX, supra note 58, at 269–72.
86 Neuroscientists use different terms in describing the cortex. For the purposes of this Article the terms neocortex, frontal cortex, prefrontal cortex, frontal lobe, and prefrontal lobe have the same functional meaning.
87 SAPOLSKY, MONKEYLUV, supra note 73, at 70–71.
88 KENNETH J. GERGEN, RELATIONAL BEING: BEYOND SELF AND COMMUNITY 101 (2009) [hereinafter GERGEN, RELATIONAL BEING] (“Most of us feel at one time or another that there are universal emotions—like love—that could possibly unite us. But we must be
Professor Gergen does not believe that we feel emotions; he believes that we do them. 89 Emotions, to Professor Gergen, are generally relational and conversationally generated, he believes that even anger is culturally based. 90 You cannot be a social constructionist, according to Professor Gergen’s form of social constructionism that Professors Bush and Folger appear to adopt, and believe in the biological bases of emotions.

As you see, the biological view stands in sharp contrast to the relational view of the emotions . . . . From a relational perspective the very idea of emotions, along with the performance we associate with them, are lodged within relationship. The future of our emotional life is not fixed by biological structure . . . but is shaped and re-shaped through coordinated action.91

The relational perspective is exclusively verbal, conditional, and subjective, and what pertains to neocortical problem solving is recognized by the transformative process. When Professor Gergen says: “[b]iology tells us nothing about what psychological states, if any, are related to biological activity.”92 he repudiates neuroscience. In so doing, he repudiates the work of Goleman, for Goleman adopts the neurobiology of the fight-flight-freeze response as the emotional basis for fear as established by the research of Hans Selye, 93 Paul MacLean, 94 Bruce McEwen, 95 Joseph LeDoux, 96 Antonio Damasio, 97 and Robert Sapolsky. 98 Professor Gergen carries his

very careful in drawing such conclusions. We take a significant step towards imperialism when we assume that everyone in the world has Western emotions.”

89 Id. Professor Gergen believes that “doing the emotion” is a “relational action simply carried out in privacy.” Id. at 106. A relational action carried out in privacy would seem to be a contradiction in terms.

90 Id. at 103 (“To properly perform anger requires an enormous amount of cultural education.”).

91 Id. at 115.

92 Id. at 116.


94 See LeDoux, supra note 58, at 91–103.


96 See LeDoux, supra note 58, at 91–103.

rejection of biology to the ultimate when he says that even an individual’s experience of pain is a social phenomenon.99

Whether a given experience is reported as painful may vary according to the gender, age, religion, and ethnicity of the individual. . . . [T]o presume a private world inside is to ensure that we shall never know each other. It was partially for this reason that we abandoned the idea of minds within bodies, in favor of a view of persons as relational performers. We should move in a similar direction with pain. Let us not assume that it is isolated within, but that it is a full participant in relational life.100

Transformative mediation appeals exclusively to the neocortex, ignoring the limbic part of our brain.101 Yet the transformative model purports to advise mediators regarding the management of the limbic brain, denying that anything it produces is helpful because it is nonverbal. Eventually, Professors Bush and Folger will have to decide whether they agree with Professor Gergen when he says: “Whatever neuroscience demonstrates will ultimately be consistent with what it is people do in cultural life,”102 because a model of mediation that rejects the scientific basis of the fight-flight-freeze system responsible for PTSD that places the victims of PTSD in grave peril.

Although social constructionists view reality as an exclusively relational, verbal construct, most of the information that humans have processed during the course of our evolutionary biological development has not been verbal and neocortical.103 The neocortex, with its cognitive knowledge, is the capstone, not the cornerstone. Professor Albert

98 SAPOLSKY, ZEBRAS, supra note 54, at 259.
99 GERGEN, RELATIONAL BEING, supra note 88, at 128 (“[W]hen we express our pain we are engaging in a culturally prepared performance. We are not reporting on the state of the psyche, but acting within a tradition of relationship.”).
100 Id. at 130.
101 Conceptual frameworks such as the transformative model of mediation are all neocortical activity, the products of our working memory. See LÉDOUX, supra note 58, at 267–303 (regarding working memory).
102 GERGEN, RELATIONAL BEING, supra note 88, at 134.
103 For instance, we know when people are watching us. This nonverbal ability provides us knowledge that is a product of evolution and protects us from predation. See Ilan Shirira, How You Know Eyes Are Watching You, PSYCHOL. TODAY (Feb. 16, 2011), https://www.psychologytoday.com/blog/the-narcissus-in-all-us/201102/how-you-know-eyes-are-watching-you.
Mehrabian’s study indicated that only “7% of message pertaining to feelings and attitudes is in the words that are spoken.”

For millions of years, the bulk of humanity’s processed information has been fear based. Long before we were able to vocalize our fears with speech, poems, and songs, we were simply fearful and employing the automatic responses of the fight-flight-freeze system for our survival. “Fear is a vital evolutionary legacy” that has driven our survival. Professors Bush and Folger’s Relational worldview excludes fear from the definition of knowledge and conflict. Relational conflict, always positive, has the feel of the theme song *Everything is Awesome* from *The Lego Movie*. The best way to stay alive and pass on our genes has not been to redefine conflict as an opportunity for positive moral growth and development; rather, it has been to be afraid of those things that might kill us. Indeed, fear is anchored deeply in the emotional parts of our brains for a reason.

Roger Fisher and Daniel Shapiro, in *Beyond Reason: Using Emotions as You Negotiate*, give you twenty-five positive emotions and twenty-five negative emotions—a cornucopia of emotional choices—with which a mediator will be faced. There are, however, only five basic emotions that a mediator will deal with: happiness, sadness, disgust,

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106 See Bush, *Staying in Orbit*, supra note 7, at 761 (“[T]his view that conflict interaction is positive carries the implication that social interaction in general, far from being a necessary evil, is a fundamental good.”); see also BUSH & FOLGER, RESPONDING TO CONFLICT, supra note 8, at 81:

Rethinking the problem solving orientation starts by questioning the premise that conflicts need to be viewed as problems in the first place. A different premise would suggest that disputes can be viewed not as problems at all but as opportunities for moral growth and transformation.

This different view is the transformative orientation to conflict.

See also id. at 84 (“[C]onflicts are seen as rich opportunities for growth, and mediation represents a way to take full advantage of these opportunities.”).


109 As to the “basic” feelings or emotions, Antonio Damasio says they are happiness, sadness, anger, fear, and disgust, while the subtle variations of emotions are built on the basics. DAMASIO, DESCARTES’ ERROR, supra note 97, at 149–51.
anger, and fear. The view all other emotions as nuances or combinations of these basic five. Although disgust can make someone angry, then fearful, and then sad (the combinations creating different emotional nuances), disgust is probably not going to make you happy.

Professor Gergen’s argument that there are no universal emotions, and that all emotions are culturally dependent, is not well taken. There was a time when culture did not exist as Professor Gergen describes it, but rather when, as a developing species, we had the neurobiology of the reptile or the shark. At that time, we did not have the cornucopia of fifty emotions that Fisher and Shapiro describe. Instead, there was simply a fear that people could be eaten or killed. As people evolved, we could eventually be angry that we had almost been eaten—after we had escaped, that is, and could afford the luxury of anger. In fact, our entire emotional structure developed off of the olfactory lobe of our limbic brain.

As people became intensely social creatures to ensure our individual survival—we needed the help of others to survive ourselves—sadness, which seems to be the ultimate basis of empathy, became very valuable. And happiness, as we know it now, came very last, at the end of our evolutionary development. Happiness is found primarily in the neocortex; it is the most fragile of the emotions and the easiest to dislodge. Those first

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110 Ekman considers surprise to be an emotion. Ekman, supra note 61, at 148. Otherwise he seems basically in agreement with Damasio as to core emotions. Id.
111 William Ian Miller, The Anatomy of Disgust 24–25 (1997) (“Disgust surely has some close affinity with other sentiments. In routine speech we use contempt, loathing, hatred, horror, even fear, to express sentiments that we also could and do express by images of revulsion or disgust.”).
112 As Neil Shubin explained:

The simplest way to teach students the nerves in the human head is to show them the state of affairs in sharks. The easiest road map to their limbs lies in fish. Reptiles are a real help with the structures of the brain.

The reason is that the bodies of these creatures are often simpler versions of ours.

Neil Shubin, Your Inner Fish, at preface (2008).
113 Goleman, Emotional Intelligence, supra note 68, at 10.
114 Evolution’s linkage of the neocortical and limbic brains supported the development of mother-child bonding which provided the long-term care commitment that complex brain development requires. Id. at 11.
115 See Happiness Psychology and Biology: Happiness Research Shows What Happens to the Brain When We Are Happy, HUBPAGES (July 24, 2013), http://hubpages.com/health/Happiness-Psychology-and-Biology-Happiness-Research-Shows-What-Happens-to-the-Brain-When-We-Are-Happy (“Studies using these two brain-imaging technologies, functional MRI and EEG, show that the left pre-frontal cortex of the brain is the prime locus of happiness, but the sub-cortex at the bottom of the brain is involved.”). The sub-cortex is the
five basic emotions, common to all human beings, have nothing to do with individual cultures and everything to do with our universal evolutionary struggle. How people display those emotions may differ somewhat in various cultures, but we all needed those five basic emotions to get to where we are today.

Fear, not rational thought, is literally at the core of what we are as human beings. Thought, cogitation, and cognition—all of those relational qualities upon which Professors Gergen, Bush, and Folger base their theories—came to us at the very end of our evolutionary development when the neocortex thickened, folded in upon itself, and finally helped us to develop speech.

This Article argues there are two options regarding the development of speech. In option one, we did not acquire knowledge until very late in our evolutionary development when our expanding neocortex generated our capacity to speak. In option two, over millions of years of evolutionary development, we must have gained a plethora of knowledge, and eventually generated an expanded neocortex to talk about it. Option one gives you the philosophy of Professors Gergen, Bush, Folger, and Beck. Option two gives you the neuroscience of McEwen, LeDoux, Damasio, and Goleman.

3. **Misunderstanding the Psychology of Conflict.** We can be at our absolute best when we are afraid of things. It is why we go to amusement parks; why “rollercoaster of life” and “heart in your throat” are such favorite metaphors. It is why former President George Herbert Walker Bush celebrated his 90th birthday by skydiving. That fear was what he needed and craved, and it reminded him that he was still alive.

There are five conflict managing modes: avoiding, accommodating, competing, compromising, and collaborating. The emotional limbic brain and its fight-flight-freeze syndrome dominate three of the modes: competing, avoiding, and accommodating—through that most basic of all

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limbic area and the “happiness studies” confirm Damasio’s theory that the cognitive and emotional areas of the brain work in tandem in the generation of consciousness, at least in the case of happiness.

116 The movie INSIDE OUT is a good primer on the five basic emotions we all share. See INSIDE OUT (Pixar Animation Studios 2015).


118 THOMAS & KILMANN, supra note 82, at 7–8.
the emotions, fear. Competing is fight. Avoiding is flight. Accommodating is freeze.\textsuperscript{119}

Everyone who suffers from PTSD will likely test very high on the avoiding, accommodating, and competing scales and very low on the compromising and collaborating scales because it is fear that drives the victim of PTSD; fear that the trauma she could not control will return and render her helpless again.

