

BEYOND FAIRNESS: THE PLACE OF MORAL FOUNDATIONS THEORY IN MEDIATION AND NEGOTIATION

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INTRODUCTION

Fairness seems inextricably woven into both mediation and negotiation. People in conflict invoke it as a sword, to bend others to their will, arguing that they acted fairly and the other acted unfairly. Or they raise it as a shield, explaining why they will not accede to what their counterpart is asking. It acts explicitly through words, and it acts tacitly through feeling. Even if no one says the word “fair” or “unfair,” a sense that a person has acted, or is acting, unfairly can elicit a negative reaction, such as anger or fear. Conversely, a sense that something is fair can elicit a positive reaction, such as acceptance and relief. Fairness is not limited to what was done or the proposed resolution. A sense of the fairness of the process itself is important for good outcomes.¹

The pervasiveness of fairness poses a problem for both negotiators and mediators. Should they seek to use it, or should they avoid talking about it? Some mediators have argued that moral discussions about fairness can inflame the parties’ antipathy towards each other and create greater distance between them, rather than finding common ground.² But if moral judgments are so pervasive and persistent, can we really avoid them by refusing to talk about them? Might they still be operating implicitly in the background, affecting what everyone says, how they react, and how they decide whether to agree?

Even what we mean by fairness remains unclear in negotiation and mediation. Is it what professional ethicists tell us, based on their systematic rational thought? Is it more a form of common sense, which people seem to have, even without having worked out a comprehensive moral philosophy? Is it as varied and idiosyncratic as the people who find themselves trying to negotiate an agreement or deal with a conflict? Or is there some kind of underlying structure

¹ “[T]he fairer we feel the process is, the more satisfied we tend to be with the outcome. . . . [T]he fairer we feel a process is, the more willing we are to settle a dispute.” Keith G. Allred, *Relationship Dynamics in Disputes: Replacing Contention with Cooperation*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 83, 91–92 (Michael L. Moffitt & Robert C. Bordone eds., 2005); see also Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 *LAW & SOC. INQUIRY* 473, 473–74 (2008).

² See, e.g., Sara Cobb, *Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice*, in *BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION* 215, 228 (Daniel Bowling & David Hoffman eds., 2003).

or content to how moral judgments work in these fields? Sometimes it seems as if moral judgment is a kind of mysterious dark matter, which surrounds negotiation and mediation, exercising some very important influence that is largely invisible to us and not incorporated into our theories of negotiation and mediation.

Philosophy and sociology have shed quite important light on what fairness is and how it works. Ethicists can categorize fairness in terms of equality, equity, and need.³ We can observe each of these three distinctions operating in negotiation and mediation. Parties stuck asserting different demands and unable to reach agreement, for instance, might find it acceptable to “split the difference,”⁴ using *equality* as a fair solution. Alternatively, seeking to justify a claim, or refusing to make a further compromise, parties might assert that they “deserve” what they are claiming; in doing so, they are using the moral claim of *equity*. Or they may claim that they “need” an agreement to contain particular terms, meaning more than an economic need, and including the moral principle of *need*.

We know that a sense of unfairness can even displace a rational calculation of benefit. For example, the Ultimatum Game, which has generated an entire industry of interesting academic study,⁵ gives two people the opportunity to share a sum of cash, but only if they can agree on how to divide it. Logic would tell us that one of the recipients should be able to capture almost all of the available cash, ninety out of one hundred dollars, for instance, simply by refusing to agree to a smaller share. The person asked to take the smaller share would be irrational to refuse the split, since they would be giving up a gain of ten dollars they would not otherwise have. Yet almost all players will reject the short end of such a deal. The demand is too one-sided, too unequal, and too unfair to be acceptable.⁶

As useful as these categories may be, they only give us a general understanding of how moral judgment, including the judgment we recognize as fairness, operates in negotiation and mediation. My project here is to explore whether moral psychology, and in particular the branch known as Moral Foundations Theory,⁷ can provide a fuller insight into how fairness works on the

³ Cecilia Albin, *The Role of Fairness in Negotiation*, 9 NEGOTIATION J. 223, 238–39 (1993).

⁴ E.g., DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION* 281–82 (2d ed. 2012).

⁵ The industry is not insubstantial. One recent study reports that a search for “ultimatum bargaining” on Google Scholar produces “more than 26,500 results.” Werner Güth & Martin G. Kocher, *More Than Thirty Years of Ultimatum Bargaining Experiments: Motives, Variations, and a Survey of the Recent Literature*, 108 J. ECON. BEHAV. & ORG. 396, 396 (2014).

⁶ Offers to provide the respondent with 40–50 percent of the available funds are the ones most frequently made and are almost always accepted. Offers to provide the respondent with less than 20 percent of the available funds are almost always rejected. *Id.* at 398. Studies of the game have included a huge number of variables, such as gender, experience, age, culture, rule variations, and even testosterone levels. *Id.* at 403.

⁷ Moral Foundations Theory has been developed by psychologist Jonathan Haidt and his colleagues, who have noticed that when people were questioned about certain situations that

ground, day to day, in mediation and negotiation. Moral Foundations Theory offers a particularly suggestive way for thinking about these issues. First, it is an account of how people react and feel, not just how they use reason or rhetoric; thus, it may offer a more revealing conceptual tool than “fairness” in general. Second, it treats moral judgment as a foundational process, thereby suggesting that “fairness” operates pervasively in conflict situations, not only when it is explicitly invoked. Rather than being something that only pops into the open in episodic and unpredictable ways, moral judgment may be a constant and more structured part of the dynamics of mediation and negotiation. Third, Moral Foundations Theory depicts moral judgments as largely intuitive. They arise effortlessly, automatically, and unconsciously, rather than through a process of reasoning and argument. This, too, could make them more pervasive than a more traditional account of moral judgment might suggest. Finally, Moral Foundations Theory asserts a plural account of moral judgment, not a singular one. Moral judgment is not limited to “fairness” or “justice,” but contains five or six different modules, or kinds of moral judgments. This range may give mediators and negotiators a more powerful tool to understand the operation of moral judgments, and to work with them to achieve their goals.

In Part I, I will introduce Moral Foundations Theory by describing an acted-out mediation conducted by two different mediators with two different outcomes. Moral judgments help to explain the different outcomes.⁸ Part II provides some examples of real mediations and negotiations, as well as some parts of negotiation theory itself, that support the claim that Moral Foundations Theory explains some of the dynamics of mediation and negotiation. In Part III, I will discuss some of the objections to Moral Foundations Theory, and consider whether they negate its usefulness for mediators and negotiators. Part IV discusses the opportunities and challenges that Moral Foundations Theory provides for mediators and negotiators. It can be a powerful tool for mediators and negotiators to wield influence over the participants or negotiation counterparts, but it also gives a more prominent, and unavoidable, role for a mediator’s or negotiator’s own intuitive moral judgments.

had moral implications (some involving incest, eating pets, hitting one’s father, and so on), they tended to make judgments in certain patterns. The patterns developed into the account of six moral modules, described below. JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 124–25, 128–54 (2012); *see also* Jesse Graham et al., *Moral Foundations Theory: The Pragmatic Validity of Moral Pluralism*, 47 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 55, 61–71 (2013).

⁸ The mediation had two different outcomes because it was simulated twice, with two different mediators. Despite being simulated, the mediations had a strong similarity to real mediations because they were unscripted, with actors improvising the parts of the disputants, and were conducted by experienced mediators who were instructed to handle the mediations as they normally do. Both versions were videotaped, and the transcripts give us the detail necessary to identify the operation of moral judgments in the different courses the mediations took. DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION: TEACHER’S MANUAL E-2 to -50* (2008) [hereinafter FRENKEL & STARK, *TEACHER’S MANUAL*] (transcripts of Craig Lord as mediator and Cheryl Cutrona as mediator).

I. AN EXAMPLE OF MORAL JUDGMENT IN A MEDIATION AND
THE PROMISE OF MORAL FOUNDATIONS THEORY

A. *An Example*

For their instructional book about mediation, *The Practice of Mediation*, Douglas Frenkel and James Stark created and videotaped unscripted mediation sessions.⁹ Actors played the disputing parties, but the mediators were experienced professionals handling the dispute as they would real disputes, and the lawyers for the disputing parties were experienced lawyers. The different mediators used different mediation styles and, sometimes, achieved different outcomes.

The matter of Bernice Wilson and Frank DiLorenzo reached very different results in its two different mediations. Bernice, a homeowner, had brought a claim against Frank's kitchen remodeling company because Frank had abandoned the remodeling of Bernice's kitchen in the middle of the job. Bernice's kitchen had been demolished already and remained unusable, and Bernice believed that Frank's company had used inferior cabinets. The conflict was aggravated by the fact that Frank never responded to Bernice's complaints. When mediated by Craig Lord, the parties agreed to settle with Frank paying some money to Bernice, in exchange for Bernice dropping her claim. She would use the money to have the work completed by someone else. In the other mediation, however, conducted by Cheryl Cutrona, the matter was resolved by Frank agreeing to return to the job and complete the work, with a financial adjustment for the delay, plus some additional terms.

What might have contributed to these different results? Mediators are intensely interested in isolating the specific factors associated with such different outcomes. Many, if not most, people expect a mediation to result in a compromised financial settlement, as in the Craig Lord mediation. The parties make settlement demands and offers, negotiate competitively, reassess their options, and make compromises in their asserted settlement positions. Resuming and completing the work, however, as in the resolution of Cheryl Cutrona's mediation, seems particularly attractive; it satisfies the parties' real world needs and interests more directly than the payment of settlement money can. Bernice will get her kitchen, and Frank will, to a degree, salvage his reputation. The result may have been more financially efficient than the simple exchange of money; Frank can provide the completion services at his cost, which is less expensive than the cash Bernice would probably have to pay someone else for the equivalent work. The agreement also repairs the relationship that was broken when Frank stopped working or responding to Bernice's calls. Many argue¹⁰ that me-

⁹ FRENKEL & STARK, *supra* note 4.

