CHAPTER ONE

Values, Models, and Codes

Ethical decision making requires tough, sometimes tragic, choices. Difficult cases do not force us to choose between obviously right and obviously wrong paths. Rather, deciding which path to take is difficult precisely because there are compelling reasons to go in each direction. We want mediation to yield substantively good outcomes, and we want to honor disputants' rights to choose the best outcomes for themselves. In hard cases, it may not be possible to do both. We often can't pursue one value without forfeiting another.

Mediating ethically usually entails some loss. The difficult choices that professional mediators routinely make are often similar to the wrenching choices that faced the Greek hero Ulysses on his odyssey from Troy back home to Ithaca. At one point in the long journey, Ulysses was forced to steer his ship through a narrow strait of sea bordered on each side by ferocious monsters. On one side lurked Charybdis, whose yawning jaws sucked in and spewed out water three times a day, creating a whirlpool that destroyed any ship unlucky enough to drift too near. On the other side hovered Scylla, a six-headed beast with three rows of teeth in every mouth. No ship could pass within Scylla's reach without losing men to the monster's predations.

Ulysses' men were loyal soldiers and sailors, and he wanted to save them all, but he knew his whole ship would go down if he veered too close to Charybdis. However, sailing within Scylla's reach would mean the death of six oarsmen. With a heavy heart, Ulysses told his crew to row hard and give Charybdis's currents a wide berth. He stayed silent about Scylla for she was "a threat for which there was no remedy." Ulysses' men were easy targets for Scylla, who snatched the strongest and bravest among them. Ulysses' anguish is clear as he describes the sight: "When I turned to watch the swift ship and crew, already I could see their hands and feet, as Scylla carried them high overhead. They cried out and screamed, calling me by name one final time, their hearts in agony.... Of all things my eyes have witnessed in my journeying on pathways of the sea, the sight of them was the most piteous I've ever seen"[1]

Fortunately for us, mediation rarely poses such difficult matters of life and death. Still, the lesson from the *Odyssey* is clear: Ulysses could not save his ship without ethical compromise. Optimally the captain of a ship is truthful with his crew and safeguards the safety of every sailor. Ulysses deceived his men about the true dangers they faced and sacrificed six of his crew. But doing the right thing almost never involves following one mandate unflinchingly. When we consider the dire choices Ulysses faced, can we say this captain acted unethically? He saved the vast majority of those on board—all who could be saved. Where does truth rate when brute honesty threatens to fatally immobilize the entire ship? And how does one protect sailors' safety when the only choice is how many will die?

On a less stark scale, mediation ethics poses similar questions and teaches similar lessons. This chapter continues to weave the lesson of Ulysses into a discussion of the underlying values of the mediation field and their articulation in formal ethics codes. It highlights the inconsistencies that exist among and within various code sections and suggests that those inconsistencies reflect tensions among mediation's underlying values: disputant autonomy, substantive fairness, and procedural fairness.[2] Ideally mediators would maximally advance each of these principles in every intervention. Often this is not possible, and mediators have to decide for themselves how to prioritize and weigh these values when they push in competing directions. Mediator philosophy and the models that emerge from this philosophy play a significant role in how these balancing acts occur.

A BASE OF UNDERLYING VALUES

In the following chapters, you will hear from commentators with diverse approaches and philosophies. You may be surprised at the range of responses, but all of them pay deliberate attention to three underlying values that shape their understanding of what is at stake and what is ethically required in any given case:

- *Disputant autonomy:* A disputant's right to make choices based on personal beliefs and values, free of coercion and constraint
- *Procedural fairness:* The fairness of the process used to reach the mediated result
- *Substantive fairness or a good-enough outcome:* The acceptability of the mediated result

In cases that require difficult ethical decision making, these three values will likely be in tension. When mediators confront such cases, they need to reflect on whether any one of these values trumps the others or whether it is appropriate to compromise one or more of these values in the face of more compelling mandates. However, before a discussion of how the tension between these underlying values will influence a mediator's ethical decision making, I explore and define each of these values.

Disputant Autonomy

"You're not the boss of me." Any adult who has tried to issue an order to a child has probably heard that rebuff. The child is asserting her autonomy in the baldest way possible.

Most simply, autonomy, frequently referred to as self-determination in mediation codes and texts, means self-rule. Mediation strives to vest maximal control and choice with the disputant—not with the mediator, the state, or another third party. Unlike litigation, in which lawyers frame disputes and judges decide them, mediation assumes that disputants should retain control over how their conflicts are presented, discussed, and resolved. In litigation, fairness is discovered by looking to existing law. In mediation, disputants are urged to look to their own personal norms of fairness. Legal rules, social conventions, and other standards that might interfere

with disputants' efforts to construct self-determining agreements are supposed to take a backseat.

Autonomous decisions express who we are—our preferences, desires, and priorities. They bear the imprint of our personality as it has developed over time. Determining whether decision making in mediation is truly autonomous requires a close look at internal and external conditions that threaten to influence or subvert our exercise of free will.

Internal threats inhere in the frailty of a disputant's mental or physical condition. If autonomous decision making reflects long-term values and an established pattern of belief and behavior, then illness, grief, or blinding rage may lead to decisions that subvert the values of a calmer, healthier self.

Situational threats arise from the dire, sometimes coercive, circumstances in which disputants find themselves. If you agree to hand me all your money because I put a gun to your head, can we say that you acted autonomously? If you haven't eaten in four days and agree to sign over the deed to your house in exchange for the rosemary-infused walnut baguette I'm waving under your nose, is that decision a true expression of free will? And if you agree to accept one thousand dollars from me for the broken elbow you suffered when I rear-ended you, ignorant that you could receive ten thousand dollars in court, how autonomous was your decision to settle?