Trauma robs the victim of a sense of power and control; the guiding principle of recovery is to restore power and control to the survivor. The first task of recovery is to establish the survivor’s safety. This task takes precedence over all others, for no other therapeutic work can possibly succeed if safety has not been adequately secured. \ldots Survivors feel unsafe in their bodies. Their emotions and their thinking feel out of control. They also feel unsafe in relation to other people.\textsuperscript{120}

A relational strategy of compromising and collaborating, based on neocortical activity, may simply be beyond the biological capacities of a trauma victim whose behavior is being driven by the limbic part of her brain. This limbic response to the perceived threat from conflict will be an instinctive desire to punch or run or freeze. The fact is people who have suffered severe trauma and resultant PTSD are operating out of an altered state,\textsuperscript{121} in which the opposing party in mediation may not be processed psychologically as human, but rather as a bear. If you run into a brown bear while hiking in Glacier National Park, your brain’s response will not be to access those neocortical areas where language is employed—you will just run. The brain’s thalamus and amygdala are doing the knowing and problem solving without discussing it with your neocortex.

Professors Bush and Folger define conflict as a perception, talk about it in terms of “orientation,”\textsuperscript{122} and call it an opportunity for growth and development. But they are committed to their ideology, and all

\textsuperscript{119} The amygdala triggers the freezing response in the reptilian brain. See Neuroscientists Pinpoint Location of Fear Memory in Amygdala, SCIENCE\textsc{daily} (Jan. 28, 2013), http://www.sciencedaily.com/releases/2013/01/130128104739.htm.

\textsuperscript{120} JUDITH L. HERMAN, TRAUMA AND RECOVERY 159–60 (1992).

\textsuperscript{121} Id. at 33–35.

\textsuperscript{122} BUSH & FOLGER, RESPONDING TO CONFLICT, supra note 8, at 55–56.
ideologies are nothing but conceptual frameworks. Conceptual frameworks are all neocortical activity; they are the products of our working memory. For Professors Bush and Folger, if conflict does not exist in such a manner that it can be dealt with by the neocortical part of your brain—it does not exist at all. They have omitted from their definition of conflict all fear-based forms of conflict that are not susceptible to a neocortical-social solution.

Lawyers are familiar with this kind of intellectual, definitional construct. We do it all the time drafting legal documents. For instance, we will have a definitional section that says that the singular includes the plural, the masculine includes the feminine—as lawyers, we can do anything that we want with definitions within the context of that single document we are drafting.

The relational definition of conflict eliminates not only the biology of fear, but also all actual threats of which our biology of fear makes us afraid. There are no actual problems within the boundaries of Professors Bush and Folger’s ideology, i.e., within the boundaries of that philosophical charter they have drafted, because they change the conversation and reconstruct what we consider to be a problem into an opportunity by redefining it.

But, just as an attorney does not actually change women into men by drafting a definitional section to a contract, social constructionists cannot make conflict exclusively an opportunity for growth and social development by changing the conversation about conflict and redefining it. In other

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123 See ROBERT S. HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 41–43 (1987) (regarding “cognitive, affective, programmatic, and solidary” aspects of ideology); see also id. at 54 (regarding ideology as belief system).
124 See LeDoux, supra note 58, at 267–303 (regarding working memory).
126 As Professor Gergen explained:
“‘Problems’ don’t exist in the world as independent facts; rather, we construct worlds of good and bad, and define what stands in the way of what we value as ‘a problem’. If the conversation could be changed, all that we construct as ‘problems’ could be reconstructed as ‘opportunities’. In effect, to choose a relationship is to choose a world and how you live in it.

GERGEN, INVITATION, supra note 15, at 6.
words, you cannot take the bears out of Glacier National Park by drafting a document about Glacier National Park that says in the definitional section: “Glacier National Park is hereby defined to be the only park in the national park system without bears.” If you bump into them, they will still eat you.

Professor Gergen believes that our cognition, in the form of its word-making power, generates our emotions through social interaction. Damasio’s research involving patients with damage or disease in parts of their brains correlative to those functions of reason and emotion led him to the opposite conclusion: that emotions generate our thoughts. Damasio believes that reason developed through the process of evolution “under the guiding force of the mechanisms of biological regulation, of which emotion and feeling are notable expressions.” Damasio believes that even after the brain began to generate a capacity for reasoning, its utility and further development depended “to a considerable extent, on a continued ability to experience feelings.”

Damasio does not see consciousness as separate or as capable of being isolated from emotion. Damasio’s view of consciousness is at variance with the social constructionist theory that reality is word based, and that there is no other reality beyond what is contained in words with their agreed upon definitions.

Damasio sees our conscious self, not as generating our emotions through conversations and social situations, but as being fully integrated with our emotional self. Whereas Professor Gergen denies feelings have power of agency and says that there is no “‘feeling’ causing a doing; there is only embodied action,” Damasio says that feelings, through their agency, drive our thought process, thereby creating knowledge. The theories of Professor Gergen and Damasio regarding the relationship of thought and emotion are polar opposites. Damasio believes that

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127 GERGEN, RELATIONAL BEING, supra note 88, at 115 (“From a relational perspective the very idea of emotions, along with the performances we associate with them, are lodged within relationship. The future of our emotional life is not fixed by biological structure, I have proposed, but is shaped and re-shaped through coordinated action.”).
128 DAMASIO, DESCARTES’ ERROR, supra note 97, at xvi.
129 Id.
130 Id.
131 Id. at 139.
132 GERGEN, RELATIONAL BEING, supra note 88, at 105.
[c]onsciousness begins when brains acquire the power . . . of telling a story without words, the story that there is life ticking away in an organism, and that the states of the living organism, within body bounds, are continuously being altered by encounters with objects or events in its environment, or, for that matter, by thoughts and by internal adjustments of the life process.133

In Damasio’s view, consciousness predates language; indeed, consciousness was a precondition for the development of language. “Consciousness emerges when this primordial story—the story of an object casually changing the state of the body—can be told using the universal nonverbal vocabulary of body signals. The apparent self emerges as the feeling of a feeling.”134 For Damasio, conscious awareness means that we have the capacity to reflect upon our emotions without words. If Damasio is right that we can give meaning to the universe without words, our ability to think and reason and feel antedates our capacity to speak about our thoughts, reasoning processes, and feelings. If this is true, then the entire social constructionist theory of word-based, subjective reality upon which Professors Bush and Folger base their theory of transformative mediation is invalid, as is their transformative model, because it relies exclusively on the relational basis of reality. In other words, we can have relationships and be relational without any words and without definitions expressed in words. Therefore, our internal cognitive realities do not have to be word based either.

In order to survive, we needed a conscious reality that was not word based, a way to reason through the problems of survival that our environment was presenting to us. Because we are social creatures, it makes sense that the relational aspects of our biological situation would have invented language. But the invention of language did not invent reality. If we, as a species, experienced reality without language as we developed evolutionarily, and language is, in effect, merely one of several possible extensions135 that we could have developed, but did not necessarily have to

134 Id.
135 An extension, simply explained, is a tool. A word is a tool for communication just as a rock, used as a hammer, is a tool for striking. See EDWARD T. HALL, BEYOND CULTURE 26 (1977).
develop, then the entire social constructionist dogma of alternate realities based on words, that allows Professors Bush and Folger to define conflict as an exclusively positive experience, is mistaken. Conflict then becomes what our brains experience without words as much as with words.

Damasio is saying, in effect, that we cannot feel without thinking, and we cannot think without feeling: “Brain core and cerebral cortex work together to construct emotion and feeling . . .”\(^{136}\) Damasio believes human nature itself “depends on several brain systems, working in concert across many levels of neuronal organization, rather than on a single brain center. Both ‘high-level’ and ‘low-level’ brain regions, from the prefrontal cortices to the hypothalamus and brain stem, cooperate in the making of reason.”\(^ {137}\)

Conflict, then, cannot be defined exclusively in relational terms as an opportunity for moral growth and development based on the social constructionist theory of knowledge and cognition. Conflict must include, in its definition, those feelings of fear that “are just as cognitive as any other perceptual image.”\(^ {138}\) It must include all those things that go bump in the night that we are too afraid to discuss because we cannot even admit that they exist.

C.  The Clash of Consensus and Divergent Ideologies

Human beings are consummate model makers.\(^ {139}\) “The purpose of the model is to enable the user to do a better job in handling the enormous complexity of life.”\(^ {140}\) Ideologies are nothing more than models—philosophical cognitive systems that we use to explain the reality that we confront on a daily basis. “Ideology is an economizing device by which individuals come to terms with their environment and are provided with a ‘world view’ so that the decision-making process is simplified.”\(^ {141}\)

As Douglass C. North noted, ideologies are based on experience, and individuals will change ideological perspectives that are no longer supported by their experiences—they will seek an ideological belief system

\(^{136}\) Damasio, Descartes’ Error, supra note 97, at 164.

\(^{137}\) Id. at xviii.

\(^{138}\) Id. at 159.

\(^{139}\) See Hall, Beyond Culture, supra note 135, at 13 (referring to Stonehenge as an astronomical model and “myths, philosophical systems and science” representing “different types of models of what the social scientists call cognitive systems.”).

\(^{140}\) Id.

\(^{141}\) Douglass C. North, Structure and Change in Economic History 49 (1981).
that is a better fit.\textsuperscript{142} “Consensus ideologies evolve when the individuals of a universe have similar experiences; divergent ideologies stem from divergent and conflicting perceptions of reality.”\textsuperscript{143}

The Enlightenment is the “consensus ideology.” The Enlightenment supports “[m]oral and ethical behavioral norms [that] are an essential part of the constraints that make up [modern] institutions.”\textsuperscript{144} These Enlightenment norms are ideological constructions of reality that modern people have developed in order to interpret and manage their environment.\textsuperscript{145}

Ideologies have norms; cultures have values.\textsuperscript{146} President Obama said in \textit{The Audacity of Hope}, “Values are faithfully applied to the facts before us, while ideology overrides whatever facts call theory into question.”\textsuperscript{147} Yet Professors Bush and Folger talk about the values of the Relational worldview when, as an ideology, it can only have norms, i.e., beliefs. Ideologies are by definition belief systems and not value systems, but Professors Bush and Folger mistakenly say that they bring “value premises” to mediation.\textsuperscript{148}

A complication in critiquing Professors Bush and Folger, and all social constructionists in general, is that despite their word-based definition of reality, none of their words, in accord with true social constructionist dogma, has an objective meaning. As Professor Bush himself points out, the reader cannot count on anything that he has written. He gives you no warrant for factual truth and cautions; “there is no implied claim of purely

\textsuperscript{142} Id.
\textsuperscript{143} Id. at 205.
\textsuperscript{144} Id. at 204–05.
\textsuperscript{145} Id.
\textsuperscript{146} As Fons Trompenaars and Charles Hampden-Turner explained: Norms are the mutual sense a group has of what is “right” and “wrong.” Norms can develop on a formal level as written laws, and on an informal level as social control. Values, on the other hand, determine the definition of “good” and “bad” and are therefore closely related to the ideals shared by a group.