¹⁰ *E.g.*, GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING, at xxxiii (2008); BERNARD MAYER, THE DYNAMICS OF CONFLICT: A GUIDE TO ENGAGEMENT AND INTERVENTION 224–31, 294–96 (2d ed. 2012);

diation is particularly valuable because it can satisfy underlying needs and real world interests, not just legal claims, repair some broken relationships, and enhance mutual understanding. Additionally, mediation can do so in a more economically efficient way than adjudication by both reducing the costs otherwise required to prepare for and conduct trials and developing terms of agreement that create more value for each participant and the situation as a whole, compared to a simple numerical compromise.

The videos and transcripts of the two mediations involving homeowner Bernice and contractor Frank reveal many differences between the two versions of the mediation. For instance, mediator Craig Lord paid extended attention to the financial claims and the legal strengths of the parties' claims.¹¹ Mediator Cheryl Cutrona, however, spoke hardly at all about such matters. Instead, she spent time trying to learn from Frank why the work had stopped and the extent of his concern about his reputation.¹² While Lord tried to elicit positional concessions in the demands and offers of each party, Cutrona sought other ideas for a solution from the parties themselves. Cutrona used a version of brainstorming by asking the parties to generate a list of desired outcomes, not limited to the payment of money.¹³ Cutrona also appeared to pay more attention to how the parties felt about the events, using reflective listening by briefly summarizing back what she had heard about what they said and how they felt.¹⁴

All of these differences may help account for the difference in results. Much mediation and negotiation literature emphasizes the importance of learning about needs and interests of the disputants in making resolutions more interest-based and more relationship-enhancing. But I would like to focus on a difference that I think is even more critical.

CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 77 (3d ed. 2003) ("One of the mediator's major contributions to the dispute resolution process is assisting the negotiators in making a transition from positional to interest-based bargaining."); JOSEPH B. STULBERG & LELA P. LOVE, *THE MIDDLE VOICE: MEDIATING CONFLICT SUCCESSFULLY* (2d ed. 2013).

¹¹ FRENKEL & STARK, *TEACHER'S MANUAL*, *supra* note 8, at E-12 to -13 (statements by mediator Lord in private caucus with plaintiff Bernice included: "And you have to keep as objective as you possibly can. . . . [Too much extraneous material] will lessen your credibility. . . . I don't think [the condition of the kitchen is] something that the court is really going to put stock in."); *id.* at E-17. In private caucus with defendant Frank, mediator Lord stated: "Unfair Trade Practices Act makes failure to comply with the contract provision a *per se* violation. . . . [The court could also award] attorney's fees . . . or punitive damages." *Id.*

¹² *Id.* at E-36 (statement by mediator Cutrona in private caucus to defendant Frank: "Sounds like she said that she was telling her friends, her people at church all about her situation. Are you concerned at all about your reputation?"). By way of contrast, when Frank raised his concern about reputation in private caucus with mediator Lord ("I have a good reputation in the city and I want to keep it"), the mediator did not pick up on the topic but raised a different issue: "Let me just ask . . . about . . . the linoleum" *Id.* at E-17 to -18.

¹³ *Id.* at E-42.

¹⁴ *See, e.g., id.* at E-31 (statement by mediator Cutrona: "Ok, so it sounds like what I hear you saying is that you've been frustrated because you anticipated that this was only going to take . . . a couple of weeks").

For me, the crucial moment in the Cutrona mediation came when Bernice learned why Frank had not responded to her phone calls. One of Bernice's great frustrations in the situation was her inability to find out the reasons for the delay in completing the kitchen. She telephoned Frank's office repeatedly but got no response. She likely concluded from the silence that Frank was scamming her, getting her to sign the remodeling contract, taking her money, and then failing to do the work. In fact, according to Frank, the failure to return her telephone calls came about because Connie, the person in his office responsible for fielding calls, avoided conflict and did not want to respond. She was not doing her job very well, but he was reluctant to blame her. She had been with the company from the time his father started it, and he thought of her as "family."

At mediator Cutrona's suggestion, Frank told Bernice why her calls had been met with silence:

Frank: "... I have a *loyalty* to [Connie and Sam, another employee] . . . I'm never going to fire them. . . . I love them like they are my uncle and my aunt . . ."

Bernice: "I understand that [reason] and respect that because they are family."

Frank: "... not literally family . . ."

Bernice: "But still."

Frank: "But they are family to me."

Bernice: "Yes."¹⁵

Bernice accepted the family-like relationship as an understandable reason why Frank would not have taken action to make his office more responsive to customer complaints.

That understanding appears to have been crucial in permitting Bernice to agree to let Frank complete the job. She needed to trust him. Learning the reason for the silence repaired some of the trust that Frank had lost when the work stopped.¹⁶

This exchange was an excellent example of "perspective taking."¹⁷ Dealing with a dispute is easier if each party can understand the situation from the perspective of the other.¹⁸ But I would suggest that this event is even more important than perspective taking. The fact that it was about loyalty is what makes the exchange so powerful and most likely instrumental in bringing Bernice and Frank to a better resolution.

¹⁵ *Id.* at E-48 to -49 (emphasis added).

¹⁶ Under Cheryl Cutrona's guidance, the mediation also developed additional ways for Bernice to develop trust for Frank. Cutrona had Bernice and Frank brainstorm possible outcomes, thus giving Bernice space to talk without rejection by Frank. Cutrona also made sure that the agreement by which Frank would complete the job had a damages clause for delay, to give him a financial incentive to complete on time. *Id.* at E-42, E-48 to -49.

¹⁷ ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 47 (2000).

¹⁸ See James H. Stark & Douglas N. Frenkel, *Changing Minds: The Work of Mediators and Empirical Studies of Persuasion*, 28 OHIO ST. J. ON DISP. RESOL. 263, 273-74 (2013) (describing how having a party to a mediation articulate the situation as the opposing party sees it can moderate the first party's views and facilitate reaching agreement).

In acknowledging why Frank went easy on Connie, Bernice was making a moral judgment. Being loyal to your group or family is a good thing to do. Contrast this with the moral quality of Frank's actions as Bernice had originally understood them. Frank had made her a promise and then failed to keep it. In her eyes, he had cheated her. Furthermore, so long as her kitchen remained unusable, Frank's inaction was harming her. He was not caring for her, as he had promised to do. Frank's failure to respond to her repeated calls merely amplified her perception that he was cheating and harming her. But his loyalty to his "family" provided a positive moral counterweight to these moral transgressions. It helped to neutralize the adverse moral meaning of his inaction and opened the door to trust.

My argument is that this moral transition—from cheating and harming to loyalty to family—was the critical transition of the Bernice-Frank mediation, allowing them to move from hostile opposition and reluctant compromise to the creation of a better, mutually valuable solution. It was a transition lacking in the Craig Lord mediation.

This moral transition can be understood in terms of Moral Foundations Theory ("MFT"). In the view of psychologist Jonathan Haidt and his colleagues, all humans share a set of fundamental moral reactions and judgments.¹⁹ The set is limited—Haidt currently identifies only six. They are foundational: specific moral reactions that we feel or express are built on them. They are universal, shared by all people, even if situation-specific moral judgments vary across cultures, sub-cultures, and individuals.

The fundamental moral reactions are best understood as dyads. Each is a kind of spectrum running from morally good to morally bad. People make moral judgments along these continuums.

The six moral dyads are:

1. Fairness/Cheating
2. Care/Harm
3. Loyalty/Betrayal
4. Authority/Subversion
5. Sanctity/Degradation
6. Liberty/Oppression²⁰

You can see that these are not moral rules or principles as we commonly understand and use them. They are not rules that tell us whether a particular action in a particular circumstance is right or wrong. They are not specific guides to behavior. Instead, they provide a more general structure within which specific moral claims are made and debated. Whether a particular action is fair, whether it imposes morally wrong harm, whether it marks betrayal, and so on, varies across different cultures, different communities, and even different indi-

¹⁹ Haidt, *supra* note 7, at 124.

²⁰ Haidt and his colleagues began with the first five, and have more recently added the sixth. *Id.* at 125, 170.

viduals. The specifics can be endlessly debated. But, Haidt argues, all the specific moral judgments occur as part of this more fundamental moral structure.

This account helps us to understand what happened in the Bernice-Frank mediation. Bernice brought to the mediation the moral judgment that Frank was cheating and harming her. She may have also been reacting with a sense of his disloyalty to her. His promise to renovate the kitchen created a kind of relationship between them that put him under a moral obligation to loyally follow through. His “disloyal” failure to follow through added to the moral aversion entailed in cheating and harm. But when Bernice learned that the frustrating silence in response to her complaints arose from Frank’s loyalty to Connie and Sam, the moral picture became more mixed. His loyalty to them helped mitigate Bernice’s sense that he was disloyal to her, or cheating or harming her.

Frank may also be understood to be enacting the moral virtue of authority. In MFT, authority does not simply mean the power to command others. It includes an obligation to behave with appropriate care for the people over whom authority is held.²¹ Frank’s exhibition of proper authority could enhance Bernice’s perception that he was also loyal and caring to Connie and Sam.

Frank’s positive moral stance toward Connie and Sam did not directly benefit Bernice. Bernice was only an observer of Frank’s moral action, not an immediate beneficiary. Nevertheless, actions can be appreciated as morally good, and evoke a favorable response, even when they are not directed at the person making the moral judgment. Under Haidt’s theory, moral judgments function as a kind of social binder even for people who are not directly involved in doing morally good or bad things to each other. Gossip is one of the ubiquitous activities through which people bind themselves into social groups and try to influence others in the direction of proper behavior.²² Frank became more morally acceptable to Bernice, and thus, more trustworthy in her eyes, because of how he acted toward Connie and Sam, negating some of her ill feelings based on how he acted toward her.

B. The Promise of Moral Foundations Theory

Several of the characteristics of MFT make it particularly attractive as a way to understand the shift in Bernice’s stance toward Frank. First, the moral judgments are intuitive. They come to Bernice, and to all of us, automatically and without conscious attention or effort. Bernice did not have to explicitly rea-

²¹ This account of authority draws on the theory of social relations developed by Alan Page Fiske, in which the authority/subordinate relationship is one of the fundamental ways in which people organize their relationships. ALAN PAGE FISKE, *STRUCTURES OF SOCIAL LIFE: THE FOUR ELEMENTARY FORMS OF HUMAN RELATIONS* 13–14 (1991).