Procedural Fairness

Procedural fairness examines the fairness of methods. When children are fighting in a nursery, a parent or caregiver may decide to handle all disputes about food by adopting a default procedural rule. That is, when, say, a cupcake is to be divided in half, one child gets to cut it and the other gets to choose the first piece. The adult has chosen not to dictate the size of the portions or who gets what. She is staying out of the substantive side of the dispute. Rather, she has decided to institute a procedure that encourages fair play in the division of limited sweets. The adult has made a decision, based on years of experience with children, that this rule, although imperfect, more likely than not creates fair results.

Long experience has taught mediation professionals that procedures such as preserving confidentiality and avoiding significant professional or personal relationships with clients facilitate settlements that are fairer and more satisfying to the disputants. In

addition, research reveals that disputants are more likely to feel that they have been treated fairly in a dispute resolution process if they are given an opportunity to tell their story and feel listened to by a neutral and respectful third party. If disputants are treated with respect and dignity, they are likely to believe that the outcome reached in such a process is fair, even if actual terms of the agreement go against them.

Substantive Fairness

Substantive fairness treats the fairness of result. Consider a tug-of-war between two children over their favorite truck. The children are grasping opposite ends of the plastic vehicle, and one of them yells, "I had it first!" When you haven't seen what actually led up to this moment and both children are screaming like banshees, how do you arrive at a substantively fair result?

How you answer depends on your values. For some parents, given the uncertainty of what happened, a fair result would need to teach the value of peaceable coexistence. This might mean taking the truck away from both children. Other parents might surmise that the child who said she had it first did indeed have it first and decide that possession is nine-tenths of the law. Or maybe the parents would decide that because one child has had the truck for the past hour, it would be more important for her to learn a lesson about sharing. Are any of these conclusions right or wrong? In each case, the decision is based on your belief system.

What informs our substantive values? When working with children, we may be influenced by the way we were raised, institutional rules, or even the theories of our favorite child psychologist. When we mediate, we don't sit in a room with the parties isolated from the outside world; each of us comes into the room with our values in tow.

Most people would agree that people should receive their just deserts. But determining what people deserve will depend on the particular theory of justice one adopts. Should resources be divided equally, according to need, according to economic efficiency, or by some other criterion? If one hundred people need a new liver and only one liver becomes available in the next week, what does fairness require? Should the liver go to the sickest of the one hundred, the one most likely to benefit (who would definitely not be the sickest), or the individual who has the most dependents or contributes the most to society? And if contribution to society counts as a criterion, how should contribution be measured?

For some, formal law—judicial opinions, statutes, and constitutions—embodies important notions of justice. Legal rules that prohibit discrimination, protect consumers from dangerous manufacturing practices, and shift costs from injured victims to negligent actors are thought to capture important social judgments about the ways in which we should interact with one another. For this reason, many feel that legal rules have a role to play in mediation, functioning as placeholders for larger notions of equity and fair play. For others, formal law and justice diverge sharply. This view sees the law less as a reflection of our collective social conscience and more as a rigid set of rules that may do more harm than good. Think of the *Dred Scott* v. *Sandford* case of 1857, which ruled that African Americans who were imported to the United States and held as slaves were not citizens and therefore were not protected by the Constitution. For those who believe that formal law and justice do not always overlap, legal rules may have little compelling moral force and should play a minor role in private negotiation.

The mediation field is conflicted on the question of whether fairness of result matters. Some mediation scholars contend that mediators should be concerned with questions of fairness, however one might define that term. Others contend that courts and judges are uniquely situated to determine what is fair and that mediators have neither the institutional authority nor the expertise for such judgments.[3] But while not explicitly adopting substantive fairness as a formal value, many of the commentators in this book express concern about the possibilities for injustice and structure their interventions to guard against it. Many mediators aspire to be a force for good, without stating so explicitly. At the very least, they seek to avoid doing harm. Although most mediators are uncomfortable with the role of justice arbiter, they seek to facilitate a good-enough outcome—one that promotes party autonomy while satisfying minimal notions of fairness and equity.

BALANCING COMPETING VALUES

Adopting a practical approach to mediation ethics requires recognizing that value compromises and trade-offs are an integral part of doing ethics in this field. In the vast array of cases and contexts, it simply isn't possible to give voice and expression to every important value in every case.

Sometimes the goal of helping disputants meet their needs and interests must be tempered by other concerns, such as protecting vulnerable parties or advancing important societal interests. Taking actions that undercut or hinder disputant autonomy may sometimes be the most ethical choice. Value trade-offs are an inevitable end product of our efforts to attain the ethical golden mean.

Some Philosophical Precedent: W. D. Ross and Ethical Intuitionism

The notion that ethical behavior sometimes requires a balancing of important, divergent requirements is not new. In advocating this approach, I borrow from the theory of ethical intuitionism articulated in the 1930s by the Scottish philosopher W. D. Ross.

Ross was both a philosopher and a statesman, active in government task forces and in the administration of Oxford University where he taught moral philosophy. With one foot in the academy and the other in the bureaucratic trenches, he was interested both in questions of pure moral theory and in how moral theory could be made to work in the real world. In considering what makes actions morally correct, he opposed the absolute, unyielding quality of two dominant philosophical traditions: utilitarianism and deontology (a duty-based ethics).[4]

Utilitarians argued that in every situation, right action is that which brings about the greatest good, taking into account everyone affected. Because utilitarians defined *good* as happiness, the morality of an action was thought to derive entirely from the measure of resulting happiness. If an action yielded an overall increase in happiness, then that action was morally desirable. If an action decreased total happiness, it was morally undesirable. Under this theory, assessing morality becomes a mathematical process of calculating hedonic outcomes. Consequences supply the ultimate measure of right action.

