

# 8

## Crosscurrents

By Nancy A. Welsh



I have always felt caught in crosscurrents of identity, never entirely settled in one place or the other. I suppose that the resulting discomfort has motivated me to try to understand the different currents tugging at me. Yearning to understand—and yet also wanting to find my own voice, to be heard and respected—these are my internal drivers. They match some of what I see as key aspirations of our

---

**Nancy A. Welsh** is professor of law and director of the Dispute Resolution Program of Texas A&M University School of Law. She was previously the William Trickett Faculty Scholar and professor of law at Penn State University, Dickinson School of Law. A leading scholar and teacher of dispute resolution and procedural law, she examines negotiation, mediation, arbitration, judicial settlement, and dispute resolution in the United States and international contexts, focusing on self-determination, procedural justice, due process, and institutionalization dynamics. Welsh presents nationally and internationally and has written more than 60 articles and chapters that have appeared in law reviews, professional publications, and books. Welsh is also co-author of the fourth, fifth, and sixth editions of *Dispute Resolution and Lawyers* (2009, 2014, and 2019). She succeeded Harvard Law Professor Frank Sander as co-chair of the Editorial Board of the *Dispute Resolution Magazine*, conducted research as a Fulbright Scholar in the Netherlands, and served as chair of both the ABA Section of Dispute Resolution and the AALS Alternative Dispute Resolution Section. Before joining the legal academy, she was the executive director of Mediation Center in Minnesota and practiced law with Leonard, Street and Deinard. She earned her BA *magna cum laude* from Allegheny College and her JD from Harvard Law School.

field—providing people in conflict with a forum in which *they* can hear each other, be heard, and find their own way.

I have working-class roots. My maternal grandfather emigrated from Italy when he was a teenager and became a coal miner in West Virginia. My maternal grandmother was only 5 when she arrived in this country from Italy and was only 15 when she married my 27-year-old grandfather. She bore nine children. Warm and loving, my grandmother never learned to read or write. When she visited us, she taught me simple crochet stitches. I taught her to read simple words. I never remembered those stitches; she never remembered the words.

My mother, the second-youngest in her large family, slept with her sisters four to a bed in their company-owned house. My grandmother had to take in a drunken boarder to make ends meet, and my grandfather had to stop work after he was injured in the mine. That sounds pretty grim, but my mother also told us stories of learning to play the piano and violin, being popular and doing well in school, and laughing and dancing with her siblings.

After high school, my mother moved in search of a better life. Erie, Pennsylvania, had substantial populations of Germans, Poles, and Italians who were relatively recent immigrants, but these snooty “city people” made my mother feel like a hillbilly, a hick. My father, who has lived his entire life in Erie except for a few years of military service in Okinawa, was smitten with the raven-haired, laughing young woman he met at a gathering spot for Catholic singles and soon asked my mother’s father for permission to marry her. My mother, to this day, believes that my father’s German and Polish family was unhappy that he married an Italian.

By the time she met my father, my mother had a good job as the secretary for the chief engineer at the telephone company. Because of her fast fingers and excellent writing

skills, she had risen out of the typing pool quickly. I think she enjoyed her job. But remembering how difficult it had been for her when all the potential jobs were occupied by “women flashing their diamond rings,” she quit as soon as she was married. It was time to be a wife and mother.

Born about a year later, I grew up in Erie, an industrial city in what is now known as the “Rust Belt,” with its best days long past. We knew it as “dreary Erie, the mistake on the lake.” From my mother—and from Erie—I inherited an identity as a have-not, likely to be discounted, someone who would have to work for everything she got.

And yet I also went to Harvard Law School—a very different identity. But I’m getting ahead of myself.

For a very long time, my identity also was tied to my religion. Catholicism permeated nearly every aspect of my life. My parents were and are devout Catholics, and I attended 12 years of Catholic school, with uniforms, nuns, crosses on the walls, and religion class every day. I was mesmerized by the Catholic saints, especially the martyrs, finding great romanticism and mystery in their lives.