\textsuperscript{147} BARACK OBAMA, AUDACITY OF HOPE 59 (2006).
\textsuperscript{148} BUSH & FOLGER, TRANSFORMATIVE APPROACH, supra note 8, at 2 (“Many have found [RESPONDING TO CONFLICT]’s clarification of value premises helpful in giving them a more stable place to stand: a value center that they sensed but could not easily find on the then-existing map of the field.”).
objective, scientific accuracy in the narrative"\textsuperscript{149} that he is offering. Every one of Professor Bush’s words is entirely subjective.

Professor Gergen repeatedly uses culture and society interchangeably. He makes no distinction between values and beliefs either. Professors Bush and Folger use world, society, culture, and western tradition virtually interchangeably throughout their twenty years of writing. The Relational worldview of constructionist ideology, with its relational theory of knowledge, allows Professors Bush and Folger to define anything any way that they want. If they use the words society, culture, and world as if they were fungible, then the social constructionist argument would be that you cannot criticize this theory because these words are fungible in their relational tradition.

Creating an ideology is something that very few human beings ever do. “Ideologies do not exist in profusion.”\textsuperscript{150} Professors Bush and Folger’s development of the Relational worldview as an ideology is a significant achievement,\textsuperscript{151} but neither it nor the social constructionist postmodern deconstructionist\textsuperscript{152} ideology, from which it is derived, is science or social science. As an ideology, transformative mediation can be no more “scientific” than Marx’s “scientific” socialism.

The 2005 model of transformative mediation that focuses on facilitating conflict interaction, as opposed to the 1994 model that focused on changing individuals morally for the good, appears to be popular with the United States Postal Service. Paradoxically, the social constructionism that Professors Bush and Folger appear to adopt as the basis for their

\textsuperscript{149} Bush, \textit{Staying in Orbit}, supra note 7, at 708.

\textsuperscript{150} As Robert Higgs explained:

\begin{footnotesize}
\[ \text{T} \text{rivial differences aside, ideologies do not exist in profusion. Because an ideology is a somewhat coherent, rather comprehensive belief system—that is, an intellectual corpus not readily contrived in every man’s sitting room—it is unlikely that more than a few will have much importance in a given time and place.} \]
\end{footnotesize}

Higgs, supra note 123, at 45.

\textsuperscript{151} See Sheila McNamee \& Kenneth J. Gergen, Relational Responsibility: Resources for Sustainable Dialogue 3–28 (1999); Gergen, Invitation, supra note 15, at 140 (“Thus we may replace the concept of individual responsibility with relational responsibility.”) (footnote omitted); see also Gergen, Relational Being, supra note 88, at 364–66.

\textsuperscript{152} It is ironic that social constructionism should actually be a deconstructionist ideology.
Relational worldview seeks to replace the Enlightenment\textsuperscript{153} that gave rise to that great charter of individual rights known as the United States Constitution that established the post office.

Transformative mediation finds itself in the uncomfortable position of being a divergent ideology seeking to replace the consensus ideology of the Enlightenment now that it has been grafted onto one of the premier Enlightenment institutions, the Postal Service. In 2008, Professor Bush began arguing for a “stable state of pluralism, in which both [relational and problem-solving] paths of practice will continue and develop, with mutual acceptance among the mediators following them.” \textsuperscript{154} With the transformative model’s institutionalization in the Postal Service every bit as secure as the problem-solving model’s institutionalization in the court system, Professor Bush is not now arguing for the dominance of his ideology of the Relational worldview as he had in his 1994 and 2005 books, but rather for the peaceful coexistence of the consensus Enlightenment ideology and the divergent relational social constructionist ideology of his Relational worldview. When Professor Robert A. Condlin talks about the transformative model’s reinvention of itself, he is correct.

Ironically, the Postal Service has institutionalized a mediation model sprung from a Marxist-inspired social constructionist ideology\textsuperscript{155} that rejects Jonas Salk, Albert Einstein, Steven Hawking, Madame Curie—all the scientists of the great Western tradition from Sir Isaac Newton to the present.\textsuperscript{156} When you read Promise of Mediation (1994 and 2005) and the Sourcebook, there is nothing of science or social science in either of them, only an argument to advance the movement to make American society more collective. Jeffrey Seul was the first to notice the lack of any social scientific basis to the transformative model when he criticized it for purporting to change people morally for the better, but without a theory of

\textsuperscript{153} See Gergen, Invitation, supra note 15, at 13–14 (“It is the challenge of the present work to search beyond the traditions of the Enlightenment. My attempt is to generate an account of human action that can replace the presumption of bounded selves with a vision of relationship.”). See also Gergen, Relational Being, supra note 88, at xiii–xxix.

\textsuperscript{154} Bush, Staying in Orbit, supra note 7, at 767 (footnote omitted).

\textsuperscript{155} “As proposed, there are no value-free statements of fact, . . . That my proposal could seem at all reasonable owes a great deal to academic developments. One could trace the influence to early Marxist writings.” Gergen, Invitation, supra note 15, at 14.

\textsuperscript{156} Id. at 27 (“First, in the deconstructive challenge to all universal claims to knowledge—in science, religion, government, news reporting, and otherwise—the grounds are removed for any particular group to claim ultimate superiority.”).
personality development.\textsuperscript{157} His question was the very essence of scientific inquiry: changing the person from what to what and how do you measure that?\textsuperscript{158}

It is very difficult to parse the meanings of what Professors Bush and Folger are saying at critical junctures because they are committed to their ideology and the purpose of their ideology is never to clarify.\textsuperscript{159} Professors Bush and Folger do not live in the world of reasoned discourse. They live in the world of rhetoric and persuasion. “Social science is diagnostic and critical; ideology is justificatory and apologetic.”\textsuperscript{160} Marx railed “about the capitalists’ ‘were-wolf hunger for surplus-labor’ and their ‘vampire thirst for the living blood of labor.’”\textsuperscript{161} Thomas Paine said, “All national institutions of churches, whether Jewish, Christian or Turkish, appear to me no other than human inventions, set up to terrify and enslave mankind, and monopolize power and profit.”\textsuperscript{162} The 1994 and 2005 versions of Promise of Mediation are likewise ideological, and their purpose is likewise polemical and not scientific. The harsh tone between Professors Condlin and Bush and Folger\textsuperscript{163} is explained by the fact that rancor always attends ideology.\textsuperscript{164}

Professor Folger was advised to bring a bodyguard for protection when he keynoted the Southern California Mediation Association annual conference in 2001.\textsuperscript{165} This happened because someone who held firm belief in the Enlightenment as the consensus ideology felt threatened by the divergent ideology of transformative mediation based in social constructionism. The Enlightenment belief system obviously does not fit Professors Gergen’s, Bush’s, and Folger’s life experiences as to what they


\textsuperscript{158} Id. at 137.

\textsuperscript{159} HIGGS, supra note 123, at 48 (“Ideological thought is expressed ‘in intricate symbolic webs as vaguely defined as they are emotionally charged.’”) (footnote omitted).

\textsuperscript{160} Id. at 56.

\textsuperscript{161} Id. at 51.


\textsuperscript{163} See Bush & Folger, Critique of Transformative Mediation, supra note 33, at 231 (regarding harsh tone).

\textsuperscript{164} HIGGS, supra note 123, at 51.

\textsuperscript{165} See Joseph P. Folger, “Mediation Goes Mainstream”—Taking the Conference Theme Challenge, 3 PEPP. DISP. RESOL. L.J. 1, 8 (2002) (showing that Professor Folger seems to attribute the hostility to ideological differences).
expect a good, just, and well-ordered society to be. Professors Bush and Folger’s attempt to replace the Enlightenment worldview with their own in order to produce a “higher nature of human beings”\textsuperscript{166} simply frightens some people.

The transformative model proposes to make society better by creating the perfect balance of the individual and collective in its Relational worldview. However, such a society already exists. According to the Individualism Index in Geert Hofstede’s book \textit{Cultures and Organizations},\textsuperscript{167} the United States predictably ranks number one. Guatemala ranks last at seventy-six. Iran ranks exactly in the middle of the scale at thirty-eight; it is a society of perfectly blended individualism and collectivism. But the fact is, “The one best way of organizing does not exist”\textsuperscript{168} either in society or in culture.

We return to the Gospel writer, Matthew’s, concern about our inability to serve two masters. Is the primary concern of transformative mediation, with its Relational worldview, the production of a perfect society, like Iran? Or is its primary concern the health and safety of its clients, especially those suffering from the effects of PTSD?

III. CONFLICTS INVOLVING A PARTY WITH PTSD PROVIDE A CASE STUDY FOR THE FLAWS IN TRANSFORMATIVE MEDIATION

A form of mediation that describes itself as an ideology, yet is incapable of articulating its belief system, is not a model that is appropriate to apply to those who suffer from PTSD. Those with PTSD require the control and security of predictability in a dispute resolution model that moves towards a solution of their problems. The neuroscience clearly shows that losing control creates vulnerability to learned helplessness in an organism. “[A]nimals of many different species show some version of giving up on life in the face of something aversive and out of their control.”\textsuperscript{169} This learned helplessness can then be transferred to problem solving in mediation.\textsuperscript{170}

\textsuperscript{166} Bush & Folger, Responding to Conflict, supra note 8, at 246.
\textsuperscript{167} Geert Hofstede, Gert Jan Hofstede & Michael Minkov, Cultures and Organizations: Software of the Mind 95–97 (3d ed. 2010).
\textsuperscript{168} See Trompenaars & Hampden-Turner, supra note 146, at 17–38.
\textsuperscript{169} Sapolsky, Zebras, supra note 54, at 392.
\textsuperscript{170} Id. at 259 (“In the absence of any stressor, loss of predictability triggers a stress-response.”).
Any model applied to people suffering from a psychological disorder needs to be based on a theory that is consistent and self-contained. A theory that is not self-contained loses its integrity. One cannot predict what will happen with certitude when it is applied because its consistency is either dependent upon changing external factors beyond its control\(^{171}\) or dependent upon an operator’s subjective interpretation of critical components during the theory’s formation in anticipation of its application. A theory not self-contained must, by definition, produce inconsistent results when it is applied.

A. Hypothetical Case Study

1. Awareness of the Biological Basis of Fear. The relational theory of reality does not allow for automatic killing due to the fear-based biological reaction of the fight-flight-freeze syndrome. According to Professor Beck, the syndrome is not automatic; it is cognitive, primal thinking. According to Professor Gergen, the syndrome is not automatic; it is a relational and a cultural expression. Professor Gergen believes that “[b]iology tells us nothing about what psychological states, if any, are related to biological activity.”\(^{172}\)

When I was studying at Gonzaga Law School in the late 1970s, our criminal law class read a murder case about a combat veteran who was shaving in the morning at the bathroom sink with a straight razor. His wife surprised him by tapping him on the shoulder. He spun and slashed her throat in an automatic response. The court’s holding was that he was not liable for murder. There was no mens rea, no guilty mind, and a guilty mind was an element of the crime of murder. One cannot be held criminally accountable in the case of an intent-based crime for an action that was a totally automatic response.