Kantian deontology, a version of duty-based ethics famously elaborated by the German philosopher Immanuel Kant, denies these basic premises while adopting equally rigid criteria for moral action. According to Kant, morality is a matter of responding to "perfect duties"—duties that apply in every instance and admit of no exception. The prime directive for Kant requires that the maxims or principles on which individuals act are such that they can be universalized. For Kant, this meant that individuals must always treat

others as ends in themselves and never simply as a means. These ''categorical imperatives'' can be further broken down into more specific obligations. For example, telling the truth and keeping promises are obligations that must be fulfilled, regardless of context.

Focusing on preexisting duties as opposed to consequences leads to dramatically different moral imperatives. For example, if it would maximize the happiness of a ten-person community to enslave one member and require him to attend to the every need of the other nine, then according to a utilitarian system, such enslavement would be morally acceptable. In a deontological system where respecting each individual's personhood is a ''perfect duty,'' involuntary servitude, even servitude that would create maximal community happiness, would never be permissible. Utilitarians and Kantian deontologists similarly diverge when considering the ''little (or big) white lie.'' If you were hiding a Jewish family in your house in Germany during Hitler's reign and the Nazis came knocking and asked if you were shielding fugitives, you would be compelled under Kant's theory to tell the truth and yield up your captives to certain death. The family's fate would not figure into the moral calculus. According to a utilitarian analysis, however, the benefits of truth telling would have to be measured against the harm that would be done to the family if discovered. One would have to consider which outcome—lying and saving the family or telling the truth and leaving the family to certain death—would maximize the overall quantum of happiness.

Although profoundly different, each of these theories offers its own unitary, monistic account of what morality requires. Each rule, applied uniformly in every circumstance, can be counted on to yield a singular measure of moral conduct.

Ross rejected the absolutist character of both utilitarianism and Kant's deontology. Although he was attracted to deontological thinking as a method, he did not subscribe to the notion of ''absolute duties.'' Instead he postulated the existence of prima facie duties—duties that were presumptively binding but that on occasion, depending on context, must yield to other considerations.[5] Thus, for Ross, promise keeping and truth telling were not absolute duties to be kept in all circumstances, but rather prima facie duties that should ordinarily be kept, except when outweighed by other prima facie duties that, in the specific situation, carry a stronger imperative.

Thus, were Ross to consider the problem of the Nazi soldiers and the fugitive family, he would probably note that the Nazis'

inquiry places the prima facie duty of truth telling in direct conflict with the prima facie duty of nonmaleficence—avoiding harm to others. Taking the situation as a whole, Ross would likely advise weighing these two prima facie duties and considering which, given these particular facts, is more compelling. After assessing the totality of the circumstances, Ross would conclude that the duty of truth telling—ordinarily a duty to be taken very seriously—must give way. Under these facts, shielding the desperate family is the primary moral imperative, and so one must come to terms with a breach of the truth-telling duty. Ethical intuitionism does not recognize absolute duties—only duties that become primary after considering the totality of the circumstances.

Ross didn't think there was any magic to the process of weighing and balancing the competing values at stake. No one rule could be laid down as to how to do it—other than to think hard and carefully about what is at stake and which duties seem most pressing under the circumstances. Rejecting methodological rigidity in favor of a fluid, intuitive approach, Ross wrote, "This sense of our particular duty in particular circumstances, preceded and informed by the fullest reflection we can bestow on the act in all its bearings, is highly fallible, but it is the only guide we have to our duty."[6]

Ethical Intuitionism and Mediation

Mediation has much to gain from Ross's ethical intuitionism. Mediators struggling to balance their duties to facilitate party self-determination with concerns about substantive outcome and procedural fairness may take comfort from the notion that duties that are undeniable in one case context may be subordinated to other priorities given a different set of facts.

The need for a context-driven balancing approach becomes even clearer when one looks at the regulatory landscape. In some professions, existing ethical guidelines are unified and consistent. This is not the situation in our field.

CURRENT ETHICAL CODES AND THEIR USES

For more than three hundred years in the United States, mediation occurred in an essentially rules-free, regulatory-ethics-free zone. With a few exceptions, no clear set of rules or guidelines steered informal

dispute resolvers in an ethical direction.[7] Rather, early mediation pioneers were free to follow their own moral leanings and draw their own lines and boundaries.

Things are different today, at least for a large swath of the mediation workforce. Codes of ethical practice abound, formulated at national and state levels by trade groups and governmental entities seeking to establish basic principles of ethical practice. In subsequent chapters, we often note how a particular standard applies. In this chapter, I introduce the broadest national standards and the concept of specialized codes.

The Model Standards of Conduct for Mediators

Perhaps the most generalized and widely known set of guidelines is the Model Standards of Conduct for Mediators, a set of nine standards with commentary originally prepared and endorsed in 1994 by the American Arbitration Association, the American Bar Association Section of Dispute Resolution, and the Association for Conflict Resolution. In 2005, these standards were revised and reendorsed by these important trade associations.

The Model Standards are not very long and are reproduced in full in the appendix at the end of this book. Throughout this book, other commentators and I will be referring to portions of them. It would be worth your while to read them in full.