Even as I write these words, I think to myself how much they evoke both a 1950s ethos and the draw of mystical medieval traditions.

But I am also female, with a decently logical brain (probably due to my data processing father), and I have the eldest child’s tendency to want to lead—a set of identities that did not fit well with Catholicism or Erie. I had lots of questions about the rules I was supposed to follow and the dogma I was supposed to believe. I preferred books and the company of wise and cosmopolitan authors as they explored new worlds and (at a safe distance) the complexities of the human condition. I liked thinking, trying to understand why things worked as they did. I wanted to make a difference, to be important somehow, not just exist

or survive—and there was no place, in Erie or Catholicism, for a girl with those sorts of preferences and ambitions.

I suppose you can see from what I've written thus far that the crosscurrents I felt had a lot to do with being female. Indeed, when I was born, my parents expected a boy. They had chosen only one name: Michael. (My father still cannot explain why he suggested the name Nancy.) My brother arrived just 18 months later. (My sister, who is nearly seven years younger than I am, took a little longer.) As the oldest daughter, I certainly played the "little mommy" role. I mediated between my younger siblings. Sometimes I mediated between my parents—and sometimes I still do. More often, however, I mediated among these different sources of identity that defined me.

As I grew up, the larger world intruded on my insular, tradition-bound cocoon. On the television and in the pages of *Life* magazine, I saw and read about what was going on—in the rain forests of Vietnam, as Walter Cronkite announced every night the number of American soldiers killed that day; in the South, as African Americans marched; on college campuses, as young people amassed and shouted and surged against school officials and armed police. There was conflict—exciting, important conflict—out there. People were fighting, martyring themselves, even, for democracy, for equal rights, for the right to be heard and counted. This conflict was different and attractive—direct, aggressive, demanding change. It was not the solitary, weakening conflict that an individual feels as she remains largely unseen and struggles to fit in.

Then in 1973 and 1974, Watergate struck. I was in an all-girls Catholic high school, but with a different breed of nuns. They were inspired by Vatican II, ready to cast off many of the traditions of the Church and become more relevant in the world. They invited debate, introduced us to other religious traditions, and even created an indepen-

dent study for a girl who hungered to read the great books. With these women and the rest of the nation, I watched the Senate and House Judiciary Committees' hearings and deliberations. Representatives William Cohen and Barbara Jordan, Senators Howard Baker and Sam Ervin, Republicans and Democrats, all asked hard questions and sought the truth. The US Supreme Court forced Nixon to turn over his tapes. As in 1968, our democracy seemed at risk. It was a time of unsettling sound and fury.

But it was also an inspiring time. Smart and brave leaders, many of them lawyers, were helping us face tough issues and find our way through. In a June 1973 hearing, Senator Baker said, "The central question at this point is simply put: what did the president know, and when did he know it?" That was exactly right, and I realized I wanted to be able to think as clearly and cleanly as that, to cut through the sound and fury. That is when I decided I wanted to be a lawyer. Lawyers were leaders, questioners, advocates—and they had played a big role in making changes I thought were important, like establishing students' First Amendment rights. When I learned that a mere 2 percent of the lawyers in the country were female, the deal was sealed.

You may notice that to this point, I have not referenced any particular desire to be a peacemaker or mediator. Yes, I mediated at home sometimes, and I sort of mediated between my different identities. I asked questions. I tried to understand. But I was drawn to the people advocating for change, finding the truth, moving us forward through crisis. I wanted to be one of *them*.

So in high school and college, I became involved in politics on a small scale. At others' urging, I ran for president of Allegheny College's student government. I wanted students' voices to be heard. After knocking on every student door on campus, I won and became the first woman to lead the organization. I met with college administrators

and advocated for students, but this was 1976 and 1977 at a small college in a small town in northwestern Pennsylvania. I was disappointed to learn that most students cared more about the cost of using the school's washing machines than the bigger issues facing their college. The few students motivated to use student government to achieve larger goals were the Young Republicans. They were my nemesis, but I have to admit a certain grudging admiration for them. Besides being ambitious, they were disciplined and patient. My supporters and I made a few reforms—and put on some great concerts—but then I moved from student government to the college radio station and professional radio and even considered broadcast journalism as a career.