Accordingly, do not mediate with Paul around July 5th. You already know that July 5th is a trigger for Paul—he sticks up convenience stores on July 5th. The further your mediation is from July 5th, the better. You know Paul is sensitive to noise, probably not a big surprise due to the explosion in Zabul. He is sensitive to bright light too, since he was blown up in the desert. Anniversaries, bright lights, loud noises, heat, and cold (really, any

\(^{171}\) E.g., Gergen, Invitation, supra note 15, at 14 (suggesting that social constructionism is postmodern). But see Gergen, Constructionist Dialogues, supra note 14, at 34 (suggesting that it is not).

\(^{172}\) Gergen, Relational Being, supra note 88, at 116.
sensory extremes) can be triggers for Paul and anyone who suffers from PTSD.\(^\text{173}\) Therefore, pay attention to the physicality of your mediation room, how it presents itself, and how you present yourself.

Only 7% of the communication is the exact content of the words. The rest is tone, body language, smell, and our hair standing on end—things that we do not think about but are simply reactions based on our evolutionary genetic coding. However, if you were locked into social constructionist relational ideology you would only be dealing with a 7% framework of the total human experience in communication. You would have primed yourself not to see when Paul’s pupils constrict, because if you are only thinking relationally, you are not thinking about Paul’s physicality. The fact that Paul is just thinking about bright lights will make his pupils constrict.\(^\text{174}\) So pay attention to the physicality of the situation, to how the environment is affecting Paul, and not to the relational ideology of Professors Bush and Folger. Ideology merely gets in the way of processing the physical dynamics of the parties’ interactions in real time.

If Paul is triggered, i.e., the fight-flight-freeze system that has been instituted by the autonomic nervous system bypasses the neocortex (what Goleman calls the emotional hijacking),\(^\text{175}\) then there is no relational-definitional aspect to the process. Paul is not in anybody’s Relational worldview. He is exclusively within the worldview framed by his amygdala. If his amygdala defines his situation during mediation as life threatening, then he will take action according to how his amygdala commands him to preserve his life and the lives of his buddies.

Due to the trauma in Zabul, Paul has lost his ability to integrate the memories of any of his overwhelming life events.\(^\text{176}\) His cognition and his memory exist in a severed state—dissociated\(^\text{177}\)—and you must be aware that this will occur. All of his perceptions generally are inaccurate and tinged with terror; he is unable to coordinate the functions of his judgment

\(^{173}\) See Levine with Frederick, supra note 59, at 146–49 (providing a comprehensive list of symptoms).


\(^{175}\) See Goleman, Emotional Intelligence, supra note 68, at 13–29.

\(^{176}\) Herman, supra note 120, at 34.

\(^{177}\) Id. at 34–35; see also Levine with Frederick, supra note 59, at 136–44.
and discriminate.\textsuperscript{178} His “aggressive impulses become disorganized and unrelated to the situation in hand,”\textsuperscript{179} and “[t]he functions of [his] autonomic nervous system may also become dissociated . . . “\textsuperscript{180} This dissociation\textsuperscript{181} of his nervous system from his cognition is what is commonly known as a flashback. A flashback is a reenactment,\textsuperscript{182} an attempt to solve the problem posed by the original trauma. Its purpose is not to regain a sense of control, but to gain control over that original traumatic event that still inspires and breathes terror, along with a feeling of helplessness into the one suffering from PTSD.\textsuperscript{183} If the Phinny Association meeting room becomes Zabul, Paul, flashing back and reenacting the original trauma from Zabul, could unknowingly\textsuperscript{184} kill you and Dennis.

Regardless of Professors Beck’s, Gergen’s, Bush’s, and Folger’s relational theories of communication and emotions, there is no relational cognitive aspect to a flashback. A relational theory of mediation assumes normal brain circuitry and denies that altered states exist. You cannot redefine Paul’s “altered neurophysiological organization”\textsuperscript{185} into a positive event. It simply operates outside of Professors Bush and Folger’s transformative theory of conflict.\textsuperscript{186} Professors Bush and Folger’s transformative theory is so successful in group conflict because, in general,

\begin{footnotesize}
\begin{enumerate}
\item[178] HERMAN, supra note 120, at 35 (footnote omitted).
\item[179] Id.
\item[180] Id. (footnote omitted).
\item[181] As Mark Dombeck explained:
\begin{quote}
Dissociation is a common-enough symptom associated with Post Traumatic Stress Disorder (PTSD). Think of dissociation as a kind of automatic coping mechanism for handling stress. When things get too stressful or threatening, your consciousness kind of “goes away” for a while. Sort of like a circuit breaker clicks off when there is an electrical surge so as to protect the sensitive stuff downstream. Your body continues to run on autopilot during the dissociative episode, and when you “awaken” again you have no memory or limited memory for what transpired during the time you were dissociated. The loss of memory is called amnesia.
\end{quote}
\item[182] HERMAN, supra note 120, at 39–41.
\item[183] See LEVINE WITH FREDERICK, supra note 59, at 173–91 (distinguishing between reenactment and renegotiation. Reenactment is mere repetition. Renegotiation is healing).
\item[184] Id. at 138 (showing that you can dissociate “habitually without being aware of it.”).
\item[185] HERMAN, supra note 120, at 39.
\end{enumerate}
\end{footnotesize}
the bulk of the people with whom they are dealing have normal brain circuitry and are able to access the working memory of their neocortices to problem solve. If, however, the group were returning combat veterans from Iraq and Afghanistan with PTSD, the transformative model would not work and would be potentially dangerous. Those suffering from PTSD simply do not have the brain circuitry to utilize the transformative model.

2. **Never Allow Venting.** Professors Bush and Folger mistakenly view intense emotions as things that need to be unpacked and understood. Their recommendation is to get behind the venting process. However, by relying on Professor Beck’s cognitive and Professor Gergen’s relational theories of emotions, they fundamentally misapprehend the neurobiology of the venting process. Venting never results in removing emotions, rather, it *always* aggravates them. This is why, contrary to popular opinion, it is bad to let your parties vent. Goleman, who does not support Professor Beck’s primal thinking theory, calls this the “venting fallacy.”

When you vent your anger, you initially get a huge shot of adrenaline. That dissipates rather rapidly and can be gone within two hours. However, if you feed that anger by venting, your cortisol kicks in and ramps up your blood sugar for conflict in the long haul. The adrenaline is the fright that you feel when you bump into a bear in Glacier National Park. You react by running. The cortisol is what kicks in after you start running, because you are going to have to run fast and hard for a long time. Once your body has sensed that it is in for the long haul, the cortisol does not dissipate easily. You will be angry for the long haul, and you will be using your

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187 As Professors Folger & Bush explained:

Thus, instead of treating emotion as static to be vented and removed, the transformative mediator considers emotion as a rich form of expression that, when unpacked and understood, can reveal plentiful information about the parties’ views of their situation and each other—information that can then be used to foster both empowerment and recognition.


188 GOLEMAN, *EMOTIONAL INTELLIGENCE*, *supra* note 68, at 64–65.

189 *Id.*

190 *Id.*

amygdala for many hours before you burn the cortisol off and can return to
cognitive thinking. 192

What Professors Bush and Folger are advising goes beyond merely allowing venting. They are encouraging the mediator to intervene in the venting process in order to unpack and understand “emotion as a rich form of expression that . . . can reveal plentiful information about the parties’ views of their situation and each other.” 193 There are no emotions that are rich forms of expression in Paul’s PTSD. There is only terror.

Professors Bush and Folger are assuming, based on the dogma of their social constructionist relational ideology, that Paul is going to be able to “reveal plentiful information” about his refusal to pay his rent if you just mine his past. They say, “An important hallmark of transformative practice is a willingness to mine the past for its value to the present, and, in particular, for the opportunities such review offers parties to help clarify their choices and reconsider their views of one another.” 194

However, Paul’s problem is not his dispute with Dennis over the rent; it is his hypersensitivity and his inability to relate to the sense 195 felt in his own body. There is no relational aspect to Paul’s deficit in his felt sense. If you interview Paul before you thrust him into mediation, you are going to discover that his apartment faces west into the setting sun, and there is a large electrical transformer outside his window that hums unremittingly. His apartment is too hot for him; he does not have control of the heat in his bedroom because the valve is broken in an open position on the radiator, again reminding him subconsciously of the desert where he lacked control over the heat.

Professors Bush and Folger would have you dig into “statements [Paul and Dennis make] as they discuss past events, not to get the facts or determine the ‘real story’ but rather to clarify misunderstandings and open up possibilities for new ways of seeing each other.” 196 Do not ask Paul for a cognitive analysis of his past traumas, most of which he cannot even

194 Id. at 274.
195 LEVINE WITH FREDERICK, supra note 59, at 8 (“The vehicle through which we experience ourselves as organisms is the ‘felt sense.’”); Folger & Bush, Ten Hallmarks, supra note 3, at 67–68.
196 See BUSH & FOLGER, RESPONDING TO CONFLICT, supra note 8, at 197.
remember because they are repressed.\textsuperscript{197} He is unable to describe the events and the situations that give rise to his feelings regarding the rent dispute.

Professors Bush and Folger’s assumption that the “descriptions of the facts behind the feelings very often reveal specific points that the parties are struggling to deal with, both to gain control over their situation and to understand and be understood by the other party”\textsuperscript{198} is mistaken when considering the reenactment syndrome of PTSD. Paul does not remember facts like you do, and if they come to mind and are painful, he dissociates from them in order to avoid the pain.\textsuperscript{199} Paul has no cognitive “misunderstandings”\textsuperscript{200} of the rent dispute. There is only the transference\textsuperscript{201} of Paul’s symptoms of limbic-based hyperarousal\textsuperscript{202} onto Dennis as an enemy. Dennis is not the landlord in Paul’s mind. Dennis is the Taliban, and his reaction to Dennis is fundamentally the same as if he was bumping into a bear in Glacier National Park.

\textsuperscript{197} See LeDoux, supra note 58, at 186–211 (explaining the role of the hippocampus in the memory).
\textsuperscript{198} Folger & Bush, Ten Hallmarks, supra note 3, at 272.
\textsuperscript{199} Levine with Frederick, supra note 59, at 207–16.
\textsuperscript{200} See Bush & Folger, Responding to Conflict, supra note 8, at 197 (discussing current reinterpretations of past events).
\textsuperscript{201} As Mark Dombeck explained:
One of the most important concepts associated with the psychodynamic tradition is the idea of transference. Transference is a simple appearing idea that has to do with the way people understand one another and form relationships with one another. As its name suggests, it involves the idea of transferring something from one place to another. What is being transferred in this case is an understanding of a person. Where it is being transferred to is onto another person. When transference is occurring, basically what is happening is that we are trying to understand someone (usually someone we don’t know very well) by making an assumption that they are similar to someone else, and will thus feel and behave in ways that are similar to how that other person would feel and behave.
\textsuperscript{202} See Levine with Frederick, supra note 59, at 155–69.
3. **Mediate Not as a Neutral but as Team Member.** The transformative model is neutral in the sense of treating both parties the same. But, you must treat the party suffering from PTSD in your mediation differently from the party who is not suffering from the effects of severe trauma. Your approach to Paul must be different from your approach to Dennis because, as we have seen, their brains are literally wired differently and process information differently. There is no “fair” or “neutral” mediator in the case of the neurobiology of PTSD. You must replace “fair” with “effective”—with what works in terms of the neurobiological functions of the victim with PTSD.