In the 2005 revisions, the drafters clarified that the Standards were to serve "three primary goals: to guide the conduct of mediators, . . . inform the mediating parties, and . . . promote public confidence in mediation as a process for resolving disputes."[8] As an aspirational guide, it is hard to overstate their significance. The Standards have assumed a Talmudic status in a field eager for direction. Like the Bible, Quran, or other holy texts, the Standards serve as the textual touchstone for virtually every argument regarding what mediation is or should be.

It is true that the Standards, except where explicitly adopted by state legislative bodies, do not enjoy the force of law. However, as the drafters point out, the fact that their text has been approved by the three largest trade associations in the field suggests that the Standards might be viewed as establishing a "standard of care" for mediators.[9] Moreover, a number of state courts and legislatures have either adopted the Standards wholesale or borrowed significantly from its language in creating their own regulatory codes.

For example, mediators who work on disputes involving federal agencies have been directed to follow the Model Standards, subject to a few caveats that apply specifically to federal employees and the constraints of working under government regulations.[10] Similarly, mediators working in court-connected programs in Arkansas, Louisiana, Maryland, Kansas, Michigan, Mississippi, New Jersey, North Carolina, South Carolina, and Virginia, as well as community mediators in New York State, are governed by codes that contain definitions of self-determination and impartiality nearly identical to those in the Standards.[11] Where state codes diverge from the Standards, they tend to allow mediators more latitude to provide evaluative information and charge the mediator more directly with a concern for the fairness of the mediated outcome.[12]

Specialized Codes

In addition to generalized codes that apply to mediation across a wide range of subject matter, there exist more specialized guidelines for particular types of cases. For example, mediators working in the area of divorce, criminal law, or disability rights all have particularized standards of practice that provide some ethical instruction.[13] Divorce mediators have the Model Standards of Practice for Family and Divorce Mediation (Divorce Mediation Standards), authored by representatives from the Association of Family and Conciliation Courts, the Family Law Section of the American Bar Association, the National Council of Dispute Resolution Organizations, and a host of other alternative dispute resolution (ADR) providers. Mediators working with those who are disabled have the Americans with Disabilities Act Mediation Guidelines, and victim-offender mediators have the Victim-Offender Mediation Association Recommended Guidelines.

Specialized standards like these alert mediators that if they wish to enter these subject matter arenas, they need to pursue additional training, become sensitive to the challenges raised by the subject matter, and pursue strategies different from those they might adopt in simpler, more generic cases.

INCONSISTENCIES AMONG CODES. With so many codes to consider, it would seem that ethical decision making would be a snap: just take a look at the Model Standards, review your particular state court rules, peruse the specialized codes for particular practice areas, and do what they say. But this linear approach will send you in circles

because the codes governing professional conduct in mediation are inconsistent. Not only will applying two separate sets of codes to the same case often yield different directives, different provisions within individual codes themselves are in conflict as well. For instance, rules binding on mediators at the state level may not jibe with either the Model Standards or the specialized codes developed for particular types of cases. Let us review a fairly common scenario from the divorce arena.

Imagine you are a divorce mediator in Alabama working with a couple in which the husband is making aggressive financial demands and the wife is passively acceding to them. The husband wants a 75–25 split, saying he is entitled to the lion's share of assets because his wife wants the divorce and is eager to remarry. You know that no court would issue such an award. Given this couple's financial situation, a court would order a 50–50 split. You wonder, *Should I talk to the couple about a court's likely approach? How can I best promote each disputant's autonomy if each is operating with minimal information? How concerned should I be with the actual terms of the monetary split? Does substantive fairness matter? If I have doubts about their proposed agreement what should I do?*

If you looked at the generalized Model Standards, the Alabama Code of Ethics, and the Divorce Mediation Standards, you might come away confused. Each of the codes says mediation rests on the fundamental principle of self-determination. So maybe if the wife wants to give away something she is entitled by law to keep, it's consistent with promoting self-determination to let her. But the Alabama Code of Ethics also says that a mediator may withdraw if he or she believes any agreement reached would be the result of overreaching, and maybe the husband is overreaching here.[14] Furthermore, according to the Alabama Code, a mediator may discuss the possible outcomes of a case and offer an opinion regarding the likelihood of a specific outcome in court as long as the opinion is given in the presence of a party's attorney. In this respect, it could be argued that the Alabama Code would authorize—maybe even encourage—a discussion by the mediator of what an Alabama court would likely do if asked how to divide this couple's assets fairly.

Turning from the Alabama Code to the specialized Divorce Mediation Standards, one can discern a concern for the fairness of the

ultimate agreement similar to that found in the Alabama Code. The Divorce Mediation Standards suggest you withdraw if the participants are about to enter into an unconscionable agreement or if one participant is using the mediation process to gain an unfair advantage.

Furthermore, to the extent provision of such information is consistent with standards of impartiality and preserving party self-determination, as determined under the Divorce Mediation Standards, mediators are authorized to "provide the participants with information that the mediator is qualified by training or experience to provide" so long as that information doesn't constitute legal advice.[15] This might lead our mediator to conclude that if he is a lawyer, it is permissible to give legal information about how community property is treated in that jurisdiction. But providing this kind of legal information threatens to transform the mediator from a neutral into a legal counselor, and the Model Standards explicitly say, "Mixing the role of a mediator and the role of another profession is problematic."

INCONSISTENCIES WITHIN CODES. With so many codes to consider, it is easy to understand how certain actions that are explicitly authorized by one set of standards may be considered problematic in another. But one needn't reach across two or more codes to find divergent instructions: most codes contain provisions that are in conflict with one another.