²² HAITT, *supra* note 7, at 171; Jonathan Haidt & Fredrik Bjorklund, *Social Intuitionists Answer Six Questions About Moral Psychology*, in 2 *MORAL PSYCHOLOGY: THE COGNITIVE SCIENCE OF MORALITY: INTUITION AND DIVERSITY* 181, 190 (Walter Sinnott-Armstrong ed., 2008) (“People love to talk about moral questions and violations, and one of the main topics of gossip is the moral and personal failings of other people.”).

son her way from thinking that Frank was bad to thinking that he was also, in some real sense, good. We do not see her laboring over her moral judgment about Frank. She just knew it, quickly. In the grand debates over whether moral judgment is largely intuitive, or only worth its salt if justified by conscious reasoning, MFT is decidedly in the intuitive camp.²³

Second, MFT is a plural theory of moral judgment. Moral judgment is not limited to a single, master concept of fairness or judgment, but incorporates several different moral modules. This multiplicity makes it easier to understand how Bernice's moral judgment of Frank could shift. She did not have to abandon her judgment that Frank had cheated her by stopping work, or had harmed her, or had become disloyal to her. She could *add* to those intuitive moral judgments her equally intuitive understanding that he was loyal to Connie and Sam, cared for them, and was exercising proper authority with regard to them. If moral judgments were limited to a single metric, then people making them would be caught in a win-lose dilemma. One must either hold on to the moral conclusion, or give it up. And it is difficult to give things up.²⁴ The multiplicity of moral modules described by MFT provides a way to ameliorate the stark conflict. The force of the moral aversion in one module (such as harm) is lessened by a positive moral judgment in one of the other modules (such as loyalty).

Third, these moral modules are foundational. Under this approach, all moral reactions are built on one or more of them. They are in the background of all the specific moral reactions and judgments people actually experience and articulate. Even if Bernice does not express her disapproval and anger towards Frank in the explicit terms of the modules, the foundational characteristic of the modules means they underlie and animate the explicit critical arguments and feelings that Bernice voices. Similarly, we can understand that loyalty is a foundational aspect underlying the specific thought—"family"—that Bernice voiced in showing that Frank had also done a good thing.²⁵

Fourth, moral judgments as described in MFT are linked to emotional responses. People tend to *prescribe* moral virtues on the "good" side of each

²³ As between Plato (reason) and Hume (sentiment), Haidt comes down on the side of Hume. *E.g.*, HAIDT, *supra* note 7, at 41; *see also* Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *PSYCHOL. REV.* 814, 814 (2001) [hereinafter Haidt, *The Emotional Dog*].

²⁴ In psychological terms, both the need to maintain consistency, and the aversion to loss, which is more painful than a comparable gain, make giving up difficult regardless of the logical force of any reasoned arguments in favor of changing your mind. *See* ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* 57 (rev. ed. 2009) (regarding the question of consistency); DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 282–86 (2011) (regarding loss aversion).

²⁵ One of Haidt's interesting findings is that the different moral modules have differing salience for people who are politically liberal and those who are politically conservative. American liberals tend to react strongly in the Fairness and Caring modules, but seem rather numb on the Loyalty, Authority, and Sanctity scales. Conservatives' moral judgments are more evenly spread across all the modules. HAIDT, *supra* note 7, at 155–88.

scale, feel good about them, and find themselves attracted to people who exhibit them. But people *proscribe* the moral vices on the “bad” side of each scale. We feel bad about them and seek to avoid both the action and the person. Negotiation and mediation are more likely to be successful when the participants feel good (or at least not so bad) about each other. MFT posits that identifying and eliciting the good moral judgments can facilitate both negotiation and mediation.

Finally, MFT is attractive for the project of understanding moral judgment in negotiation and mediation because it identifies only a few modules. Unfairness and blameworthiness, as individual people experience it in conflict, can be as idiosyncratic as the people involved and as variable as snowflakes. It might seem a fool’s errand to try to identify and chase down all the specifics of a broad claim of unfairness. MFT, however, tells us that if we look past specific expressions of unfairness, we will find no more than five or six modules.

II. MORAL FOUNDATIONS THEORY IN THE REAL WORLD

Identifying a moral turning point in the Bernice Wilson-Frank DiLorenzo mediation does not establish that similar moral judgments exist in the world of real conflicts. Although many observers would find the Wilson-DiLorenzo mediation credible,²⁶ it was still “acted” and thus might not exemplify what happens to people enmeshed in their own very real conflicts. Examples from the real world are not easy to locate because we do not have access to the minute-by-minute exchanges of words, feelings, and actions that are needed to see intuitive moral judgments in action. Most mediations are private and confidential.²⁷ We do not have an adequate database to study with the needed detail.

Nevertheless, both mediation and negotiation stories, and even some negotiation theory, suggest that moral judgment in general, and the moral categories of MFT in particular, function widely in mediation and negotiation. Readers who have experience in mediation might review their own experiences to find examples.

²⁶ This is far from a universal reaction. Several readers have found it completely unbelievable that someone whose life was so hurtfully disrupted by Frank’s unexplained disappearance would ever let him back in the house. Many mediations will be characterized by antagonistic anger that never abates, even if the dispute is resolved by some compromise of settlement positions. But mediators (and others) usually will have at least some experiences in which initial antipathy somehow changes to greater mutual understanding and successful problem solving. Our task here is to explore whether MFT can help us account for such changes, and perhaps bring about more of them.

²⁷ Statements made in a negotiation or mediation arising from an effort to settle a lawsuit are privileged to a degree by Federal Rule of Evidence 408 and its state analogues, preventing the use of settlement statements to prove or disprove liability. Statements made in mediation, regardless of whether the mediation is to settle a lawsuit, may be privileged by virtue of Section 4 of the Uniform Mediation Act and similar state provisions. UNIF. MEDIATION ACT § 4 (2003). Parties to a mediation may also agree to keep their mediation statements confidential, and the Uniform Mediation Act affirms the validity of such agreements. *Id.* § 8.

A. *Mediation Stories*

A purse-snatching: Malcolm Gladwell recounts in recorded detail a mediation between a purse-snatcher and his victim, videotaped in England.²⁸ The mediation began in a distant, hostile manner, but it changed when the purse-snatcher began to reveal information about his own family, his child, and his dire financial straits. We might understand the shift in tone and content as follows: in the eyes of the victim, the purse-snatcher had committed the moral transgression of harming her (harm/care). The information about the purse-snatcher's family introduced some new moral dimensions into the discussion. Rather than seeing the offender as merely a harmer, the victim could also begin to see him as caring (for his child). In addition, in acting to protect his own family, even if he broke the law to do it, the offender was exhibiting loyalty to others, a moral good (loyalty/betrayal). The victim ended up even showing some care and concern for her robber's situation.

A disputed mechanical repair: Another possible example comes from a mediation in small claims court handled by one of my mediation course students. The dispute was between the owner of a motorcycle and the shop that had installed loudspeakers in it. The loudspeaker mountings had rusted, and the motorcycle owner blamed the shop. The student mediator, as he reported it, tried many of the standard interventions to find terms on which the parties could agree. He tried to reduce each party's confidence that they would win the case if they could not settle, communicating that facts are always uncertain, and one cannot easily predict what the judge will decide. The shop owner would not budge. The student mediator tried to find aspects of value beyond the dollar amounts at issue by reminding the owner that a reputation for good customer service is quite valuable for a business, and a contrary reputation for treating customers poorly is bad. Still no movement. Then the conversation came around to the fact that the customer was a friend of the shop owner's son. The owner changed his position, and the parties reached agreement!²⁹

This account has several layers of hearsay in it, and we lack the detail to confidently draw a conclusion about what happened. To me, however, it seems quite plausible that highlighting the relationship between the customer and the owner's son elicited a new moral response. Prior to that, the parties had been engaged in trading moral claims about fairness and harm. Each probably thought the other had acted unfairly: in the shop owner's eyes, the customer had paid for work done and was now "cheating" by asking for money back, and in the customer's eyes, the shop owner had "cheated" by not doing work of the quality that had been implicitly promised. On top of that, on the care/harm spectrum, each saw the other as trying to harm him. The introduction of the

²⁸ Malcolm Gladwell, *Here's Why: A Sociologist Offers an Anatomy of Explanations*, NEW YORKER, April 10, 2006, available at <http://www.newyorker.com/magazine/2006/04/10/heres-why/>.

²⁹ Notes of student description on file with author.

family relationship allowed the parties to shift to a different moral spectrum. It is a moral good for a father to be loyal to the members of his family (loyalty/betrayal). By focusing on the relationship between the customer and the owner's son, the customer could be brought within the ambit of the group for whom loyalty was a moral good.

It is also possible that some of the authority/subversion spectrum was elicited. Fathers have authority in their families. With this authority comes some obligation to care for those over whom authority is exercised. Once the moral good of recognizing and exercising authority came to the fore, it became morally more appropriate for the shop owner to show some care to the customer who was connected with his son.

The lawyer's advice: Mediator Dwight Golann describes saving a mediation by having a party's lawyer meet privately with the opposing party and his lawyer. Settlement efforts were getting nowhere; the creditor thoroughly mistrusted the debtor because the debtor had stopped payments when the dispute arose. Golann, as the mediator, discovered that the debtor had stopped paying on the advice of his lawyer. He arranged for the debtor's lawyer to explain to the creditor that the cessation of payments had been on his advice, and not the result of the debtor's own decision. Suddenly, in the eyes of the creditor, the debtor went from the moral wrongs of cheating (fairness/cheating) and harming (care/harm) to someone who was complying with the authority of his lawyer (authority/subversion.) The matter was subsequently resolved.³⁰

The terminated marine: Mediator David Hoffman tells the story of a former marine who, upset by his employer's practice of cutting corners and bending rules, became a whistle-blower and was fired. During the mediation, the marine came to understand that the employer did not treat rules, goals, and practices in the same clear and direct manner as the military did, and it was better for him to move on. While we lack many details of the people and the mediation, I suspect that differing views of authority was one of the factors driving the conflict between the company and the marine. Under MFT, a perception that authority is being abused can elicit a negative moral judgment. The marine's condemnation of the company's practices may have arisen from his sense that his colleagues and superiors were subverting proper authority. Resolution became possible when he realized that the company had a different view of authority, one that he did not wish to be part of.³¹

A transgender dispute: Russell Brunson tells the story of a conflict that arose from the adamant refusal of one resident of a housing complex to refer to a transgendered neighbor by the latter's new female gender, or to engage with her about arranging for community tasks that involved both of them. I think we can plausibly understand that the conflict rested, at least in part, on one resi-

³⁰ DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR NEUTRALS AND ADVOCATES* 74 (2009).