You should view yourself as a team member—as someone who is actively participating in the process—not as someone who is above the process. It is okay that different parties require different assistance. Your very presence will influence Paul and Dennis, and your personal qualities will influence the mediation process itself. Be aware of your power, use it wisely and with restraint. The assumption of transformative mediation is that it is restorative of a power deficiency, “disempowerment,” caused by the conflict. But telling a victim of PTSD that he or she does not have control because he or she has lost empowerment, as the transformative model posits, is counterproductive to helping an individual suffering from PTSD establish control. What if Paul comes to the mediation and he is having a really good day?

If Paul is feeling in control, why would you plant Professors Bush and Folger’s suggestion in his mind that he was engaged in a “negative conflict cycle”? Why would you say to Paul that if he did not “regenerate some sense of [his] own strength and some degree of understanding of [Dennis], it is unlikely that they can move on and be at peace with themselves, much less each other”? If Paul is feeling strong and

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203 Bush & Folger, Responding to Conflict, supra note 8, at 104–08 (showing that a bedrock assumption of the transformative model, and mediation generally, is mediator neutrality).
205 See id. at 21.
207 Id.
208 Id. at 19.
empowered, which he will be the further away from July 5th that it gets, why would you emphasize the negative with him? It would be better to start out with the positive, with the assumption that both Paul and Dennis have personal power and do not need to engage in a transformative process of empowerment orchestrated by a mediator to restore something they have lost.

4. **Victim of PTSD Must Win.** If the session were to turn sharply competitive, Paul will have to perceive himself as winning. Human beings are by nature fearful, more fearful than hopeful. This is an evolutionary fact of our survival on the planet. Human beings are more afraid of losing than they are hopeful of winning.\(^\text{209}\) If Paul is triggered for any reason, you must let him avoid, which is to say you should terminate the session immediately. If the session turns sharply competitive but Paul has not been triggered, you must frame it so that Paul feels as though he is winning.

The solution to an event of PTSD is bringing the victim into a feeling of control, into a sense of winning, because winning in competition is surviving. The reenactments of the past trauma are based on the fact that Paul is emotionally cued to losing, to his inability to protect himself and his buddies who died in the explosion. Therefore, it is best to minimize fear and anger, not in any way to mine them. You should emphasize the neocortical as much as possible, the neocortical looking forward to events that are controllable and manageable.

The feeling of control keeps Paul working within his neocortex. Remember, sometimes the thalamus decides to bring the neocortex to the party.\(^\text{210}\) However, if the thalamus thinks that the cognitive offers nothing to survival, the thalamus leaves the neocortex out. Therefore, let me emphasize again that you must never suggest to Paul *ab initio* that he is not in control, and that you are going to give back to him the control that he has lost. You have merely reaffirmed his victimization. You must judge your


\(^{210}\) See, e.g., LEVINE WITH FREDERICK, supra note 59, at 26–28 (discussing the Chowchilla school bus kidnapping in 1976); see also GOLEMAN, EMOTIONAL INTELLIGENCE, supra note 68, at 22–24.
conduct in your mediation by the standard of whether or not you are increasing control for Paul.211

Hope is the expectation of success that obstacles can be overcome and the problem solved. Hope is one of the most powerful human emotions,212 so you should harness it on behalf of your mediation with Dennis and Paul in order to diminish anxiety. “Anxiety undermines the intellect”213 and sabotages performance. Remain optimistic that the parties will be successful in reaching agreement. Merely hoping to improve conflict interaction is not good enough. Solving Paul’s problem is essential on the road to his feeling of safety.

5. **Create Safety for the Victim of PTSD.** Paul does not experience himself “as completely capable of defending [himself] against danger.”214 On a basic cellular level, far different from that of people who have not suffered pervasive trauma, Paul’s “body perceives that it has sustained a wound serious enough to place it in mortal danger,”215 when it is confronted by a new stressful situation—such as a hostile Dennis in mediation.

“All trauma sufferers experience the phenomenon of chronic helplessness to some extent.”216 If Paul does not feel that he is in control of his situation, he will default to a feeling of helplessness that impedes his successful navigation of stimuli that he has interpreted as threats.217 This means that in mediation, Paul’s working memory will be severely impaired if he feels threatened. In the terminology of the conflict handling modes of the Thomas-Kilmann Instrument, Paul will do very poorly at collaborating and compromising. Collaboration and compromise require the working memory generated by neocortical activity.218

It is critical that you reassure Dennis and keep him from becoming angry, because Paul will respond in kind. Paul will internalize the stress of the perceived hostile encounter during mediation, and either grow angry,

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211 See, e.g., Levine with Frederick, supra note 59, at 26–32 (Chowchilla school bus kidnapping in 1976).
212 Sapolsky, Zebras, supra note 54, at 400.
213 Goleman, Emotional Intelligence, supra note 68, at 83.
214 Levine with Frederick, supra note 59, at 50.
215 Id. at 54.
216 Id. at 162.
217 Id. at 160–62.
218 See LeDoux, supra note 58, at 279 (discussing the frontal lobe (neocortex) in working memory).
become evasive, or freeze up. As in the vocabulary of the Thomas-Kilmann Instrument, he either will compete (fight), avoid (flee), or accommodate (freeze).

Paul’s neural system is keyed to bypass his neocortex in the event of any new stimuli that may be interpreted as threatening. In Goleman’s terminology, he will be primed for emotional hijacking. Because of the extensive trauma he has suffered, he has developed amygdala-reliant, not neocortical-reliant, patterns of behavior in an attempt to establish control.

Paul avoids all the time because his “neural set point for alarm” is so low that he has been left “to react to life’s ordinary moments as though they were emergencies.” He is incredibly passive, which can be interpreted as a lack of caring or sensitivity. His affect is acute avoidance to protect himself from his extreme hypervigilance, which is not readily apparent specifically because he is avoiding.

You cannot push Paul into Dennis in a relational sense by deciding what is controllable for Paul and what is not. The answer to this problem is not in a relational solution between Paul and Dennis. The answer is in a relational solution between Paul and you as mediator, which means that you cannot act as a neutral party.

Severe trauma has made Paul’s brain chemically and biologically different from yours and Dennis’s to the point that he is over-reactive.

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219 Id. at 176–77.
220 See HERMAN, supra note 120, at 42–47 (regarding “constriction”).
221 As Peter A. Levine and Ann Frederick explained:
When people are traumatized, our internal systems remain aroused. We become hypervigilant but are unable to locate the source of this pervasive threat. This situation causes fear and reactivity to escalate, amplifying the need to identify the source of the threat. The result: we become likely candidates for re-enactment—in search of an enemy.

See LEVINE WITH FREDERICK, supra note 59, at 226.
222 GOLEMAN, EMOTIONAL INTELLIGENCE, supra note 68, at 203.
223 As Daniel Goleman explained:
Vietnam vets with PTSD, one study found, had 40 percent fewer catecholamine-stopping receptors than did men without the symptoms—suggesting that their brains had undergone a lasting change, with their catecholamine secretions poorly controlled. Other changes occur in the circuit linking the limbic brain with the pituitary gland, which regulates release of CRF, the main stress hormone the body secretes to mobilize the emergency fight-or-flight response. The changes lead this hormone to be over secreted—particularly in the amygdala, hippocampus, and locus ceruleus—altering the body for an emergency that is not there in reality.

See id. at 205 (footnotes omitted); SAPOLSKY, ZEBRAS, supra note 54, at 319 (explaining that catecholamines include adrenaline (epinephrine) and noradrenaline (norepinephrine)).
You cannot fix this problem with Paul for the purposes of your mediation if you push into the past or ask him to explain what he cannot remember, thereby causing him stress. Applying Hallmark 6 in order to encourage “[Paul] to explore the sources of [his] confusion and uncertainty” strongly resembles the Socratic method of teaching, but you cannot teach Paul by confronting him with his confusion and uncertainty, or with his present sense of helplessness. This will only make him dissociate.

“In PTSD, spontaneous relearning fails to occur.” You cannot cognitively “retrain” Paul in mediation to collaborate and cooperate. Paul can relearn, but that requires a lot of therapy. Paul has a limbic disorder and forcing him to respond according to the dogma of a relational ideology that erroneously asserts a cognitive nature and denies the limbic nature of his disorder threatens his health and the safety of the parties. As a mediator, even if you were a psychotherapist, you do not have the time, in a few hours or days of mediation, to reeducate Paul as a PTSD sufferer so that he can begin accessing his neocortex, with its capacity for working memory, to renegotiate his trauma as opposed to reenacting it.

Paul’s history is Zabl and Zabl is always in the room with Paul. He has no other story. Delving into Paul’s history will not produce auspicious results. The key to dealing with Paul’s PTSD is to bring him out of the past with reenactments and into the present where you can give him a

224 GOLEMAN, EMOTIONAL INTELLIGENCE, supra note 68, at 205 (“[P]eople with too much CRF don’t habituate.”). CRF is the same thing as CRH. CRF is corticotropin-releasing factor. CRH is corticotropin-releasing hormone. CRH is the hormone that signals to the brain that it needs to produce adrenaline. People who have suffered from PTSD have fewer receptors in their brain for CRH. This means they have been so overloaded by stress that their brains have cut back on the ability to respond to stress. See id. at 330; see also SAPOLSKY, ZEBRAS, supra note 54, at 96, 248, 251 (showing that a flashback results from an oversecretion of CRH when the brain’s receptors have been worn out from over use).


226 GOLEMAN, EMOTIONAL INTELLIGENCE, supra note 68, at 206.

227 Id. at 207.

228 Id. at 207–14.

229 See id. at 204–07 (PTSD as a limbic disorder).

230 See LEVINE WITH FREDERICK, supra note 59, at 120–23.

231 See GOLEMAN, EMOTIONAL INTELLIGENCE, supra note 68, at 200–14.

232 Cf. HERMAN, supra note 120, passim (regarding omnipresence of perpetrator in victim’s life).

233 See Folger & Bush, Ten Hallmarks, supra note 3, at 273 (“When they are following a transformative approach to practice, third parties not only allow but even encourage disputants to talk about past events—the history of the conflict—because doing so is often a very good way to achieve the goals of empowerment and recognition.”).
sense of control. The past, for a victim of PTSD, is like a metastasized cancer. Like the wise cats in Dylan Thomas’ *A Child’s Christmas in Wales,* the history of a victim of PTSD should never appear in your mediation.

6. **Solve the Problem.** Professor Gergen says, “[T]o presume a private world inside is to ensure that we shall never know each other. It was partially for this reason that we abandoned the idea of minds within bodies, in favor of a view of persons as relational performers.” According to relational theory, Paul and Dennis have no individual existence and no separate minds within their bodies. To the extent that they exist at all, they only exist in relation to one another.

The solution to Paul’s problem has nothing to do with ideology or with the relational definition of reality as agreed upon by Dennis and Paul. Paul’s “neurophysiological organization” may be “altered,” but it is his altered state, internal to him, and him alone, on the cellular level of his neurobiology. Dennis has nothing to do with the initial trauma that caused Paul’s neurobiology to produce PTSD.

The dispute over the rent arises from conflict that is exclusively the product of Paul’s PTSD—his hypersensitivity to physical stimuli is triggering reenactments in him that are taking him out of neocortical functioning and plunging him into the amygdala of his limbic brain. Certainly he appears to be acting irrationally, when all that is happening is his amygdala is trying to ensure his survival in situations that appear to be similar to Zabul.