Take the Model Standards, for example. The Standards encourage mediators to recognize party self-determination as "a fundamental principle of mediation practice" and to work to ensure that parties are supported in making "free and informed choices as to process and outcome." This, of course, is to guarantee increased disputant autonomy. However, the Model Standards also contain provisions regarding procedural fairness and demand that mediators conduct their mediations in a strictly impartial fashion, avoiding any conduct that could lead the parties to think that the mediator favors one over the other.

The tension between promoting disputant autonomy while preserving procedural fairness emerges clearly when considering how the mediator should handle requests for legal information. If the wife

asks you pointedly what sort of split a court would likely recommend, should you, if you are able, supply the information yourself? The Standards charge you with encouraging informed decision making. Optimally you would recommend that the wife elicit the information from her own attorney. But what if she doesn't have an attorney and refuses to get one? Providing the information yourself may seem harmless, but the Standards also eschew conduct that might lead one party to suspect partiality. If you were to provide such information, the husband may consider your disclosure to be partiality of the worst sort.[16]

Why the Codes Are Not Enough

When we apply the language from the Model Standards—either alone or in conjunction with other state or specialty subject matter codes—we reach three definite conclusions:

1. *The codes don't answer the question, ''What is the ethical course of action in this case?''* There are simply too many contradictions and tensions between different codes and within individual codes. Ethical codes of conduct in mediation should be looked at as a place to start the ethical inquiry. Alone, they will not resolve the issue in any particular case.

2. *Most ethical dilemmas are not resolved by finding the one right answer*. Although certain discrete choices may fall beyond the ethical pale, usually there exists a range of ethically permissible responses and outcomes.

3. *It rarely makes sense to hold one value to be the one dominant principle that subordinates all others in every possible case*. Rather, the primacy of various principles should vary according to the particular facts of the case. For example, self-determination should figure more prominently in cases where the parties are evenly matched, fully competent, and informed and the outcomes contemplated don't threaten to harm third-party or societal interests. Similarly, quality of process and fairness concerns should garner more attention in cases where the ability of the parties to deliberate fully regarding their long-term best interests is in question and where the decisions may affect the well-being of those not at the bargaining table.

A BALANCING ACT: REJECTING RIGIDITY IN MEDIATION

Because the codes take us only so far, we must acknowledge the need to exercise discretion and balance competing ethical objectives. Adopting a practical approach to mediation ethics requires recognizing that value compromises and trade-offs are an integral part of doing ethics in this field. In the vast array of cases and contexts, it simply isn't possible to give voice and expression to every important value in every case.

Sometimes the goal of helping disputants meet their needs and interests must be tempered by other concerns, such as protecting vulnerable parties or advancing important societal interests. Taking actions that undercut or hinder disputant autonomy may sometimes be the most ethical choice. Value trade-offs are an inevitable end product of our efforts to attain the ethical golden mean.

In our divorce mediation example, we can profit from Ross's ethical intuitionism by first noting that it is unclear how best to satisfy the primary mandate of mediation to "respect party self-determination." Both the husband and wife profess to be comfortable with the 75–25 split. But what information are they working with? Although the exact components of autonomous decision making have never been fully defined, most in the mediation community have come to believe that decisions can never be fully self-determining unless they are reasonably informed; that is, the decision maker understands the risks and benefits that such a decision entails.

Does the wife have enough information to make a fully informed decision? Does she know that if the case were decided in a court of law, she would likely be entitled to half the assets? Must she know what a court would likely do before she can make an informed decision in mediation? If we facilitate the 75–25 split that both husband and wife are leaning toward, have we supported their self-determination, or have we simply helped them both make decisions that were only partly thought out? Exactly how much information does informed consent require?

If you asked these questions of half a dozen mediators, you might get at least six different answers. Most mediators would say they would do their best to make sure the wife knew what she was gaining, and giving up, by agreeing to an unequal split. But each mediator's personal "best" will differ depending on his or her understanding

of what it means to promote disputant autonomy and procedural fairness, and the definitions adopted and weights assigned to achieving substantive fairness. Some mediators believe that settlement on almost any terms constitutes a good when compared to the alternative of continued discord or resolution through litigation. Other mediators believe that nonsettlement is preferable to an agreement that departs dramatically from societal norms. Thus, some mediators would be troubled by a split of marital assets that gave the wife much less than legislative and judge-made law would provide. Other mediators don't believe that legal norms should serve as any sort of benchmark of fairness, at least not in mediation, and so would not be disturbed by such a settlement disparity.

If you as mediator believe that self-determination means that the parties get to decide how much information they want or need, then you would favor letting the couple divide assets exactly how they want, regardless of what they know or don't know about prevailing legal norms. If you felt strongly that social norms are a relevant indicator of what is fair and just, then the couple's proposed split may trouble you even though you feel that the mandate of respecting party self-determination has been met.

Here, an ethical intuitionist such as Ross would likely counsel you to try to determine how much weight, in this case, the value of promoting self-determination should receive. At the same time, you would need to try to determine how important it is to strive toward an outcome that incorporates societal notions of equity in postdivorce property division.

The Range of Acceptable Action

Because mediators differ dramatically as to both their goals for mediation and the underlying values that shape those goals, there is a wide arena of conduct that most in the mediation community would condone as acceptable. For example, the following responses would all likely be seen as ethical by a vast majority of mediation experts in the field:

- Asking the wife if she has consulted with an attorney
- Suggesting the wife consult with an attorney
- Discussing in joint session the legal norms that suggest a judicial award of 50–50

Each of these options seeks to promote informed decision making while still protecting the parties' right to decide for themselves what they believe to be fair.