³¹ David A. Hoffman, *The Whistle-Blower: Mediating an Employment Termination Dispute*, in *STORIES MEDIATORS TELL* 141 (Eric R. Galton & Lela P. Love eds., 2012).

dent's moral judgment that his transgendered neighbor was, in the sanctity/degradation module, degraded, while in the other resident's judgment, she was being oppressed (liberty/oppression).³²

B. *Negotiation Stories*

Negotiation to create value and invent options for mutual gain: Many conflict theorists have urged negotiators to adopt a value-creating approach to mediation.³³ I think the approach is attractive because it has a positive moral connotation, above and beyond the tangible economic value it might add to an agreement. Using this approach, the negotiators, who are to various degrees opposed to each other and seeking to enrich themselves at the expense of the other, have now begun to *care* for their counterparts. The method shows that it is possible to be self-interested and still care for the other. The moral power of the care/harm module has been elicited.

We might even recast the famous argument against positional, distributive negotiation, and in favor of interest-based, value-creating negotiation, in terms of MFT. In *Getting to YES*, Roger Fisher, William Ury, and Bruce Patton point out that people who negotiate in a positional, distributive way face a dilemma between “hard” and “soft” negotiating.³⁴ Act too hard, by demanding too much and conceding too little, and one runs the risk of losing any agreement and poisoning relationships. Act too soft, being “nice” by giving concessions for the sake of harmony and a better relationship, and one may be taken advantage of. In the framework of MFT, acting too hard is a way to avoid being cheated, to protect the fairness of the exchange. But the cost of insisting on fairness is to put aside care for the counterpart and run the risk of harming them. Acting too soft is a form of caring for the counterpart, but at the cost of suffering from cheating at their hands. The path around that dilemma—focusing on interests rather than positions to invent options for mutual gain³⁵—allows one to exhibit

³² Russell Brunson, *Becoming a Believer*, in *STORIES MEDIATORS TELL*, *supra* note 31, at 193. Through the mediation, including an apology, the co-residents were able to agree to more respectful treatment and better methods to deal with issues in their common housing complex.

³³ The term “value-creating” refers to negotiators’ efforts to restructure an agreement so one participant gets more value from the new terms without subtracting any value from the other. It is most clearly set out in DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 88–116 (1986), and it pervades work such as ROGER FISHER & WILLIAM URY WITH BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 58–81 (3rd ed. 2011) (“invent options for mutual gain”) and WILLIAM URY, *GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE* (1991). It is equally pervasive in mediation theory. *See* sources cited *supra* note 10. Mediators who can help one or both participants achieve a better outcome without diminishing value for the others have substantially increased the likelihood of a resolution. These mediators have also helped the participants do substantively better than they might have done without the mediator’s intervention.

³⁴ FISHER ET AL., *supra* note 33, at 9, 13.

³⁵ *Id.*

some care for the counterpart, while at the same time insisting on what is fair and avoiding being cheated.

Managing emotions in negotiation: We can also see shadows of the moral judgment modules in Roger Fisher and Daniel Shapiro's guide for managing emotions in negotiation.³⁶ Fisher and Shapiro set out five precepts to elicit positive emotions and to mitigate the negative emotions that often accompany conflict³⁷: show appreciation of your counterpart, find affiliations with her, honor her autonomy, recognize her status, and adopt a role that is personally fulfilling.³⁸ Three of these precepts—affiliation, autonomy, and status—appear directly linked to the MFT moral judgment modules. Finding commonalities with your negotiation counterparts and treating them as colleagues—affiliation—is a way to highlight group connection and group loyalty, in the loyalty/betrayal module.³⁹ Autonomy—emphasizing the freedom of your counterpart to decide important matters—would seem to be a form of the liberty/oppression module. Status—giving your counterpart full recognition of whatever status is deserved—connotes the authority/subversion module. Showing appreciation might even be an instance of caring, although it does not imply bestowing a tangible benefit or assistance. Perhaps it would not be too strong to say that the Fisher/Shapiro precepts are a kind of field guide for MFT.

As an example of how the precepts might operate in the context of Fisher/Shapiro negotiation, imagine that a plaintiffs' lawyer in a class action has the opportunity to meet with the officers of the defendant company who have authority to settle the matter.⁴⁰ How should she approach them? Should she play hardball? Or would she be well advised to follow the Fisher/Shapiro precepts, seeking affiliation, recognizing her counterpart's autonomy and status? (Note that using the Fisher/Shapiro precepts does not mean compromising her goals, her focus on satisfying her clients' interests, or her bargaining limits, which she should craft by a clear-headed analysis of the promise and risks of continued litigation. Fisher and Shapiro urge us to use the precepts to the maximum extent it is feasible to do so without giving up on goals, interests, and limits.⁴¹) Let's assume that we would advise her to use the precepts.

Why should they be helpful? I suggest they have impact precisely because they address the intuitive moral judgments that are flowing through the encoun-

³⁶ ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (2005).

³⁷ *Id.* at 16–21.

³⁸ *Id.* at 17.

³⁹ Henri Tajfel's classic experiment with groups of boys showed that affiliation among group members leads to more cooperative and more valuable agreements. Henri Tajfel, *Experiments in Intergroup Discrimination*, *SCI. AM.*, Nov. 1970, at 96, 99–102.

⁴⁰ My thanks to my colleague Douglas Eakeley for suggesting the class action settlement negotiation as a place to examine the role of Moral Foundations Theory. The argument that the Fisher and Shapiro approach is valuable in such a situation is mine, which he may not necessarily share.

⁴¹ FISHER & SHAPIRO, *supra* note 36, at 37.

ter. I suspect that the company managers will not only be resisting the demands of the plaintiff-class lawyer in order to save the company money. They may see the class claim as unfair. Using MFT, we can extract the intuitive moral judgments that lie beneath a sense of unfairness. Certainly the class claim threatens to harm the company, and their management of the company, eliciting the care/harm module. It may also invoke the fairness/cheating module because the class lawyer is seeking payment that neither she nor the class appears to deserve.⁴² Even if the defendants arguably (but not conclusively) violated some aspect of the law, they may feel that they deserve to keep their money. Perhaps they believe that they were only operating according to the “rules” of competitive business as actually practiced and were under no obligation to follow the “technical letter of the law.” These intuitive moral judgments strengthen the defendant-managers’ resistance. Among other things, they will make it easier for the defendant-managers to believe that their defense is stronger than it is,⁴³ and that the class lawyer’s claim is greedy and unreasonable.

Affiliation, autonomy, and status can counteract these negative moral judgments much in the same way that the introduction of care and loyalty into the Wilson-DiLorenzo matter ameliorated Bernice’s judgment that Frank was cheating and harming her. By searching for some affiliation with the defendant-managers, class counsel may elicit the group loyalty pole of the loyalty/betrayal module. Demonstrating respect for the defendant-manager’s autonomy and status may bring out the positive authority pole of the authority/subversion module. If class counsel can thus reduce the intensity of the defendant-managers’ feelings of cheating and harm, it may be easier for the defendant-managers to think more clearly about the risks of the matter, see the situation more objectively, and search for creative solutions that preserve important company (and personal) interests, while also satisfying different interests of the class lawyer and the class.

While the Fisher/Shapiro precepts are designed for negotiation, they work equally well for mediation. We could easily give the same advice to a mediator trying to resolve the class action matter that we would give to the class lawyer. Actually, unlike a negotiator, a mediator faces the challenge of using the Fisher/Shapiro precepts along several dimensions at the same time. A mediator is always in negotiation with the participants (both parties and lawyers), seeking to persuade them to engage in the process in the way the mediator thinks is best. Highlighting the mediator’s affiliation with the participants, and honoring

⁴² Haidt notes that the Fairness/Cheating module can be expressed in two different modes. In some instances, and for some people, fairness is distribution according to what they deserve, usually by their efforts. In other instances, and for some other people, fairness is distribution through roughly equal division. HAIDT, *supra* note 7, at 138.

⁴³ Egocentric bias, leading to optimistic overconfidence in a good future, is a common feature of human decision-making. Various sources are collected in RANDALL KISER, *BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS* 124–26 (2010). Here, we see how egocentric bias can be fueled by intuitive moral judgment.

their autonomy and status, should moderate whatever negative moral judgments they are experiencing in their conflict. At the same time, a mediator would like the parties to employ the same methods with each other, finding points of affiliation, and showing respect for the autonomy and status of each, including both parties and lawyers.⁴⁴

A failed purchase of a house in Malibu: Negotiation scholar Michael Wheeler tells the story of how Arvind Gupta lost the opportunity to buy an expensive house at a very low price.⁴⁵ When some childless friends of his were confronted with a huge unexpected real estate tax bill for their house in Malibu, they decided to downsize and offered Gupta the house at a bargain price. Since the house was in Malibu, Gupta needed financial assistance to purchase it, even at the low price, and he sought out a wealthy friend to invest. The friend suggested offering a lower price, to test the bargaining waters, a sensible suggestion, both to learn the firmness of the owners' offer and to avoid the regret of feeling one has paid too much. Gupta did so. But the counteroffer offended the homeowners, who then withdrew the offer.⁴⁶ According to Wheeler, the homeowners told Gupta, "We treated you like a son, and this is how you thank us?"⁴⁷ The homeowners' reaction can be understood as their moral judgment that Gupta had been disloyal to them, acting on the wrong pole of the loyalty/betrayal moral module.

C. *Implications of these Stories*

The foregoing review of examples of moral modules has featured loyalty/betrayal, with a nod to authority/subversion in Roger Fisher's and Daniel Shapiro's precepts about negotiating. I have not set out many examples of fairness/cheating; I assume it is widely accepted that claims of cheating appear frequently in negotiations and mediations. Such moral judgments most likely play a meaningful role in many contracts disputes, in which one party feels that they have been cheated by the false promises of another, or by one party's failure to keep the promises they have made. Similarly, it is easy to understand that people in conflict feel they have been hurt, and that their opponent has committed the moral wrong of hurting rather than caring for them. Arguments about causation and damages in torts cases can often be mapped to moral claims about who did the hurt. The degree of hurt and compensation can similarly carry moral freight: the defendant's settlement offer, if any, may be seen by the plaintiff to insufficiently acknowledge the degree of hurt, and, conversely, the plaintiff's demand may be seen by the defendant as seeking undeserved com-

⁴⁴ Showing appreciation for the others' participation in the process—the fourth Fisher/Shapiro precept—would not hurt, either.