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234 As Daniel Goleman explained:

> The operative word is *uncontrollable.* If people feel there is something they can do in a catastrophic situation, some control they can exert, no matter how minor, they fare far better emotionally than do those who feel utterly helpless. The element of helplessness is what makes a given event *subjectively overwhelming.* . . . “The helpless person is the one more susceptible to PTSD afterward. It’s the feeling that your life is in danger and there’s nothing you can do to escape it—that’s the moment the brain change begins.”

**See** Goleman, EmotionaL Intelligence, supra note 68, at 204.


236 Gergen, Relational Being, supra note 88, at 130.

237 Herman, *supra* note 120, at 39.
This dispute cries out for a physical solution, not for an emphasis on improved conflict interaction. Paul should be moved from his apartment on the west side of the building that takes all the sun to either the east side or the north side of the building that takes less sun. Perhaps he could be moved into the basement where there is no sunlight and use artificial light for the plants. The move also solves the radiator issue Paul has been unable to raise with Dennis.

In addition to cutting down the light and fixing the problem with the heat, the move takes Paul away from the transformer noise that is imperceptible to most people, but is deafening to him. Paul is projecting his internal reality onto the plants because he finds himself unable to foster his felt sense. The focus of transformative mediation on conflict interaction is wholly inadequate in this situation. This dispute springs entirely from the physical nature of Paul’s disorder.

Digging in to get to the facts behind Paul’s feelings with Dennis is a mistake because Dennis thinks Paul’s behavior is bizarre. It is bizarre to a normal person who is unfamiliar with the residual effects of severe trauma, and Dennis is not capable of respecting Paul’s plants no matter how much you foster “conflict interaction.” Paul interprets disrespect for his plants as disrespect for himself, by extension. Paul cannot, in a rational sense, articulate the importance of his plants. The fact is, Paul can “protect” the plants, while he cannot “protect” himself without severely overreacting. Do

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238 Menkel-Meadow, Many Ways of Mediation, supra note 24, at 238 (“How anyone could feel empowered if they did not get a least some of what they needed or expected from a mediation seems a bit much to ask.”).

239 Roderick Usher’s sensitivity to sound in Edgar Allan Poe’s The Fall of the House of Usher is Paul’s reality. See also Judith Lewis Herman’s explanation:

[T]raumatized people cannot “tune out” repetitive stimuli that other people would find merely annoying; rather, they respond to each repetition as though it were a new, and dangerous, surprise. The increase in arousal persists during sleep as well as in the waking state, resulting in numerous types of sleep disturbance.

Herman, supra note 120, at 36 (footnote omitted). The hum of the power line, which Dennis does not even notice, is deafening to Paul. Paul is sleep-deprived: “People with post-traumatic stress disorder take longer to fall asleep, are more sensitive to noise, and awaken more frequently during the night than ordinary people. Thus traumatic events appear to recondition the human nervous system.” Id.

240 See Mark Dombek, Coping Strategies and Defense Mechanisms: Basic and Intermediate Defenses, MENTALHELP.NET (July 3, 2006), https://www.mentalhelp.net/articles/copinng-strategies-and-defense-mechanisms-basic-and-intermediate-defenses (explaining that projection occurs when “a person’s thought or emotion about another person, place or thing is too troubling to admit, and so, that thought or emotion is attributed to originate from that other person, place or thing.”).
not minimize or seek accommodation regarding the plants. Paul must win on the plants issue, and a new apartment to heal the plants is the perfect and only solution required. Literally, when the plants heal, Paul heals, and the entire problem regarding the past-due rent disappears. After all, Paul has the money; his VA checks have simply piled up on his coffee table.

B. Exploring the Inherent Ethical Dilemmas Within the Relational Worldview

Despite the shift from changing the individual in the 1994 transformative mediation model to a focus on changing the conflict interaction with the 2005 model, the 2005 model never gives up pretensions as to therapy:

The mediation field has tended to be hypersensitive about preserving strict divisions among mediative and therapeutic processes—drawing lines that have at times been ignored in practice and have at times held mediation back from realizing transformative objectives. If mediation is to be helpful in transforming conflict interaction, then its overlap with some therapeutic processes needs to be acknowledged and accepted.241

But “drawing lines” is exactly what professionals do. Holding back is what professionals call restraint and good judgment. For instance, the cancer pathologist must make a determination after examining a biopsy while the patient is still opened up on the operating table whether or not the patient has cancer and the surgeons must remove part of the stomach or the lungs. Ignoring the lines is not acceptable for mediators who are dealing with victims of PTSD, either. It is not acceptable for transformative mediators to blur the lines between the practice of law and therapy simply because their model was devised by an attorney, Professor Bush, and a psychologist, Professor Folger, working in tandem.

Donald T. Saposnek gives the following advice regarding mediating child custody disputes: “[I]t is very important not to slip into the role of therapist, and to maintain the mediator role throughout the process. . . . If it appears that either or both spouses need therapy before they will be able to

241 Bush & Folger, Transformative Approach, supra note 8, at 228 (showing that Professors Bush and Folger never delineate which of the transformative processes constitute therapy and which do not).
negotiate effectively in mediation, the mediator can make an appropriate referral."²⁴² This Article would give the same advice to a mediator who is dealing with a case involving a victim of PTSD: Do not accept the advice that there is an overlap between transformative mediation and “some therapeutic processes” and blunder your way through mediation with victims of PTSD.

Transformative mediation is a creature of the postmodern movement. It is both an institution and an ideology that has adopted in its entirety the social constructionist theory of knowledge. Professors Bush and Folger, its creators, are postmodern individuals. “The postmodern goal is not to formulate an alternative set of assumptions but to register the impossibility of establishing any such underpinning for knowledge, to ‘delegitimate all mastercodes.’”²⁴³ “The post-modern individual calls for the end of certitude, reasoned argument, modern rationality, objective modern science, law grounded on jurisprudence, and art subject to evaluation on the basis of standard criteria.”²⁴⁴ The Relational worldview, of which Professors Bush and Folger consider themselves denizens, is a postmodern world. “Within a post-modern world truth is absent, and this renders evaluation and judgment relatively meaningless.”²⁴⁵

When I was sworn into the bar in Washington State in 1979, I took an oath. I swore to uphold, protect, and defend the Constitution of the United States of America, the Constitution of the State of Washington, and the Organic Act of the State of Washington. I also swore I spoke the truth, and I took the oath freely and without any evasion or mental reservation. When I took that oath I was and I still am a modernist and a positivist—a foundationalist. I believe in the scientific method and reason. I also believe that the United States Constitution, the Constitution of the State of Washington, and its Organic Act are mastercodes that are the products of enlightened minds that accessed objective truths. I believe that I am sworn to uphold, protect, and defend those mastercodes.

Can a postmodern individual, who believes in the tenets of the social constructionist ideology on which transformative mediation is substantially,

²⁴³ ROSENAU, supra note 5, at 6 (citation omitted).
²⁴⁴ Id. at 55.
²⁴⁵ Id. at 20.
if not completely, based, take the same oath I took in 1979 without evasion or mental reservation? By definition, does not the postmodernist who is committed to anti-foundationalism dissemble when raising the right hand to swear the attorney’s foundational oath?  

The fact of the matter is the transformative model of mediation, if it has truly adopted social constructionist ideology in its entirety, rejects the truth of the Enlightenment, modernism, and positivism with its Western tradition of law, and the rule of law as created by judges. You cannot ethically, as an attorney who has taken an oath to uphold positivism, preside as a mediator over any proceeding involving a conflict over positivist legal rights that are the property of the parties and re-categorize those legal rights as postmodernist opportunities for personal growth and moral development. You are ethically bound by your oath to call something what it is. Only in a postmodern world is it the case that “Disneyland is authentic because it does not purport to be real.” Only in a postmodern world can you turn legal rights, obligations, and duties into non-legal fodder for mediation.

Professor Victoria J. Haneman in her Article, The Inappropriate Imposition of Court-Ordered Mediation in Will Contests, raises a very similar concern: If the purpose of a will is to give effect to the testator’s

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246 See id. at 124 (“Legal theory is an arena where post-modern views of epistemology and method have created one of the most serious intellectual crises, questioning the very legitimacy of judicial systems and the integrity of legal studies.”).

247 As Pauline Marie Rosenau explained:

  Almost all post-modernists reject truth even as a goal or ideal because it is the very epitome of modernity. Truth is an Enlightenment value and subject to dismissal on these grounds alone. Truth makes reference to order, rules, and values; depends on logic, rationality, and reason, all of which the post-modernists question. Attempts to produce knowledge in the modern world depend on some kind of truth claim, on the assumption that truth is essential.  

  See id. at 77 (citation omitted).

248 As Pauline Marie Rosenau explained:

  Post-modern interpretation and deconstruction . . . argue that there is no definitive meaning in law and question the possibility of any truth claims based on reason in the field of law. . . . All legal texts are also “undecidable” or “incoherent” because legal language, as with all language, either has no final meaning for post-modernists or merely supplies a function of power relations.  

  See id. at 125 (footnote omitted) (citation omitted).

249 See id. at 126 (“Post-modernists discard the author in law for the same reasons they attribute little importance to the literary author. They question the authority of the author and legal authority and suggest that judicial decisions are arbitrary.”) (citation omitted).

250 Id. at 110.
intention, is it appropriate to engage in a court ordered mediation proceeding that vitiates the intent of the testator by redefining it to be whatever the beneficiaries want against express legislative policy to the contrary?\textsuperscript{251} Professor Haneman says that realizing the testator’s intent should remain the goal in order to protect the property rights of the decedent. The goal should not be to further the policies of a court ordered alternative dispute resolution system.\textsuperscript{252}

The focus of mediation in a will contest, even when the testator’s intent is clear, must always, by definition, be on the interests of the parties.\textsuperscript{253} This Article would advance Professor Haneman’s argument to say that a transformative attorney-mediator violates his or her oath to uphold the law by attempting to redefine a testator’s clear intent. An attorney who has sworn to uphold the law cannot ethically participate in a proceeding where he or she is intentionally undermining the positivist law by placing the dogma of a divergent ideology, like social constructionism, above his or her sworn obligation to uphold, protect, and defend the law.

Transformative mediation claims to eschew the directive approach and be facilitative, but if as a transformative mediator you relationally define a party’s chose in action,\textsuperscript{254} something of actual or potentially great economic value, as other than a legal right of potential economic value,

\textsuperscript{251} Victoria J. Haneman, The Inappropriate Imposition of Court-Ordered Mediation in Will Contests, 59 CLEV. ST. L. REV. 513 (2011) (“Unfortunately, mediation rejects the primacy of testamentary intent in resolving the will contest. The intent of the testator may be nothing more than an obstacle to mediation, in that the main actor is deceased and his views are therefore not represented at the negotiating table.” Id. at 528 (footnote omitted). “Court-ordered mediation forces a will contest into a dispute resolution process beyond the reach of legislators.” Id. at 530.).