But I still wanted to work for change, to be the one making a difference, not just reporting it. I had done very well in college and had impressed the faculty with my service as a student leader, my double major in English and political science, and my senior thesis. I also did well on the LSAT. (I “prepared” for the test, by the way, by going to the movie *Animal House* the night before. That would never work today.) I ended up at Harvard Law School, which was quite the feat for a nerdy, working-class girl from Erie, Pennsylvania, a coal miner's granddaughter whose parents had not attended college. My parents were proud and happy for me.

Harvard, though, was a culture shock. The students were nothing like my college classmates or my family or the people I knew in Erie. Harvard Law's students had lived; they knew the world, sometimes because this was their second career or because they came from a much more worldly social class. They read and cared about the news, they were ready to compete, they knew they mattered, they intended to be noticed and, if necessary, would force change. The faculty also were nothing like my previous teachers, many of whom had been grateful to have a student who was moti-

vated to engage and learn. These professors had active lives outside the classroom, with research, consulting work, and television appearances. They did not identify primarily as teachers and mentors, preparing us to perform as lawyers. They were confident that we were smart and would find our way. Indeed, our job was to live up to *their* institution, “the” Law School.

And what about that demanding mistress, the Law? Like most law students, I found learning to read judicial opinions much more difficult than reading and analyzing novels or textbooks. In addition, the exciting concepts involved in Constitutional Law represented just one minuscule part of the legal curriculum. Most of the common law’s foundational principles involved private property-related rights and obligations, contracts, or determining liability after accidents. Changing the world was not its primary focus. Rather, we learned the elements of legal causes of action and defenses, identified key facts that could affect application, and ultimately prepared to help clients achieve their self-interested goals. Sometimes, legal analysis and argument felt like dancing on the head of a pin to determine who would win or lose an ultimately inconsequential battle. Even working with Harvard’s Prison Legal Assistance Project to help prisoners in parole revocation hearings or monitoring and researching potential legislation for the Washington, DC office of the American Civil Liberties Union ultimately did not seem to provide for meaningful forward movement. In the case of the prisoners, we were placing bandages on much bigger problems—and at the ACLU, we were caught in Washington DC’s large web of big egos and self-interest.

But it was at Harvard Law School that I was first introduced to mediation. All 1Ls had been required to read Charles Dickens’s *Bleak House*—an interesting way to introduce future lawyers to the effect of law and legal

institutions. (Clearly, some people at Harvard had their doubts about our current legal structures.) I participated in a mediation training that took place on the weekends and mediated disputes in small claims court. I also took an elective course taught by Professor Frank Sander titled "Interdisciplinary Approaches to Dispute Settlement." I did not know that Frank was a central figure in dispute resolution. I knew only that I enjoyed his class and, very uncharacteristically, enjoyed taking the final examination because it required us to identify the disputing parties' interests and goals and figure out how to help them resolve their dispute. *This* felt creative and meaningful, although I had no idea what career path would allow me to use the concepts and skills that Frank taught.

Upon graduation in 1982, I joined the Minneapolis law firm of Leonard, Street and Deinard to practice civil litigation. I was drawn to Minnesota's progressive history and Minneapolis' Midwestern pace and personality. Leonard, Street was a medium-sized firm, with accomplished partners and a social justice history that remained an important part of the firm's culture. Three very talented Jewish lawyers had founded the firm after they had been rejected by the city's white-shoe law firms, and the firm was very involved in the labor movement, the creation of the Minnesota Civil Liberties Association, and protection of northern Minnesota's environment. Leonard, Street also had made a woman one of their partners well before any other firm in town. I liked the tradition of this firm.