⁴⁵ MICHAEL WHEELER, *THE ART OF NEGOTIATION: HOW TO IMPROVISE AGREEMENT IN A CHAOTIC WORLD* 21–22 (2013).

⁴⁶ The house sold a year later for almost five times the price that had been offered to Gupta. *Id.* at 22.

⁴⁷ *Id.*

pensation—a form of cheating. A test for MFT lies in whether we can identify the other modules in mediated or negotiated conflicts, as well. Thus, I have tried to identify examples of loyalty/betrayal at work.⁴⁸

But what about authority/subversion, sanctity/degradation, or liberty/oppression? If MFT is correct, and if intuitive moral judgment pervades human relations and conflict situations, then shouldn't we see examples of those modules, as well?

I find aspects of both authority/subversion and loyalty/betrayal in the Wilson and DiLorenzo matter. Frank was the head of his company, and thus, he had authority over Connie and Sam, the employees who had contributed to the situation. In standing up for them, he was showing a proper exercise of authority, as well as loyalty, to his employees. This might not be immediately apparent until we understand “authority” in a broader sense than simply the power to command obedience. Haidt derives the MFT concept of authority from the work of anthropologist Alan Fiske.⁴⁹ Fiske has proposed that all social relationships fall into one of five categories, one of which is authority ranking.⁵⁰ In authority ranking, the person with higher ranking does not have *carte blanche* to do whatever he or she wants to the other. Authority carries with it some obligation to care for the subordinate. When the authority end of authority/subversion is understood this way, it includes some concern and responsibility for the subordinates. Frank voiced this concern and responsibility for Connie and Sam, which elicited a positive response from Bernice.

I think we would be most likely to find the authority/subversion module flaring up in employment disputes, particularly between supervisors and subordinates, as in the mediation story of the former marine,⁵¹ but it might also operate with some force in family disputes, conflicts between business partners, and even schoolyard conflicts, where there is disagreement over how much authority one person should properly exercise over another. Some medical or other professional malpractice disputes might elicit authority/subversion issues; the professional might feel morally affronted by having his or her professional judgment subverted by the client's or patient's claim. Conversely, a client or patient who has been injured by professional malpractice might intuit the moral

⁴⁸ A skeptic might point out many examples I've cited—Wilson and DiLorenzo, Gladwell's British mediation, the bike shop, the Malibu house—involve family or family-like relationships. Perhaps the moral judgment at issue is not Loyalty/Betrayal at all, but simply “family.” A defender of Moral Foundations Theory might respond that family is one of the places where Loyalty/Betrayal is most prominent, but that does not make “family” a foundational moral category. Instead, family is a specific articulation of a more fundamental intuitive moral judgment that also exhibits itself in patriotism, team spirit, and similar situations.

⁴⁹ HAIDT, *supra* note 7, at 144 (“The Authority foundation . . . is borrowed directly from Fiske.”).

⁵⁰ The others are community sharing, equality matching, market pricing, and a null category of the imposition of raw force. FISKE, *supra* note 21, at 3–4.

⁵¹ See *supra* text accompanying note 31.

mistake made by the professional who abused his or her authority by not taking proper care.

Sanctity/degradation seems less familiar in mediation and negotiation situations. These moral issues cluster around matters of religion, sex, cleanliness, and food.⁵² Some conflicts, such as those between divorcing parents over the proper religious affiliation for their children, may present a perceived threat to sanctity, which would give extra force to the parties' opposing views. In some other conflicts, something about the other disputant, rather than the matter in dispute itself, might elicit this moral module. A white person might feel extra antipathy dealing with a person of color.⁵³ The mediation story of the transgendered neighbor, described above, seems to fall into this category.⁵⁴ Even a conflict with someone deemed to be slovenly, or to smell bad, might give rise to an intuitive moral rejection.

Of course, a handful of incomplete and suggestive examples, some of which are not even real disputes, proves nothing. But they fit well enough for me to continue exploring the operating hypothesis that MFT accounts for the extensive, perhaps even universal, role of moral judgment in mediation and negotiation.

III. CRITIQUES OF MORAL FOUNDATIONS THEORY

A. *Has MFT Established an Identifiable, Limited Number of Modules?*

The idea of moral modules, and a limited number of them, is critical to MFT and to the project of understanding intuitive moral judgment in negotiation and mediation. Without either the concept of modules—functionally distinct areas of concern and reaction—or a limited number, we would need to address moral judgments either in terms of the widely variable specifics of each participant or seek to find some more general, universal moral principles, such as fairness or empathy. Philosophers Christopher Suhler and Patricia Churchland have challenged MFT on the following three grounds: “modules” remain an unsubstantiated account of how the mind actually works; MFT’s articulation of five (now six) particular moral modules has an arbitrary character, that is not well supported by empirical evidence; and the MFT concept does not match well with what neuroscience tells us about how the brain actually functions.⁵⁵

⁵² Tying the moral modules to evolution, Haidt notes that this module seems rooted in intuitive disgust with rotten or otherwise dangerous food, which has the obvious virtue of keeping people healthier. HAIDT, *supra* note 7, at 146–48.

⁵³ The discomfort may not require explicit racism. The Implicit Association Test (“IAT”) tells us that many people have unconscious bias. JOSHUA GREENE, *MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM* 51–53 (2013).

⁵⁴ See *supra* text accompanying note 32.

⁵⁵ Christopher L. Suhler & Patricia Churchland, *Can Inmate, Modular “Foundations” Explain Morality? Challenges for Haidt’s Moral Foundations Theory*, 23 *J. COGNITIVE NEUROSCIENCE* 2103, 2103 (2011).

While Haidt has a vigorous and well-stated rejoinder, attributing the critique in part to different degrees of preference for the extent of empirical support needed for a conceptual theory,⁵⁶ the challenge to the idea of mental modules and the apparent flexibility in identifying and naming modules does create concern. I will discuss the question of the *number* of mental modules below.⁵⁷ But if the idea of mental modules itself is not supportable, then the effort to identify and manage moral judgments in negotiation and mediation will be much more difficult.

For purposes of this article, I accept Haidt's account of moral modules, despite the possible weaknesses of the concept of mental modules in general.⁵⁸ My purpose is to explore whether Haidt's account is useful for negotiation and mediation, and for that task I can remain open minded about the reality of mental modules. A weakness in the concept of mental modules might help explain why I found it relatively easy to identify MFT's modules in a variety of negotiation and mediation situations.⁵⁹ In articulating the modules, Haidt and his colleagues have drawn on very familiar and evocative words, such as care, betrayal, subversion, and disgust. Because those words are so powerful, they can easily seem explanatory when we come to apply them to specific disputes. They may be floating free of any empirical mooring, a risk that is magnified if they have little or no empirical basis to begin with. But even with that caveat, I would still like to try to give more shape and name to the moral dimensions of negotiation and mediation.

B. Are the Moral Modules Innate or Learned? Are They Universal or Culturally and Individually Variable?

MFT has been subject to the objection that it is culturally specific rather than universal. Most of the studies on which it is based rely on WEIRD people, an acronym coined by the psychologists Joseph Henrich, Steven J. Heine, and Ara Norenzayan to refer to people from "Western, Educated, Industrialized, Rich, and Democratic (WEIRD) societies."⁶⁰ Haidt acknowledges the cultural limitations of much of the study data, but he and his colleagues have conducted studies in other countries and other cultures.⁶¹ Even if the modules are not truly universal, they can still be quite useful to a mediator. For the most part, Ameri-

⁵⁶ Jonathan Haidt & Craig Joseph, *How Moral Foundations Theory Succeeded in Building on Sand: A Response to Suhler and Churchland*, 23 J. COGNITIVE NEUROSCIENCE 2117, 2118 (2011).

⁵⁷ See *infra* Part III.E.

⁵⁸ Suhler and Churchland note that brain studies show us that the brain operates through a very rich pattern of connections, in a "loop[ing]" kind of fashion, rather than limiting function to particular areas that might form a physical basis for "modules." Suhler & Churchland, *supra* note 55, at 2109.

⁵⁹ See *supra* Part II.

⁶⁰ Joseph Henrich et al., *The Weirdest People in the World?*, 33 BEHAVIORAL & BRAIN SCI. 61, 61 (2010).

⁶¹ Graham et al., *supra* note 7, at 92–93.

can mediators work in a WEIRD society with WEIRD people; findings related to such people will help the mediators who work with them.

Of more concern is Haidt's own finding that the constellation of moral modules varies between people of different political views. People who are politically liberal tend to be concerned with issues of care/harm and fairness/cheating, and less attentive to issues of loyalty/betrayal, authority/subversion, or sanctity/degradation.⁶² Political conservatives, by contrast, tend to be concerned about all of these moral modules in more equal degree.⁶³ This variability suggests that even if the modules are innate, they may somehow become enhanced or minimized through a person's growth and experience.⁶⁴

These findings, based on tendencies across large groups of respondents, should not lead a mediator or negotiator to draw conclusions about pertinent moral issues simply by learning the political leanings of their mediation participants. Some politically liberal people may respond to matters of authority or loyalty quite vigorously, even if the majority of them do not, and much may depend on the particular circumstances in which the salient issues arose. Little concern with authority in a formal institutional setting, such as a large corporation, may change to much more concern for the proper respect for authority within someone's family, for instance. Any correlation between political views and moral judgments is by no means universal across groups or across all conflict situations.

More importantly, variability means that mediators should not assume that all people they deal with will experience the same moral judgments with similar intensity. For some, cheating and harm may loom particularly large, while betrayal or subversion simply do not elicit much reaction. For others, attending only to fairness and caring may not remove the moral sting from the situation. They may need to deal with the felt immorality of betrayal or subversion, or may need a dose of loyalty or authority to make moving forward morally acceptable.