A tougher question arises if the wife says she has not consulted an attorney and does not care to. Options available to the mediator at this juncture range from the highly paternalistic to the more laissez-faire. If you were propelled by concern that all decisions made in mediation be informed, you could refuse to continue working on the case unless the wife agrees to obtain legal information from either you directly or outside counsel. Conversely, if you understood self-determination to require acquiescence to the wife's own judgment regarding the relevance of social norms to her negotiations with her ex-husband, then you would assist the parties in writing up their three quarters/one quarter split. Either of these options would fall well within the margin of acceptability given current thinking in the mediation world.

Beyond the Ethical Pale

Although mediators enjoy a large gray area in which they can safely work, there are some actions that many mediators would likely see as ethically out of bounds. For example, although a well-intentioned mediator, convinced that legislative and judge-made norms perfectly capture what should happen in all postdivorce splits, might be tempted to impose a settlement that fully incorporated her prediction of what a court might do, this would clearly cross the line.

While a mediator who imposes her preferred settlement is clearly too directive, mediators operating within the bounds of acceptable mediation practice vary in terms of how directive they are. Some mediators may closely question parties seeking to waive legal entitlements in order to make sure that they fully understand what they are giving up and how those waivers may affect their long-term self-interest. You may ethically ask:

"Are you sure you are comfortable receiving only one-quarter of the property's equity when you would likely receive more if you went to court?"

"How do you think you will feel about this decision in six months or a year?"

"What is the benefit to you to come to this resolution now in this way? What are the possible costs?"

These questions are ethically acceptable: they serve to buttress mediator confidence that the party has thought carefully and deliberately about the waiver. But ethical dictates would require the mediator to abstain from requiring—or even pushing—the party to adopt any particular outcome. Mediator concern for substantive fairness can only trench so much on party self-determination. Arguably, mediators may impose on party autonomy by requiring the parties to acquire information. But what the parties do with that information is up to them. If a mediator is so troubled by the substantive outcome reached that she concludes it is unconscionable or the product of duress or overreaching, she can withdraw. But she cannot press the parties to adopt a particular outcome because it accords with her own sense of fairness, equity, or propriety.

The Role of Mediator Philosophy in Balancing Competing Value Commitments

Mediators everywhere say that promoting party autonomy, encouraging substantively good outcomes, and ensuring procedural fairness are important. But how they weigh and balance the three is in part a matter of mediation philosophy and model.

Mediators' models differ significantly in ways that are not simply stylistic variations on a common theme. Rather, they reflect divergent philosophies about conflict and human nature, as well as the primary goals and purposes of the mediation process. Because adherents to these different models are inspired by different ideological commitments, they deploy different ethical analyses and, unsurprisingly, sometimes reach different conclusions.

This does not mean that there is no overlap. And it does not mean that any action one would choose to take in mediation can be defended by some theory. Some actions would be considered unethical by mediators from every camp. It does mean, however, that there remains a considerable gray area where mediators working with different models would disagree regarding what should be done in any particular case. Given this impact of models, it is crucially important that mediators be clear about the models they are using and their own goals for the mediation process.

THE MULTIPLE MODELS OF MEDIATION

Numerous mediation schemata exist, and the nomenclature is vast and ever growing. For simplicity, we will focus on the distinctions between problem-solving and relationship-building approaches and explore briefly the subcategories that exist within each basic approach.

Problem-Solving Models: Evaluative Versus Facilitative

In 1996, Len Riskin developed a typology of mediation approaches that captured the mediation field's collective imagination and has gained increased traction ever since.[17] Indeed, when, nearly ten years later, Riskin himself attempted to rework his categories,[18] he found the original structure and vocabulary immovable. The second-generation terms and concepts that he described as allowing for a "new and improved" mediation grid simply have not caught on the way his first set of descriptors did. Given its widespread popularity and presence in training curricula, credentialing measures, and informal mediator chatter, it seems sensible to review the features of Riskin's typology that have had the greatest impact on the field to date.

Riskin's typology is oriented around problem solving. His models assume that the primary goal of the process is settlement. Within that basic framework, he identifies two different approaches—one facilitative, the other evaluative.[19]

FACILITATIVE MEDIATION. Facilitative mediators see their primary role as problem solving, but they adhere to clear limits in that role. Facilitative mediators "assume the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than either their lawyers or the mediator."[20] Because facilitative mediators vest ultimate confidence in the parties' own problem-solving capacities, they work mainly at developing those capacities through skillful questioning and listening. Facilitative mediators assist by helping parties better explore their underlying interests, develop proposals, and evaluate those proposals. They ask questions designed to help the parties probe in greater depth the likely consequences of settling or not settling. They encourage parties to assess the strengths and weaknesses of their various legal positions.

Notably the facilitative mediator does not evaluate the soundness or practicability of any party's stance. She does not judge the value or merit of any proposal on the table or offer up opinions about what would happen if the case settled or did not settle. She believes that such tactics impair mediator impartiality and stifle party autonomy. If a party appears to be sticking stubbornly to an unrealistic position, a facilitative mediator may ask questions in an effort to create movement. But she would stop short of giving her own view of the merits or offering an opinion of what a reasonable settlement option would be.

Because facilitative mediators seek to tap into the parties' own deep knowledge and understanding of the matters in dispute, they do not stress or claim to have subject matter expertise themselves. In fact, in Riskin's words, "too much subject-matter expertise" might be a hindrance for facilitative mediators because it would incline them "toward a more evaluative role, and could thereby interfere with developing creative solutions."[21] The facilitative mediator is like a symphony conductor: she brings the instruments together and works to help them play in harmony, but she does not add a bass or soprano voice herself. She is the maestro of process, but endeavors to have little influence on the actual melody that emerges.