By the time I arrived, though, medium-sized law firms faced a dilemma. They had to become smaller, boutique firms or grow substantially to become more corporate, full-service firms. Leonard, Street chose the latter course. I had wonderful mentors, made good friends, learned the craft of lawyering, and settled all my cases. I never used mediation, but in one case in which I represented a third-

party defendant with minimal exposure, I played the role of quasi-mediator because it was in my client's interests for the case to settle—and sooner rather than later.

A large federal securities class action, a case that was in discovery and motion practice for five years, also played an outsize role in my life as a junior lawyer. I was part of a team of lawyers and legal assistants who spent countless hours combing through documents, preparing clients for depositions, and researching and writing motion papers. Finally, we went to Philadelphia for the trial, empaneled a jury, made opening statements, and began putting evidence into the record. The judge, known for settling cases, required the lawyers and clients to meet with him—repeatedly. After four days, the case settled. Despite my belief in settlement, I was crushed. I *wanted* that case to go to trial. That is what we had prepared for, and I could not believe how much time, energy and creativity we had wasted. There had to be a better way. I knew what it was.

In 1986, I left the firm to join Mediation Center, a non-profit organization founded by the Hennepin County Bar Association, that provided mediation and other dispute resolution services, conducted negotiation and mediation training, and probably most important, served as a resource and catalyst for the development of dispute resolution in Minnesota. Bobbi McAdoo was executive director. I was director of mediation services, responsible for overseeing our roster of mediators, marketing our services, consulting with private and public entities, conducting trainings, and mediating my own cases.

This was an exciting time. I received additional mediation training from CDR Associates, with masterful demonstrations of how people's interests could open a productive path to solving their problems. With mentoring and encouragement from Bobbi, I mediated cases large and small—contract, employment, environmental issues,

public policy. It was exhilarating to give people the opportunity to explain what troubled them, show that I was listening and really understood what they cared about, and then help them identify and use their underlying interests, tempered with realism, to arrive at a workable solution.

We also were involved in systemic change. Mediation Center played a key role in persuading Minnesota's legislators to allow Hennepin County's courts to pilot the use of mediation for civil cases, provided the services for the pilot, and worked closely with the state to design an evaluation. Although we believed in our process, we did not know what the results would be. They turned out to be good. The parties rated mediation as fairer, more efficient, and more satisfactory than traditional adjudication (Kobbervig, 1991).

This evaluation led to statutes and rules requiring lawyers and clients to consider dispute resolution and authorizing Minnesota judges to order the use of mediation. Mediation Center then began conducting training and continuing education programs, for judges assessing cases for their mediation potential, lawyers representing clients in mediation, and the many lawyers, mediators and others who wanted to serve as court-connected mediators.

It was a heady time. Even those who decided after the training that they were not cut out to be mediators told us they appreciated learning a new way to interact with their clients and opposing counsel. I also was tapped to advise the Minnesota Supreme Court regarding mediator ethics requirements and procedures. The state of Minnesota had institutionalized dispute resolution in its courts and had developed innovative rules and procedures. We were leaders.

During this time, in 1989, I became the executive director of Mediation Center. I recall three particular moments of reveling in the center's—and my—leadership role. The first occurred on a quiet day in the office as the snow spar-

kled outside. I leaned back in my chair and reflected that after a lot of work, we had reached and were riding the crest of a wave. It was exciting and wonderful. The second moment occurred at one of the annual spring conferences held by the ABA Section of Dispute Resolution. As I sat with Bobbi in the audience for one of the workshops, I realized that she and I could and should be in the front of the room and people would be interested in what we had to say. They could even learn from us. The last moment occurred when I met with Bobbi, Jim Coben, and some of Mediation Center's trainers, debating whether we had something we could write about. Would anyone want to know the story of mediation's institutionalization in Minnesota? Jim was doubtful, but I was sure we had something worth sharing. My writing began.