C. *Were the Moral Modules Formed by Evolution?*

Critics challenge Haidt's claim that the moral modules have evolved with the human species, binding human communities and vastly increasing mankind's opportunities for successful cooperative action.⁶⁵ Proof of evolutionary function is often weak and contested, since it depends on much inference about the past with almost no directly observable data. If we cannot show that the

⁶² See Jonathan Haidt & Jesse Graham, *When Morality Opposes Justice: Conservatives Have Moral Intuitions that Liberals May Not Recognize*, 20 SOC. JUST. RES. 98, 99 (2007).

⁶³ *Id.*

⁶⁴ HAIDT, *supra* note 7, at 130.

⁶⁵ See, e.g., Moses L. Pava, *The Exaggerated Moral Claims of Evolutionary Psychologists*, 85 J. BUS. ETHICS 391, 398–99 (2009) (discussing criticisms).

moral modules serve an evolutionary, beneficial function, then Haidt's claim that the moral modules are built into human functioning and are foundational becomes correspondingly weakened.

The evolutionary explanation, however, is not necessary to make MFT useful for contemporary mediators or negotiators. The moral frameworks might be foundational for people here and now, even if they did not develop through evolution to improve social cohesion and cooperation. If they are foundational, then a mediator has some guidance for how to understand the moral dynamics of the conflict. Even without the evolutionary origins account, we can credit the research of Haidt and others identifying a discrete and limited set of moral modules. We can then feel moderately confident using that set.

D. *How Strong is the Empirical Evidence for MFT?*

Haidt developed the theory from questionnaires using odd-sounding and troubling scenarios, such as eating one's pet dog or slapping one's father.⁶⁶ The questions might seem too troubling and unusual to justify the creation of an entire theory of mental functioning, particularly one with such a fully articulated and multi-part structure. Nevertheless, Haidt and his colleagues have kept at it, and researchers have made findings using other methods, including studies of brain activity using fMRI machines, that are at least consistent with the theory.⁶⁷ Haidt candidly admits that the theory is a work in process, and subject to revision as the empirical evidence develops.⁶⁸

E. *Are There Only Five or Six Moral Modules?*

Haidt remains open-minded on whether there are only five or six foundational moral modules. He notes that further research might identify more, or fewer.⁶⁹ The tentative nature of the list should give us some pause in applying MFT. If it turns out that there are more, then a mediator or negotiator might be unwise to limit the discussion if she were to focus only on those that Haidt has

⁶⁶ See, for example, the questionnaire set out in *The Righteous Mind* asking the respondents, in part, how much they would need to be paid to either "1a. Stick a sterile hypodermic needle into your arm," or "1b. Stick a sterile hypodermic needle into the arm of a child you don't know." Haidt, *supra* note 7, at 129. The different dollar amounts demanded reveal different moral judgments for similar actions, depending on the moral module elicited by the question.

⁶⁷ Graham et al., *supra* note 7, at 73, 97.

⁶⁸ *E.g.*, *id.* at 71.

⁶⁹ *Id.* at 104. Ronnie Janoff-Bulman and her colleagues present a model that has six distinct attributes. Ronnie Janoff-Bulman & Nate C. Carnes, *Surveying the Moral Landscape: Moral Motives and Group-Based Moralities*, 17 *PERSONALITY & SOC. PSYCHOL. REV.* 219, 221–22 (2013). Tase Shakti Rai and Alan Page Fiske argue that intuitive moral judgments should be understood in terms of the underlying (and finite) structure of human relationships, and not as disconnected from relationships as Haidt would have them. Tase Shakti Rai & Alan Page Fiske, *Moral Psychology Is Relationship Regulation: Moral Motives for Unity, Hierarchy, Equality, and Proportionality*, 118 *PSYCHOL. REV.* 57, 57–58 (2011).

identified so far. At the same time, many more equally fundamental modules would deprive MFT of much of its usefulness as a way to avoid an unmanageable flood of possible moral issues.

F. Can We Identify the Moral Modules in the Wild?

Identifying moral modules in the tightly controlled settings of questionnaires, neuroscience experiments, or even close readings of texts is a far cry from seeing them operate in the free-flowing, poorly structured, multifaceted setting of a negotiation or mediation. Real life settings create a substantial risk of false diagnosis. The risk is made worse by the fact that MFT uses familiar but highly charged words to describe the modules. If a party to a dispute alleges “cheating,” is it because she understands her counterpart to have violated the moral standards of the fairness/cheating module, or only because that was the word available to her when what she was really experiencing was harm and betrayal? Or, if she says she is “disgusted” by the way the other has “betrayed” her by flouting her “authority,” how can we tell which module or modules lie behind her view of the conflict? Perhaps we could become more confident about the module or modules in play by asking her to talk more about the situation and her view of it. Or perhaps the context in which the words were said—after a particularly hostile verbal barrage from the other, for instance—might help us judge when not to take the module-specific words as indications that the speaker is making the moral judgment supposedly indicated by those words. MFT has proposed no way for ordinary practitioners to understand the words with technical precision in live situations.

IV. IMPLICATIONS FOR MEDIATORS AND NEGOTIATORS

A. Should Mediators and Negotiators Care about Intuitive Moral Judgments?

The importance of MFT for mediation and negotiation depends on how we understand the moral modules to operate in the mind. May they safely be ignored if no one mentions them? Or, to the contrary, must they always be attended to, even when no one has voiced moral claims or moral judgments, such as in a mediation that focuses entirely on competing monetary settlement positions? Do they only operate in certain circumstances? We do not know the answers to these questions, but our assumptions about them will have an important impact on what we do.

At one extreme, we might think that the moral judgments made by the moral modules simply do not exist unless and until they become part of someone’s conscious awareness or palpable feeling. If moral judgments are primarily matters of reasoning, they must be explicitly articulated, even if only in one’s private thoughts, to count as moral judgments. We could expand this view of the operation of moral judgments to encompass feelings, as well. Someone might not have an explicit, conscious thought about the rightness or

wrongness of some act or situation, but might feel angry, sad, or troubled by it. The feeling might have been elicited by a moral judgment, even if the moral judgment only remains a vague sense that something is right or wrong. In either event, under this explicit view, the moral judgment cannot be properly said to exist, or to have any effect on thought or action, unless the person making the judgment perceives it some way.

At the other extreme, we might understand that the mind is continually but unconsciously assessing the moral situation along all the moral modules, even when a person remains totally unaware of them.⁷⁰ Just as we can safely drive a car while thinking about what to have for dinner, leaving it to our unconscious mental processing to guide the car and avoid danger, perhaps we can discuss all sorts of things in a negotiation or mediation without being aware of any moral dynamics. In the example of driving, when something unusual or dangerous is unconsciously perceived, the appropriate thoughts and feelings leap into conscious thought and the driver acts accordingly. Perhaps the moral modules work the same way: the mind constantly inventories the people and actions with whom one is dealing, raising a moral alarm to palpable feeling or conscious thought only when something unusual or threatening appears.

Intuitive moral judgment might act in some way between these two extremes. It might operate for the most part unconsciously, but not continually. We would then want to understand more fully when and how it might start to operate unconsciously and how it might affect thought and action. For instance, intuitive moral judgments might be “primed” by words or actions, images or memories. In the psychological phenomenon of priming, people are unconsciously influenced to have certain thoughts, experience certain feelings, or take certain actions by the priming agent.⁷¹ In one famous experiment, people who had first been given warm drinks were more likely to characterize someone they read about as “warm.”⁷² In another, people who had, as instructed, recalled an ethically questionable deed, were more likely to take an antiseptic wipe to clean their hands.⁷³ Intuitive moral judgments might spring to unconscious life when primed, and have some effect on thought and action even when not explicitly articulated, recognized, or felt by someone.

I do not have a confident opinion about which of these accounts, if any, best describes how our moral judgment works. The most rational approach—moral judgments do not count as such and need not be considered unless they

⁷⁰ Recent research suggests that unconscious moral judgment even affects how and what people notice, not only how they make decisions. *See, e.g.*, Ana P. Gantman & Jay J. Van Bavel, *Moral Perception*, 19 *TRENDS COGNITIVE SCI.* (forthcoming Aug. 2015), available at <http://ssrn.com/abstract=2647767>.

⁷¹ KAHNEMAN, *supra* note 24, at 52–58.

⁷² Lawrence E. Williams & John A. Bargh, *Experiencing Physical Warmth Promotes Interpersonal Warmth*, 322 *SCIENCE* 606, 607 (2008).

⁷³ This has been termed the “Macbeth” effect. Chen-Bo Zhong & Katie Liljenquist, *Washing Away Your Sins: Threatened Morality and Physical Cleansing*, 313 *SCIENCE* 1451, 1452 and erratum posted Oct. 13, 2006 (erratum not changing the pertinent conclusion).

are explicitly thought or felt—is, of the three, most at odds with the psychological account of the “new unconscious.”⁷⁴ At the other extreme, it would be difficult to demonstrate that our minds are continually making unperceived moral assessments along the five or six moral modules, since, by definition, most of that important mental functioning throws off no explicit or conscious markers. Nevertheless, we can speculate on the implications of each for a mediator or negotiator.

The explicit model of moral judgment presents the least concern for a mediator or negotiator. Unless a disputant says something with moral meaning, or expresses a feeling that seems closely linked to a moral judgment, we can pretty safely assume that the moral modules articulated by MFT are not operating or influencing the disputant’s decision-making. One must be cautious with such a judgment, however, even in the explicit model. A participant might be thinking a moral thought, or feeling an emotion linked to a moral judgment, without obviously expressing it to a mediator or negotiator. There are myriad reasons why someone might censor their own thoughts or feelings, such as a sense that they are inappropriate for the situation, or perhaps are a cause for shame or embarrassment, or would expose a weakness that another could take advantage of, and so on.⁷⁵ The participant might have a briefly passing thought along these lines, or a sudden but temporary feeling, and then put them aside without their becoming part of the mediation or negotiation. A mediator or negotiator who wants to recognize and deal with moral judgments that appear in this way should remain attentive to these brief appearances, and should use the standard methods of good interviewing to make sure they are learning what the participants are actually thinking and feeling.⁷⁶

But under this mental model, a mediator or negotiator could choose to ignore the moral thought or feeling with at least a moderate sense of assurance. Once the thought or feeling has passed, under the explicit or rational approach, it no longer operates to affect further thought or action. In the Wilson-DiLorenzo mediation example, the mediator heard Frank mention “loyalty.” She might have let that pass, and the matter might have moved on without the moral issue of loyalty playing a part. Instead, she reiterated the word, kept Frank’s attention on it, and even suggested that it might help his negotiation with Bernice. And so it turned out to be.⁷⁷

If, however, moral judgments and associated feelings operate more persistently in an unconscious way, either in the constant or priming models de-

⁷⁴ See generally TIMOTHY D. WILSON, *STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS* (2002); Haidt, *The Emotional Dog*, *supra* note 23, at 814–15.