EVALUATIVE MEDIATION. The evaluative mediator is also oriented toward problem solving, but she views her role in the dispute some-what more expansively. The evaluative mediator "assumes that the participants want and need the mediator to provide some direction as to the appropriate grounds for settlement—based on law, indus-try practice or technology." She also assumes that "the mediator is qualified to give such direction by virtue of her experience, training and objectivity."[22]

Whereas facilitative mediators place the burden of developing and evaluating proposals firmly on the parties, evaluative mediators will, if need be, take on some of those tasks themselves. They feel free to offer their opinions regarding proposed settlement options and the legal merit of each party's positions. Because evaluative mediators introduce their own assessments into the mix, they view their own substantive expertise regarding relevant law, industry practice, or custom as a significant aspect of their skill.

DIFFERENCES IN DEFINING AND SUPPORTING AUTONOMY. Whereas both facilitative and evaluative mediators seek to support party

autonomy, they differ on how to do so. Evaluative mediators believe autonomous decision making is better achieved when disputants are maximally informed about their best and worst alternatives to settlement. They view the provision of information regarding likely court outcomes as increasing, not diminishing, disputant autonomy. Facilitative mediators worry more about the possibly coercive effect of the mediator's opinion. If the mediator speaks, people, especially disputants, listen. According to the facilitative worldview, the mediator's provision of information risks overriding the disputants' own preferences and values; evaluations usurp, rather than support, party self-determination.

Thus, although both facilitative and evaluative mediators take party self-determination seriously, in their efforts to bring closure to disputes, they differ about what autonomous decision making entails and consequently adopt different attitudes toward offering opinions or evaluations.

DIFFERING VIEWS ON SUBSTANTIVE FAIRNESS. Writers who have set out to describe and advocate for either a facilitative or evaluative model have touched on the notion of substantive fairness only obliquely. Determining the relationship of these models to fairness concerns is thus, by necessity, somewhat speculative. Nevertheless, a few general observations can be made.

First, facilitative mediators are more likely to define fairness or justice as highly contextual and to take their cue from the parties' own perceptions. Thus, as two facilitative mediators have written, there is a difference between justice on high (what the law says) and justice from below (what the parties see as fair), and in their view, mediation is a place where justice from below should govern.[23]

Second, facilitative mediators would be loathe to vest formal rules or legal strictures with excessive moral authority and thus would be less likely to seek their recourse in considering whether outcomes reached are fair or equitable. Evaluative mediators are accustomed to referencing collective norms, be they legal, psychological, engineering, or grounded in some other customary practice. Because their expertise flows from knowledge of and facility with these norms, they are more inclined to endow them with some sort of moral authority. Many evaluative mediators look to legal or industry norms not simply as strategic tools that help settle cases but as authoritative benchmarks embodying societal judgments about what is fair and reasonable.

Relationship-Building and Personal Growth Models

Not all models view mediation as a tool for problem solving. Some adopt a broader vision, viewing mediation as a way to help people gain a deeper understanding of themselves and those they interact with. These models stress the potential of mediation to enhance relationships and encourage personal growth.

TRANSFORMATIVE MEDIATION. Unlike both facilitative and evaluative mediators, transformative mediators see problem solving as ancillary to the true goals of the process. Introduced by Robert A. Baruch Bush and Joseph P. Folger in their groundbreaking book, *The Promise of Mediation,* the transformative school views mediation's main task to be relational change and personal growth rather than dispute settlement.[24]

Conflict, according to Bush and Folger, offers disputants a unique opportunity to change the quality of their interaction and, in the process, develop into more morally and emotionally mature beings. While parties may enter into disputes feeling vulnerable and self-absorbed, mediation offers them the possibility of better understanding themselves and their underlying goals, as well as the perspectives and goals of their adversaries. Mediator strategies and techniques are thus entirely oriented toward promoting parties' recognition of their own needs and capacities and encouraging their ability to empathize with each other. Consequently, interventions that do not push toward party empowerment or recognition have no place on the transformative mediator's mental map.

For this reason, a transformative mediator would likely not see the use or merit of offering information or opinions to the parties. Empowerment, as defined by Folger and Bush, occurs when parties reach a clearer realization of their goals and interests and come to understand that ''regardless of external constraints, . . . there are always some choices open and the control over those choices [is theirs] . . . alone.''[25]

Like the facilitative model, the transformative model is wary of mediator interventions that might shift the focus or direction of the parties' discussion. The mediator's job, according to the transformative school, is to change the quality of the parties' interaction; to watch for and support shifts that reflect party self-confidence, agency, and

empathy. Mediator interventions, according to this school, should help the parties better understand where *they* want to go with their dispute. Under no circumstances should the mediator intervene in ways that effect a shift in the substantive direction of the discussion. For that reason, in this model, offering an evaluation or assessment of the parties' position is never justified or warranted.

NARRATIVE MEDIATION. Like transformative mediators, narrative mediators also reject problem solving as the ultimate end goal of the process. According to Gerald Monk and John Winslade, the principal architects of this model, the goal of mediation "needs to be constructed in terms of a story. A story is not a one-time event but something that moves through time."[26] A successful conclusion to a mediation may be an agreement, but it need not be. Even if no agreement emerges, the process is successful if participants walk away with a new story about their interaction with one another. In the authors' words, the process has been successful if the parties have created a "sustainable, forward-moving narrative."[27]

Three interrelated assumptions shape narrative mediation practice:

- Foremost, language shapes reality. It does not merely transmit meaning; rather, it is a site where meaning is created.
- There is no such thing as an objectively fixed reality. Facts are always the product of a subjective perspective forged in particular social or cultural circumstance.
- Individual identity is a product of the multiple myths, traditions, and stories embraced by the surrounding culture. These stories shape and guide individual understandings and choices. These stories must be unpacked so that parties can gain a fuller sense of how they have imagined their conflicts and how they might reimagine them in a way that enables forward movement.