\textsuperscript{252} As Professor Haneman explained:

An irony inheres where the legal system mandates a dispute resolution process that perverts the underlying rule of law that courts have purported to embrace for centuries—effectuating testator intent in will contest cases. Will contest cases are not suited for court-ordered mediation without the consent of the testator, because testamentary intent is laid to waste by a mediated settlement that alters the dispositive plan set forth in the will. When the judicial system incorporates a process that weighs the needs and wants of the living, thereby unintentionally turning focus away from the intent of the testator, it undermines the property rights of the decedent.

Id. at 534–35 (footnotes omitted).

\textsuperscript{253} Id. at 515–16.

\textsuperscript{254} Chose in Action, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The right to bring an action to recover a debt, money, or thing.”).
have you not made the harshest kind of evaluative judgment to the
detriment of the party who had the economic and legal right in the chose?

Of course, in defining a “chose” as something other than a “chose”
you have done what postmodern transformative mediators do with their
definitional Wittgensteinian word games. You have turned conflict over the
chose into a positive form of relational social interaction, but you have also
stripped a party of an asset of value under our law, a potential economic and
legal right to money. The potentiality itself in terms of risk calculation has a
value. The transformative definition of conflict that excludes or ignores the
existence of a legal right of economic value is effectively an adjudication
against the interest of the party who holds that right. It is in essence the
rankest form of evaluation. Perhaps a psychologist may advise a client to
give up a legal claim, but an attorney cannot participate in a process that
eliminates a party’s legal claims through a redefinition of the conflict
process under the guise of therapeutic overlap.

The Relational worldview is a postmodern conceit that undermines
an attorney’s oath to support, protect, and defend the law and the courts that
administer it. The application of an ideology in order to further social policy
through mediation instead of settling disputes will eventually not be
tolerated. States are beginning to take control by developing mediation
standards. A number of states have adopted the Uniform Mediation Act\textsuperscript{255}
and attorneys are coming under especial scrutiny by states and bar
associations regarding what they may ethically do in mediation.\textsuperscript{256} Not
coincidentally, evaluations by attorneys in mediation are coming under
heavy scrutiny as the practice of law.\textsuperscript{257} Relational theory is the worst kind
of evaluation because its application is ultimately without standards,
degenerates into nihilism, and renders the law meaningless. “Without any

\textsuperscript{255} See Matt Brown, Legislation: Where the Uniform Mediation Act Stands in the
States, CPR, http://www.cpradr.org/About/NewsandArticles/tabid/265/ID/239/Legislation-
e=Mediation%20Act (last visited Feb. 16, 2016) (for text of the Uniform Act).

\textsuperscript{256} See Maureen E. Laflin, Preserving the Integrity of Mediation Through the Adoption
of Ethical Rules for Lawyer-Mediators, 14 NOTRE DAME J.L. ETHICS & PUB. POL’y 479,
526 (2000).

\textsuperscript{257} Id. (“Thus, the more evaluative the techniques the mediator uses, the more closely
mediation comes to the practice of law.” Id. at 505. The state of Florida forbids court-
appointed mediators to evaluate: “Regarding the question of evaluation, Florida allows
certified and court-appointed mediators to provide information which the mediator is
‘qualified by training or experience to provide.’ In no event, however, may a mediator offer
an opinion or prediction as to specific court outcomes.” Id. at 509) (footnotes omitted).
standard or criteria of evaluation post-modern inquiry becomes a hopeless, perhaps even a worthless, enterprise.”

IV. AN ALTERNATIVE SOLUTION

There is a clear tension in the transformative model between actual dispute resolution and the creation of social justice. In their 2012 Article, Mediation and Social Justice: Risks and Opportunities, Professors Bush and Folger made it clear they were not only trying to achieve justice in individual cases (the “micro” level), but they were also hoping to achieve justice in society (the “macro” level).

By “social justice,” Professors Bush and Folger mean:

[A] state of affairs in which inequalities of wealth, power, access, and privilege—inequalities that affect not merely individuals but entire classes of people—are eliminated or greatly decreased. Social justice, in short, means achieving relative equality of conditions (not just opportunities) as between all groups or classes within the society.

And they acknowledge the importance of social justice as a priority in mediation. The ideology that Professors Bush and Folger have adopted as the framework for their achievement of social justice is social constructionism, but that ideology of “unbridled relativism” poorly serves them and is unworthy of their humanistic goals and objectives.

258 ROSEN AU, supra note 5, at 136.
260 Id. at 3 (footnote omitted).
261 Id. at 4.
262 See Joel F. Handler, Postmodernism, Protest, and the New Social Movements, 26 L. & SOC’Y REV. 697, 702 (1992). The eminent American pragmatist Richard Rorty says: “Relativism” is the view that every belief on a certain topic, or perhaps about any topic, is as good as every other. No one holds this view. Except for the occasional cooperative freshman, one cannot find anybody who says that two incompatible opinions on an important topic are equally good.

RICHARD RORTY, CONSEQUENCES OF PRAGMATISM 166 (2011). I find it both ironic and unfortunate that someone who has done as much good as Professor Bush in his lifetime has painted himself into a relativist ideological corner that is unworthy of his life’s work. For instance, as a modern positivist I can tell you that his history of mediation in Staying in Orbit was outstanding and objective. As a postmodern relational relativist, he must tell you that “there is no implied claim of purely objective, scientific accuracy in the narrative offered here.” Bush, Staying in Orbit, supra note 7, at 708.
Social justice implies a value system, a true North Star by which we navigate, and there are no North Stars in the nihilism of social constructionism.

Professor Condlin is correct when he says that Professors Bush and Folger have modified transformative mediation. This Article argues they have reinvented the model and there are three distinct iterations. The first in 1994 focused on individual change. The second in 2005 focused on changing the group conflict interaction. Both of these forms were wholly dedicated to bringing about the creation of social change through the Relational worldview—both sought the victory of the divergent relational ideology over the consensus Enlightenment ideology. However, in 2008, Professor Bush proposed a truce. He was no longer arguing for the primacy of the Relational worldview. He was proposing a peaceful coexistence, if you will, in which both ideologies were allowed to exist. This Article considers this as the beginning process for a third iteration of transformative mediation reflecting Professor Bush’s instinct for the American cultural value of pragmatism.

Divergent ideologies seek to replace consensus ideologies. Marxism, for example, sought to replace capitalism. Had Professors Bush and Folger prevailed in their quest to replace the Enlightenment worldview with their Relational worldview, there would be no To Kill a Mockingbird in our schools with its Atticus Finch to teach our children Thomas Jefferson’s absolute truths that all men are created equal and entitled to pursue their happiness. There would only be Pirandello’s Six Characters in Search of an Author.

Professor Bush’s proposal for ideological peaceful coexistence heralds an abandoning of his quest for ideological supremacy of the divergent Relational worldview over the consensus Enlightenment worldview. Where there is coexistence there is eventually trade and an exchange of ideas. Coexistence is a pragmatic solution to an ideological

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263 Condlin, supra note 22, at 623–25.
264 See Douglas McDermid, Pragmatism, INTERNET ENCYCLOPEDIA PHIL., http://www.iep.utm.edu/pragma/ (last visited Feb. 16, 2016) (“Pragmatism is a philosophical movement that includes those who claim that an ideology or proposition is true if it works satisfactorily, that the meaning of a proposition is to be found in the practical consequences of accepting it, and that unpractical ideas are to be rejected.”).
265 You see this principle in the Netflix series House of Cards when Frank Underwood breaks from conversation with a character in a scene and turns directly to you in your living room to tell you what he is really thinking. See House of Cards (Netflix). This is a
competition, and opens the possibility for the transformative model to cut loose of its seminal developmental stage in social constructionism and adopt postmodern pragmatism.

If transformative mediation remains grounded in social constructionism, it will never make the leap from efficacy in institutional and group dispute resolution to the status of a helping profession that is appropriate for cases involving victims of PTSD. The problem, of course, is Professor Gergen’s social constructionist theory of knowledge, which Professor Bush acknowledges as integral to the transformative model when he writes his history. 266 Professor Bush explicitly adopts a social constructionist ideological theory of knowledge that rejects the reality of history, rejects science and neuroscience, and posits that biology has nothing to do with emotions or the individual’s psychological state.

The legal system’s problem with postmodernism is the same as epistemology’s: “How can we evaluate anything and by what standards are we to judge anything?” Even critical legal scholars like Joel Handler thus acknowledge that even if no single “procedure . . . has access to truth or reality, including science,” we must use some measure to assess facts and to act. For Handler, as for others, that “something” is a nonfoundational pragmatism: “The test of knowledge is efficacy.”267

But the social constructionist theory of knowledge as articulated by Professors Gergen, Bush, and Folger, has not produced an efficacious theory of knowledge; it has produced an anti-foundational nihilism denying neuroscience.

postmodern Pirandello type device in which art and reality merge, yet it does not seem to destroy your modernist suspension of disbelief. This seems to me to be the same kind of fusion between modern and postmodern that Professor Bush is broaching, and Ernesto Laclau was proposing, when he said: “Postmodernity does not imply a change in the values of the Enlightenment modernity but rather a particular weakening of their absolutist character.” Handler, Postmodernism, Protest, and the New Social Movements, supra note 262, at 702 n.1.

266 ROSENAU, supra note 5, at 63 (“History [for postmodernists] is a creature of the modern Western nations; as such it is said to ‘oppress’ Third World peoples and those from other cultures. History has no reality.”).

There is no evidence to confirm Professor Gergen’s relational theory that emotions and the fight-flight-freeze syndrome are cultural and not biological. The cross-cultural psychologist, Gustav Jahoda, says about Professor Gergen’s relational theory of emotions in his book review of *Relational Being*: “The one preposterous bit of the book is the claim that biology in general and the brain in particular have nothing to do with mind and emotion—it is astonishing that so erudite a person as [Professor] Gergen could be so misguided.”

The neuroscience regarding emotions works to explain the functioning of PTSD; Professor Gergen’s relational theory regarding emotions does not.

In articulating his postmodern “American-style pragmatism,” Joel Handler says that although “truth is contingent and subject to revision, the ‘best available truths are warranted and acceptable.” Handler rejects pure postmodernism in favor of a postmodern pragmatism because “[p]ragmatism is willing to use science and structural analysis.” This Article offers that Professors Bush and Folger should transition away from Professor Gergen’s nihilistic postmodern relational theory of knowledge that rejects morality because it is not the “best available truth,” and adopt Joel Handler’s theory of postmodern pragmatism that embraces science, including neuroscience, because it is the best available truth. Whereas their relational theories are successful in a group where people are accessing the cognitive abilities of their neocortices to collaborate and cooperate with one another, those theories present a problem for victims of PTSD who cannot access their neocortices to collaborate and cooperate because their decision making process is being limbic-driven.