⁷⁵ DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 19–26 (3d ed. 2012) (listing inhibitors to disclosure in interviewing situations).

⁷⁶ *Id.* at 46–63.

⁷⁷ Mediator Cutrona to DiLorenzo in private caucus: “I think the fact that you are so loyal to [Connie and Sam], that they have been long-term employees speaks well for you. I don’t understand you [sic] hesitancy in terms of telling [Bernice] that.” FRENKEL & STARK, *TEACHER’S MANUAL*, *supra* note 8, at E-38.

scribed above, mediators and negotiators would ignore them at greater peril. They will not disappear simply by the failure to explicitly think or talk about them. Even if Frank never voiced his thoughts about his loyalty to Connie and Sam, or they were dropped from the conversation after a brief mention, his thinking and feeling would still be affected by his sense that it was morally right to remain loyal to them. We cannot predict for sure what the effect would be, but it would likely make him less willing to acknowledge the bad things that had happened to Bernice, or to make concessions to her, since both of those might mean turning away from his loyalty to them.

This is where MFT has consequence for mediation and negotiation. It tells us that moral modules most likely operate in a pervasive or priming manner. After all, the moral modules arise, intuitively, automatically, quickly, and effortlessly. Explicit, rational thought plays a minor role, meaning that moral modules will have an effect even if no one discusses them or pays explicit attention to them. By making the moral issue of loyalty an explicit part of the conversation, Cheryl Cutrona, the mediator, tried to exert more intentional control over it, rather than letting it silently affect the course of the mediation.

B. How Can Mediators and Negotiators Discover the Moral Modules?

If moral modules operate pervasively or by priming, how can a mediator, or even a participant for that matter, know whether specific modules are influencing thought and action? By definition, people make their moral judgments without necessarily being aware of what is going on. The most apparent way is to listen, but listening is not simple. One could just attend to words or stories that are particularly indicative of a moral judgment, or associated with one of the modules—words about fairness, harm, disloyalty, and lack of respect might all be good clues. Similarly, a display of feelings such as anger, fear, or disgust, even if only fleeting, might indicate some unstated moral judgments.

Having heard such words or seen such displays of feeling, a mediator might then seek to learn more about the moral story the speaker might be trying to tell. The least intrusive way to learn would be simply to articulate or reflect back the words or feelings he or she heard or saw. Such reflection could signal to the speaker that the words and feelings were appropriate, and the speaker might then go further with them.⁷⁸

But a mediator (or a listening negotiator) could also go further, suggesting words or naming feelings to see whether they elicit a fuller moral account from the speaker. The benefit of such an approach is that it would disclose an intuitive reaction that might otherwise remain hidden but still affect the discussion. The danger, however, is that the mediator's or negotiator's own statements could prime a moral judgment that would otherwise not exist or have any impact. In this instance, it makes a difference whether moral modules are continu-

⁷⁸ BINDER ET AL., *supra* note 75, at 46–55 (describing the techniques of reflective or active listening).

ally working unconsciously in the listener, or whether they only become a factor if primed in some manner.

Moral judgment priming may also occur for reasons other than a mediator's or negotiator's intervention. Many statements or events in a mediation or negotiation could elicit an intuitive and unconscious moral judgment. A person in a conflict may have made moral judgments or had associated feelings at some point during the conflict, even if only fleetingly and not fully articulated or realized. Having had the previous experience, the judgments and feelings might be more readily accessible, and have a greater potential for an impact, than if they had never crossed the person's mind initially. If that is so, then the priming might be something out of the mediator's or negotiator's control. He or she could remain alert to whether the discussion seems to elicit words, feelings, or actions that have a moral connotation, without directly injecting a moral issue that was not already inchoate.

C. Should Mediators and Negotiators Use a Variety of Moral Modules?

If moral judgments are as pervasive and ungovernable as MFT suggests, then mediators are faced with a substantial dilemma. They need to address the moral judgments that may be hindering a good process and a good resolution. Equally important, it would be useful to harness moral judgments that could improve process and outcome. But any actions to engage with the participants' moral judgments may collide with party autonomy and self-determination. Honoring participants' autonomy and self-determination is a cardinal ethical principle for mediators.⁷⁹ People own their moral judgments, and it is highly intrusive to try to get them to change, or even to raise questions about their moral judgments.

Of course, if we take the view that moral judgments do not operate in a mediation setting unless the participants explicitly recognize and articulate them—the conscious-processing model of moral judgment—the mediator's dilemma is ameliorated: simply stay away from whatever moral judgments are expressed. At most, a mediator might respond if a participant accuses her of operating an unfair mediation process, such as “cheating” on the promise of equal treatment by not giving the participants equal time or respect. It does not undermine respect for a participant's autonomy for a mediator to respond directly to an explicit claim that the mediator did something wrong.⁸⁰

The troublesome quality of MFT lies in the fact that, under its account, moral judgments cannot be limited to those that are explicitly articulated. They pervade without being explicitly mentioned. A mediator or negotiator cannot be

⁷⁹ AM. ARBITRATION ASS'N ET AL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005) (Standard I: Self Determination, “A. A mediator shall conduct a mediation based on the principle of party self-determination.”).

⁸⁰ Some mediators might choose to respond less directly, merely summarizing and reflecting back what the participant said, and then let the process go forward.

confident that they do not exist, or have no effect, simply because no party makes an explicit moral claim. Mediators should seek to understand and deal with unstated assumptions and views that might be affecting the mediation. Does that sound too intrusive? It would not be intrusive to question mistakes of fact, such as a math error in calculating the amount of a demand, or to question the participants' unrealistic, wishful predictions that a court will award them everything they want. It would also be appropriate to explore and question a participant's mistaken belief about the negotiation process itself; they might suffer from an unrealistic expectation that their opponents will "cave in" so long as they remain "tough" and yield no positional ground. Further, it would not be intrusive for a mediator to explore whether a participant is making these kinds of mistakes, even if they have not been explicitly articulated. Each of these mistakes, stated or not, hinders the search for a good resolution. Good negotiation and mediation should expose this kind of error, and encourage the participants to adjust their thoughts and actions accordingly.

Intuitive, unexamined, and unarticulated moral judgments can thwart the search for a good resolution in the same way as factual mistakes or biased judgments. Cass Sunstein has likened intuitive moral judgments to decision-making "heuristics," the mental shortcuts and biases we use to address many of the issues that face us.⁸¹ Often, those heuristics provide an effective way to make a decision without an unnecessary use of mental energy and time. Sometimes, however, they skew judgment and prevent good decisions. A good negotiator or mediator should step in to counteract their effect. But moral judgments seem to form part of a person's being in a way that facts and predictions do not. Trying to "correct" them raises ethical concerns, particularly for a mediator, that correcting bad math or bad predictions does not. In terms of moral judgments, one might argue that negotiators and mediators should leave participants as they find them.⁸²

Regardless of one's view on the need to leave moral judgments alone, mediators still have options that might alleviate the participants' judgmental obstacles to good mediation. As noted above,⁸³ the nature of an articulated moral claim might be ambiguous or misleading, and a mediator could at least try to clarify it. For instance, a participant who says that some act or settlement proposal is "unfair" might be speaking from a fairness/cheating module, accusing the other party of cheating in some way. The statement of "unfair" might have another moral module meaning, though, such as the other person being harmful and insufficiently caring, or subversive of the speaker's authority, or disloyal in

⁸¹ Cass R. Sunstein, *Some Effects of Moral Indignation on Law*, 33 VT. L. REV. 405, 432–33 (2009).

⁸² Opinions may differ on how cautious a mediator might be in this regard. My colleague Kenneth Kressel, an experienced mediator and mediation scholar, would feel comfortable with a more direct engagement with a participant's moral views, making them part of the mediator's work. Email on file with the author.

⁸³ See *supra* Part IV.A.

some way. Without debating whether the accused actually acted unfairly, a mediator might ask the speaker to talk more about the expressed moral judgment, to see if the judgment is really of a different kind. Clarifying the nature of the moral claim might create opportunities for more fruitful discussion. An opponent who bristles at being labeled a “cheater,” for instance, might not be so offended by an accusation of disloyalty. Then, if it turns out that disloyalty more accurately states what the speaker was feeling, the opponent might be more willing to engage in a discussion of how to solve the matter.

The pluralist nature of MFT is useful because it can reveal ways to see even morally troublesome opponents in a morally better light, as happened in the Wilson-DiLorenzo matter. Craig Lord handled the mediation simply as a matter of compromising the parties’ competing claims, in light of the law, the provable facts, and what one should expect from a trial. The salient moral issue in his handling of the mediation was *how bad* a cheater Frank was: Why did he install cabinet “seconds”? Was it because he did not care for Bernice, and sought to unfairly cheat her out of what he had promised? Or was it standard in the industry to install that kind of cabinet?⁸⁴ Was his work stoppage justified by delays in getting parts? Or was he acting in his own self-interest in a way that hurt Bernice? Lord did not have the parties engage in the moral dimensions of these events, or change the moral judgments they might have about each other. He instead focused the discussion on industry standard and the risks each faced at trial. In Cheryl Cutrona’s mediation, however, a different moral module—Frank’s loyalty to his employees—also became part of the discussion, allowing Bernice to trust Frank more without having to change her view that he had been wrong to stop work and ignore her.⁸⁵

Discussion about the moral claim may, in some instances, moderate the moral judgment itself, even without shifting focus to a different module. When asked to describe in more detail how and why an opponent is a cheat, for instance, a speaker may realize that their claim is not logically coherent, or rests on assumptions that do not seem so correct once articulated. But we should not be optimistic that talk and explanation will lead someone to change their moral judgment. Haidt notes that intuitive moral judgments—that is to say most moral judgments—are quite resistant to reason. Indeed, most of what passes for moral “reasoning” is actually nothing more than rationalization of conclusions already embraced.⁸⁶

⁸⁴ DiLorenzo to mediator Lord: “The cabinets are the cabinets that we always use. They are irregular; that is why we are able to buy them—but they are sound” FRENKEL & STARK, TEACHER’S MANUAL, *supra* note 8, at E-18.