In narrative mediation, disputants come to the table with a "conflict-saturated story," and the job of the mediator is to deconstruct that story, expose those ideas "that masquerade as unquestioned truth,"[28] and help the parties work toward a more positive discourse. According to this view, shifting to an alternate narrative will effect shifts in the parties' relationship and situation.

Narrative mediation sees individuals trapped in conflict stories that emanate from and embody cultural myths and unexamined verities. The mediator expands party autonomy by "unpack[ing] the suitcase and tak[ing] out the pieces" and "hold[ing] them up for view."[29] The mediator helps parties look more closely at unexamined feelings of entitlement as well as scripts handed to them by virtue of their membership in family, religious communities, or society at large.

Substantive fairness is a concern in this model. Narrative mediation is sensitive to the role of power in mediation and seeks to destabilize existing and entrenched power relations. True to its postmodern roots, however, it does not see legal or social norms as necessarily delineating what is fair or right in any given situation. Rather, these norms are relevant to the discussion in that they are an important strand of the cultural script that parties work with.

The Effect of Mediation Model or Philosophy on Ethical Deliberation

This chapter has argued that weighing and balancing competing ethical mandates is an essential component of ethical deliberation. It suggests that thoughtful mediators, including the commentators in the following chapters in this book:

- Pinpoint the crucial values at stake

- Look for tension between those values

- Consider how the factual features of the case and their own mediation philosophy affect the balance of conflicting values and principles

- Select an action plan that honors the identified value trade-offs

Some ethical dilemmas point toward a common set of responses regardless of mediation philosophy. Conflict of interest and confidentiality problems would likely be diagnosed and understood similarly by evaluative, transformative, and narrative mediators alike. But other ethically challenging cases will look very different depending on the model employed. We will see, in the chapters ahead, that mediation philosophy plays a significant role in how various commentators balance commitments to disputant autonomy, substantive fairness, and procedural justice.

HOW THIS BOOK PROCEEDS: A ROAD MAP

The following chapters present hypotheticals designed to flush out some of the more difficult ethical dilemmas presented in practice. Each chapter begins with a brief discussion of the values implicated and guidance offered by existing codes and guidelines. This introduction features an editor's case—a relatively straightforward case that can be analyzed without great difficulty or controversy. Each chapter also features at least one, and sometimes two, commentators' cases: more difficult cases where the tensions between competing ethical values are posed more starkly. Prominent mediators and scholars have been recruited to discuss how they would proceed if faced with the dilemmas outlined in the commentator's case. They were recruited based on their experience and expertise and diversity of viewpoint. The book aims to showcase the heterogeneity of approach that characterizes the community of practicing mediators. At the same time, it seeks to reveal the common process of deliberation that undergirds each commentator's analysis.

A WORD ON MY BIASES

A crucial aspect of ethical practice involves being reflective about one's own biases. As editor, I have framed the issues, created the hypotheticals for discussion, and suggested that certain ways of proceeding are more advisable than others. In myriad ways, my biases shape the discourse that follows, and I wish to be transparent about the assumptions that suffuse my analysis:

- Only penetrating and sustained inquiry can determine the extent to which individuals are able to exercise and indeed are exercising their autonomy in mediation. Disputants can act autonomously only when certain conditions are in place, and mediators must attend carefully to constraints and pressures that may be impinging on and limiting a disputant's ability to act freely.

- Social norms, especially those embodied in the rule of law, constitute important guideposts to human behavior. They don't "do justice" in every individual instance, and thus the opportunity that mediation offers to reorient the negotiations around

the disputants' idiosyncratic needs and interests is profound. Still, where extreme power imbalances exist, legal norms can be useful in delineating the minimal set of obligations owed the less powerful by the more powerful. Although mediators must be careful to preserve the unique capacities of mediation for innovative problem solving, they must also attend to the dangers of exploitation implicit in an unbalanced process.

- Intervening in others' conflicts is an act of temerity. It can be justified only if mediators embrace a duty of beneficence, aspiring to be a force for good. At the very least, mediators should embrace the less rigorous duty of nonmaleficence—the duty to avoid harm. Mediators should be concerned about fairness. They should ask the justice question while remaining humble about their ability to supply an answer and open to the possibility that multiple definitions abound.

Not everyone in the mediation community shares these views. Many would object to a searching inquiry of disputants' capacity to act autonomously, arguing that it imposes unnecessarily high barriers to the exercise of party self-determination. Mediation invites parties to expand and develop their sense of competence and agency. Why impose a burden of proof on disputants who accept the invitation? Similarly, many in mediation hold jaundiced views of the rule of law and the relationship of these rules to justice. They would assess mediation's efficacy according to its separation from, rather than incorporation of, legal norms in the parties' discussions. Moreover, the very idea that mediators should ask the justice question would be objectionable to many in the mediation community because it might encourage paternalism and place constraints on the sorts of unconventional outcomes that mediation makes possible. The notion that mediators should explicitly adopt a theory of beneficence, or at the least nonmaleficence, has not been widely articulated or embraced.

I have tried to provide some balance by recruiting commentators with diverse perspectives. It will be clear from their writings that they do not agree with me and would pursue different interventions than the ones I recommend. As the mediation field matures, it is likely that we will reach greater consensus regarding best practices in the field and what it means to practice ethically. For now, this book offers an opening to begin the conversation.