As to creating social justice, Professor Bush has already made half the journey by proposing the truce with the Enlightenment’s model of problem-solving mediation. In discussing postmodern pragmatism, Joel Handler said:

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270 *Postmodernism, Protest, and the New Social Movements*, supra note 262, at 703 (footnote omitted); RORTY, supra note 262, at xiii (“For pragmatists, ‘truth’ is just the name of a property which all true statements share. It is what is common to ‘Bacon did not write Shakespeare,’ ‘It rained yesterday,’ ‘E equals mc²,’ ‘Love is better than hate.’”).
272 GERGEN, INVITATION, supra note 15, at 6.
Postmoderns are willing to believe in the humane side of the Enlightenment. Whether they admit it or not, this is a meta-narrative—a construction of human nature that transcends context. They now must believe in a political economy. The enemies of the poor and those who suffer discrimination do not rely on localized knowledge in mini-rationalities.\textsuperscript{274} Handler is saying that nihilistic postmodernism\textsuperscript{275} is totally relativistic because it deconstructs the truth into multiple narratives. True change, the kind that Professors Bush and Folger have been working to bring about over the past twenty years, can only be produced within the context of foundationalism\textsuperscript{276} with its faith in absolute truth, or within the context of something that resembles foundationalism in a pragmatic sense,\textsuperscript{277} because only within such a context can we make moral judgments that function as absolutes in order to generate progressive politics. “Instead of extending democracy, postmodernism’s radical pluralism amounts to unbridled relativism; politics becomes either passive or regressive or provides no defense against fascism and terrorism.”\textsuperscript{278} Fascism, communism, capitalism, radical fundamentalism—all have big narratives. Deconstructionism with its radical pluralism and unbridled relativism does not have a big narrative. Unbridled relativism is not a countervailing big narrative that the individual can latch on to as true in order to drive social change. Handler has turned to

\footnotesize{\textsuperscript{274} Handler, Postmodernism, Protest, and the New Social Movements, supra note 262, at 727–28.  
\textsuperscript{275} See Gergen, Invitation, supra note 15, at 27 (regarding the idea that social constructionism is a form of nihilistic postmodernism with no absolute truth or beauty or good or bad in its ideology).  
\textsuperscript{276} See Justin Skirry, René Descartes, INTERNET ENCYCLOPEDIA PHIL., http://www.iep.utm.edu/descarte/ (last visited Feb. 20, 2016) (showing that René Descartes’ “cogito ergo sum” can be viewed as an attempt to find that first “foundational” truth upon which all reality is based).  
\textsuperscript{277} As Joel F. Handler explained: Pragmatists deny that antifoundationalism necessarily means relativism. Hypotheses, systematic thought, evidence, and inference are taken seriously. “All the major pragmatist figures accepted and asserted the importance of general principles and systematic thought; they insisted only that the test of abstractions must be their usefulness for action and concrete inquiry.” . . . While truth is contingent and subject to revision, the “best available truths are warranted and acceptable.” Handler, Postmodernism, Protest, and the New Social Movements, supra note 262, at 703 (citations omitted).  
\textsuperscript{278} Id. at 702.}
pragmatism, as should Professors Bush and Folger, because he does not believe “postmodern politics is useful as transformative politics”\textsuperscript{279} to effect social change.

Viktor Frankl,\textsuperscript{280} a psychiatrist who survived the Nazi concentration camps and developed the psychiatric treatment of logo-therapy, said:

As long as we do not have access to absolute truth, we must be content that our relative truths correct one another, and that we find the courage to be biased. In the many-voiced orchestra of psychotherapy, we not only have the right, but the duty to be biased as long as we are conscious of it.\textsuperscript{281}

If anyone could have fallen into the abyss of nihilistic social constructionism and forsaken humankind’s ability to find the truth, it would have been Frankl. But to him, our biases and our mutual perspectives were just part of the process on our road to the truth. He believed we self-corrected by correcting each other. The fact that we each see things through the given lens of our own perspective merely means that our knowledge is limited.\textsuperscript{282}

[\textit{L}ike the man who knows an elephant only from holding its trunk. But while it is true that all human knowledge is gained from a subjective perspective, the only thing that is subjective is the perspective through which we approach reality “this subjectivity does not in the least detract from the objectiveness of reality itself.”}\textsuperscript{283}

Transformative mediation does not have to mean a “radical pluralism” of disparate traditions that “amounts to unbridled relativism.”\textsuperscript{284} It can embrace the limits of our knowledge and still find truth.

\textsuperscript{279} Handler, \textit{A Reply}, supra note 269, at 802.
\textsuperscript{280} Viktor E. Frankl is the author of \textit{MAN’S SEARCH FOR MEANING}.
\textsuperscript{282} DuBois, supra note 281, at xi (citing VIKTOR E. FRANKL, \textit{THE WILL TO MEANING: FOUNDATIONS AND APPLICATIONS OF LOGOTHERAPY} 59 (1988)).
\textsuperscript{283} Id.
\textsuperscript{284} Handler, \textit{Postmodernism, Protest, and the New Social Movements}, supra note 262, at 702.
For transformative mediation to make the leap from group dispute resolution to individual dispute resolution, to include victims of PTSD, it will have to have a Grand Narrative that replaces those multiple relational stories of social constructionist ideology. It must have something for the individual to believe in that is the best available truth. Joel Handler says, “Postmodernists say that they believe in the humane values of the Enlightenment, and I believe them because I don’t know how it is possible to conceive of the postmodern project of social interaction without such a belief.”

Handler’s belief in the best available truth is not all that dissimilar from Frankl’s belief in a subjectivity that “does not in the least detract from the objectiveness of reality itself.” Handler is a postmodernist and an anti-foundationalist. Frankl is a modernist and a foundationalist. But as to a theory of what we know and how we can know it, they have both arrived at the point of essentially the same Grand Narrative that can create a basis for managing conflict interaction in transformative mediation that is elemental and nourishing for the victims of PTSD.

Currently, the problem-solving model is the only model grounded in neuroscience that can address the “altered neurophysiological organization” of victims of PTSD. Although Professor Bush maintains that the firm anchoring of the transformative model “in a different, relational vision of society . . . can stand on its own outside and beyond the individualist vision of the courts,” that relational vision is in fact also outside and beyond accepted scientific standards for the safe management of victims of PTSD, especially the returning combat veterans with PTSD from Iraq and Afghanistan. The transformative model presently disqualifies itself for practice with victims of PTSD because it is not safe to use with them.

This Article does not, however, argue that science is fundamentally inconsistent with the transformative model’s goal to make the world better.

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285 Id. at 726.
286 See BUSH & FOLGER, RESPONDING TO CONFLICT, supra note 8, at 15–18 (regarding Satisfaction, Social Justice, Oppression Story, and Transformation Stories).
287 Handler, A Reply, supra note 269, at 822–23. Handler equates, as do most postmodernists, values and beliefs. Values and beliefs (norms), however, are different.
288 See, cf., GERGEN, INVITATION, supra note 15, at 222 (regarding Professor Gergen’s “favored reality”).
289 HERMAN, supra note 120, at 39.
290 Bush, Staying in Orbit, supra note 7, at 761.
By changing the ideological basis of their transformative model from social constructionism to postmodern pragmatism, Professors Bush and Folger can develop a new third version that uses the structural analysis of neuroscience\textsuperscript{291} to mediate disputes involving victims of PTSD.

Turning to the humane side of the Enlightenment, as Handler suggests, and including American values supportive of Enlightenment ideology in the transformative model would also meet the ethical concerns about the transformative model. Despite the philosophical differences with the “individualist vision of the courts,”\textsuperscript{292} the transformative mediator cannot stand so far “outside and beyond the individualist vision of the courts” that she cannot truthfully swear to uphold the law. Again, as the Gospel writer Matthew advised, you cannot serve two masters: either you support the U.S. Constitution, your state constitution, federal and state statutes, and judicial rulings, or you support social constructionist relational ideology. You cannot support both. Your agreement or disagreement with these mastercodes\textsuperscript{293} is irrelevant to the obligations that your oath imposes upon you.

Philosophically the transformative model must be recalibrated. Its discussion must be expanded to recognize that in the case of victims of PTSD the settlement of the dispute must take primacy over conflict interaction, and in mediations presided over by attorney-mediators, the parties’ legal rights, obligations, duties, and the respective economic values of these must be acknowledged by the attorney-mediator and made clear to the parties.

Enlightenment ideology can adapt\textsuperscript{294} to accommodate the transformative model. But just as the Phoenix renews itself in fire, so too must social constructionism be burned away, and transformative mediation be born again as postmodern pragmatism sharing our Enlightenment inheritance.

\textsuperscript{291} Handler, A Reply, supra note 269, at 820 (“Pragmatism is willing to use science and structural analysis.”).

\textsuperscript{292} Bush, Staying in Orbit, supra note 7, at 761.

\textsuperscript{293} See ROSENAU, supra note 5, at 6.

\textsuperscript{294} See Handler, Postmodernism, Protest, and the New Social Movements, supra note 262, at 726; HALL, SILENT LANGUAGE, supra note 146, at 83–85 (showing that culture itself, both its norms and values, can change).
CONCLUSION

As presently constituted, the transformative model is an inappropriate model to employ with victims of PTSD because it is primarily based on the ideology of social constructionism. It is not ethically permissible for the attorney-mediator to employ a model of mediation based on social constructionism. In order to make the transformative model safe for victims of PTSD, and ethically acceptable for attorney-mediators, Professors Bush and Folger should retool their model in terms of postmodern pragmatism.

Professors Bush and Folger base transformative mediation on their Relational worldview derived from social constructionism that is, by its very nature, inappropriate for victims of PTSD, because individuals who suffer from a psychological disorder need mediation models based on consistency and self-containment. A mediation model based on social constructionism has neither, because it is dependent on changing external factors beyond its control and subject to subjective interpretation by the mediator. The lack of self-containment and consistency in such a model, at best, leads to inconsistent results with individuals who suffer from psychological disorders and at worst creates an unsafe condition for victims of PTSD, especially combat veterans.

Transformative mediation is a by-product of postmodernism that holds no absolutes. Evaluation and judgment are irrelevant in a postmodern world because truth is absent. The attorney’s oath requires the individual to swear to uphold, protect, and defend the Constitution of the United States of America, as well as the constitution of the state in which the individual will be practicing, and to swear the oath voluntarily without any evasion or mental reservation. Social constructionism undermines this oath with its anti-foundational, relational ideology because it rejects truth, modernism, and the rule of law as created by judges. It would be difficult for a postmodern individual who believed in the tenets of social constructionism to swear the attorney’s oath without reservation because that oath is based on objective truths while social constructionism relies on subjective realities. And it would be unethical for an attorney to take an objective dispute involving issues of law and, by ignoring the law, relegate it to a subjective opportunity for personal growth and moral development.

Transformative mediation is poorly adapted for working with victims of PTSD because it does not recognize the biological basis of brain
circuitry that is altered by fear. Transformative mediation seeks out information from stories of the individual’s past that can be detrimental because such retellings generate terror in the victim of PTSD. Additionally, the mediator cannot be neutral; rather, he or she must relate to the victim of PTSD as a team member who is in control and engaged in the process of winning by obtaining concrete, objective outcomes that resolve the dispute.

Transformative mediation, however, neither works in nor does it concede concrete objectivity. Therefore, it is unsafe when applied to victims of PTSD, especially combat veterans. In order to make transformative mediation a viable option for dispute resolution involving victims of PTSD, it will have to replace its multi-relational stories of social constructionist ideology with a Grand Narrative. Transformative mediation needs to provide the individual with something to believe in that is the “best available truth.” Professors Bush and Folger could achieve a transformative model that is appropriate for work with victims of PTSD by changing the ideological basis of their model from social constructionism to postmodern pragmatism that includes neuroscience.