⁸⁵ Focusing on someone’s morally positive actions, as a way to ameliorate the effect of negative moral judgments, is a kind of polar opposite from using guilt to try to change a participant’s decision. *See* Stark & Frenkel, *supra* note 18, at 325 (describing how mediators might elicit participants’ feelings of guilt to induce the participants to change their negotiating positions, but with the risk that feelings of guilt that are too strong might produce anger and resistance from the participants).

⁸⁶ *E.g.*, HAIDT, *supra* note 7, at 87.

Negotiators need not be as concerned as mediators with the autonomy and self-determination of the others they are dealing with. Negotiators must serve their own interests, and the interests of their principals or clients, if they are negotiating for another. When these interests conflict with those of their negotiating counterparts, a high degree of influence or even manipulation of the other may be justified. There are both practical and moral reasons, though, for even a negotiator to be concerned with autonomy and self-determination of their counterparts. Such attention can elicit a greater willingness to agree.⁸⁷ And treating the other as an end, and not just as a means to satisfy one's own interests, is morally good.⁸⁸ Of course, all of this must still be done in the context of the need to serve one's own or one's principal's interests as well.

Once we understand moral modules as a plural phenomenon, however, we see that even a mediator has opportunities to engage with a participant's moral judgments without disagreeing with them or trying to change them. Knowing that the participant most likely has moral judgments across a range of modules, a mediator or negotiator can look for places to avoid a direct conflict between a moral good and a moral bad. It may not be necessary to get a participant to abandon the view that their opponent did something morally wrong. Instead, one can look for instances of actions in a different moral module that are morally good. This is precisely what Cheryl Cutrona did in the Wilson-DiLorenzo matter. Rather than trying to get Bernice to think that Frank was not really as much of a cheat as she thought he was, she allowed Bernice to understand that Frank had taken a morally good path of showing loyalty to his business "family."

D. Moral Foundations Theory and the Mediator's Own Judgment

MFT presents yet a further challenge to mediators—themselves. Mediator ethics require that a mediator remain impartial between the other participants.⁸⁹ But MFT tells us that mediators will probably be making intuitive moral judgments about the participants, consciously or not. In the strong account of how the modules function, the mediator's intuitive moral judgments will be influencing his or her views and actions even if the mediator has no conscious thought or feeling about good or bad. Mediators may intuitively understand that one of the participants cheated, or demonstrated insufficient care, or was disloyal in some way, and so on. Those understandings will most likely have some effect on what the mediator says and does, such as how hard to push for a compromise, whether particular terms seem "reasonable," whether to focus more on

⁸⁷ FISHER & SHAPIRO, *supra* note 36, at 74–75, 82–89.

⁸⁸ Jonathan R. Cohen, *When People Are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739, 742–43 (2001).

⁸⁹ AM. ARBITRATION ASS'N ET AL., *supra* note 79 (Standard II: Impartiality, "B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.").

making adjustments for future dealings, or simply get “closure” on the ongoing dispute and encourage the participants to move on to other things.⁹⁰

Moral judgments about the participants thus create a real risk that a mediator might not be treating the participants in an equal or even-handed manner. One might think that impartiality requires the avoidance of all moral judgments. But MFT tells us that such avoidance is not possible.

A mediator’s intuitive moral judgments will probably be less intense than those of the participants themselves. As has been pointed out,⁹¹ MFT primarily concerns *interpersonal* moral judgments, the kind people make about each other, not our thoughts and feelings about the morality of our own actions. Not having been in an interpersonal relationship with the parties, mediators will mostly only be observers of what was done. This distance to the conflict may reduce the intensity of their intuitive moral judgments, but it does not eliminate them altogether. MFT describes a rich web of judgments that bind societies; societies necessarily function by its people constantly assessing and judging each other from a moral perspective.⁹²

MFT does not give us an operating manual of when and how mediators, or anyone else, can set aside or counteract intuitive moral judgments through deliberation or rational moral thought. It only warns us that such control is less possible than we might like to believe. Nor do we have a clear account of whether or how a mediator’s or negotiator’s experience and expertise might disarm or sidestep intuitive moral judgments that would otherwise influence one’s thought and action. A mediator whose style focuses only on the participants’ negotiating leverage and legal strengths and weaknesses might, over time, come to be less affected by his or her own intuitions about cheating, harm, betrayal, or subversion of authority than a mediator who seeks to know more about the moral dimensions of the conflict. But we cannot be sure. A mediator’s own intuitive moral judgments about the participants might influence how he or she assesses the participants’ negotiating leverage and legal strengths; if a mediator intuitively judges one of the participants to have acted in a morally dubious way, he or she may simply not as readily see that participant’s negotiating leverage or the strengths of the case, or may not be as willing to search for novel ways to achieve a good resolution. Even if a mediator’s judgment is not subtly distorted by an unconscious moral judgment, his or her will and energy to keep working with a participant—and mediation often re-

⁹⁰ For a thoughtful and wise description of how mediators can recognize and respond to their automatic emotional reactions to the participants, see GARY FRIEDMAN, *INSIDE OUT: HOW CONFLICT PROFESSIONALS CAN USE SELF-REFLECTION TO HELP THEIR CLIENTS* (2015). Friedman does not explicitly refer to moral judgments or to Haidt’s moral modules, but intuitive feelings are often linked to moral judgment.

⁹¹ See Janoff-Bulman & Carnes, *supra* note 69, at 219; Ronnie Janoff-Bulman & Nate C. Carnes, *Moral Context Matters: A Reply to Graham*, 17 *PERSONALITY & SOC. PSYCHOL. REV.* 242, 242 (2013).

⁹² Haidt & Bjorklund, *supra* note 22, at 181.

quires an abundance of both—may flag in the face of some unstated moral doubts.

Moreover, mediators who limit themselves to a narrow focus on negotiating leverage, legal strengths, and reciprocal compromises, for the sake of avoiding intuitive moral judgments would also be limiting the opportunities provided by mediation.⁹³ Focusing only on positional compromises ignores the opportunities that mediation provides for creating more value for the participants, or helping them improve troubled relationships, or achieve greater mutual understanding.⁹⁴

CONCLUSION

Contemporary moral psychology provides a tool to examine certain dynamics of negotiation and mediation in a revealing light. The specifics of a dispute—the dollars involved, the interests and needs lurking beneath the surface, the claims and denials of responsibility, the shape and progress of negotiation—often seem accompanied by vaguely shaped issues of fairness and unfairness, and by the ebb and flow of feeling. Moral psychology, and in particular the branch known as MFT, sheds light on this shadow dimension. Using it, we can understand better why some negotiations break down and some mediations end with impasse. Also, it can help explain why some discussions focus entirely on the compromise of dollar claims, without encompassing other aspects of the situation, such as creating value by dovetailing the parties' complementary needs and interests, or dealing with difficult relationships and distorted communication.

MFT, as developed by Jonathan Haidt and his colleagues, proposes that people bring to every social interaction a finite set of intuitive moral modules, which constitute the foundations of their moral judgments and feelings about themselves and others. Rather than relying on some general sense of fairness, people respond to others by intuitively understanding whether the other is being fair or cheating, caring or harming, showing loyalty or betrayal, properly exercising (or obeying) authority or subverting it, maintaining sanctity or eliciting disgust, or permitting liberty or imposing oppression. By attending to the presence of these moral reactions, in others and in themselves, participants in a ne-

⁹³ Such action would be toward the narrow end of the narrow-to-broad scale of possible mediator actions, as described by Leonard Riskin. Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 3–4 (2003).

⁹⁴ See Jonathan M. Hyman, *Four Ways of Looking at a Lawsuit: How Lawyers Can Use the Cognitive Frameworks of Mediation*, 34 WASH. U. J.L. & POL'Y 11, 14–17 (2010) (describing how mediators can handle mediation through four different cognitive frameworks: positional compromise; creating more value by dovetailing complementary interests; dealing with relationship and communication problems; and fostering greater mutual understanding by the disputing parties. In each, the mediator provides benefits that are more difficult for the parties and their lawyers to achieve through unmediated negotiation.).

gotiation or mediation can better manage the process of achieving a more satisfactory outcome.

Attention to the moral modules may affect a negotiation or mediation in a variety of ways. Simply bringing the moral judgment issues into explicit discussion may moderate a moral aversion that has caused the participants to resist any progress towards a solution. For instance, when the participants realize that one of them tends to see fairness in terms of equal distribution while the other tends to see fairness in terms of what is deserved, they may realize that they need to deal with both versions of fairness to reach an agreement. Similarly, a participant may mobilize the moral power of caring, not hurting, by demonstrating that she is sincerely interested in trying to meet the needs of the other.⁹⁵ A participant may also elicit a positive reaction through loyalty—by finding a point of affiliation with her negotiation counterpart—or a positive reaction through authority—by acknowledging the counterpart's authority to make a decision.⁹⁶ Articulating some morally positive actions of the participants, even those that are outside the parties' treatment of each other, can ameliorate some of the moral aversion that enflames conflict and makes resolution difficult.

At this point, the use of MFT to understand and guide mediations and negotiations is only an enticing suggestion. We have no demonstrable proof that the five or six moral modules proposed by Haidt apply in the field in some regular and predictable way. The studies used to develop the theory depend more on controlled experiments than on the ebb and flow of ordinary social interaction. Even the number and nature of the foundational moral modules remains open to debate and revision. Nevertheless, the basic point of MFT—that intuitive and unconscious moral judgments form a constant background to our reactions and decisions—tells us that we should not try to exclude an awareness of moral judgments from our negotiation and mediation practices. Instead, it provides ways to engage the moral dimensions of difference and conflict without stifling the opportunities for both creative problem solving and greater understanding that good negotiation and mediation can provide.

⁹⁵ As we know from the work of Fisher and Ury, *supra* note 33, and many others, such as DEAN G. PRUITT & SUNG HEE KIM, *SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT* 28–35 (3rd ed. 2004), it is often possible to care for and seek to meet the needs and interests of others without at the same time sacrificing one's own needs and interests.

⁹⁶ See *supra* text accompanying notes 21, 25, 38, 47–48.