With Bobbi, I wrote about Minnesota's experience. We wrote for lawyers, for judges, for academics. We wrote about the steps we had undertaken. We wrote about the results of empirical research that Bobbi had conducted to learn how Minnesota lawyers perceived the courts' mediation process. But as we reviewed those results, I began to fear that the wave I'd reveled in earlier, that wonderful wave, was crashing. Increasingly, especially in the personal injury mediations that then dominated the courts' civil dockets, defendants were not showing up. Lawyers—not their clients—were doing most of the talking. Lawyers were choosing litigators with substantive expertise as their mediators and expected reality-testing, not facilitation of the parties' dialogue. Increasingly, mediation was being conducted in caucus rather than joint session.

Wait. The mediation that I had helped institutionalize, the process that fit with what I cared about, involved enabling people to talk productively, getting at their underlying interests, and helping them figure out whether they could reach a solution based on those interests. Of course,

discussions in a court-connected mediation should inevitably include the law, but the process was supposed to offer more than that, something that served the people involved by incorporating their voices and enhancing their self-determination.

Again, I felt conflicting currents. I was a mediation advocate, but this was not what I had advocated for. I decided that I needed to research, to write, to try to understand what was happening, to determine whether I *deserved* to be upset as the mediation process adapted to fit the culture of the courthouse. I also wanted to be sure that lawyers understood mediation's potential.

I had been teaching as an adjunct law professor at Hamline University School of Law and had recently experienced exhilarating intellectual discussions at the Salzburg Seminar in American Studies, an invitation-only global conference held in Salzburg, Austria. I had enjoyed leading Mediation Center for nearly a decade, but it was time to throw my hat into the ring to try something new—the legal academy—to affect policy regarding mediation and help law students understand the process. Frank Sander and Len Riskin agreed to serve as references, as did Bobbi and federal judge Ann Montgomery.

Penn State University's Dickinson School of Law offered me a tenure-track position as assistant professor of law. Dickinson had a long and storied history as a private and independent law school and had produced many of Pennsylvania's best lawyers. In 1997, Dickinson had become part of public Penn State University. The law school had a vibe that was both warm and ambitious, committed to teaching while being part of a major research university.

It was difficult to leave Minnesota. I had come to love the state, the Twin Cities, cross-country skiing, and camping on the North Shore. I had made many wonderful friends, some of whom had introduced me to my husband,

Eric. Our two sons had been born in Minnesota. But in 1998, I headed with my family back to Pennsylvania.

In my first few years at Penn State Dickinson, I focused on researching and writing articles that would help me—and, I hoped, others—figure out whether mediation was being misused in the courts. First up: the principle of self-determination. What did it mean, exactly? How were ethics codes in Florida, Minnesota, and Virginia dealing with the effect of mediator evaluation on the parties' self-determination? How likely were the courts to understand and seek to protect self-determination? I concluded that courts were very unlikely to care about protecting parties' self-determination or even understand the concept and that the courts' interest in docket reduction would translate into a strong presumption favoring the enforcement of mediated settlement agreements, no matter what approach the mediator used. At most, the courts might rescind mediated settlement agreements that were clearly coerced by a mediator's behavior, but how likely was a court to find that a mediator, with no power to impose solutions, had coerced a party's agreement by conducting reality-testing, even strong reality-testing? To protect self-determination, I proposed that every mediated settlement agreement should be subject to a three-day cooling-off period. Even my friends were troubled by my proposal, because it could encourage people to back out of agreements. But I thought self-determination ought to trump finality.

Because I had concluded that courts would not care about self-determination, I decided to focus in the second and third articles on something that courts should care about: justice, particularly procedural justice. Somewhat to my surprise, I concluded that mediators' evaluative interventions could be entirely consistent with procedural justice, depending upon when such evaluation occurred and how it was delivered. I also concluded that lawyers'

domination of mediation sessions, speaking on their clients' behalf, also could be entirely consistent with procedural justice, as long as clients could observe that they were being given voice and their lawyers sufficiently understood what was important to them. And finally, I concluded that the use of caucuses would not necessarily undermine perceptions of procedural justice as long as enough was done in joint session to permit the parties to make a judgment about the even-handedness of the mediator. In my final article in this trilogy, I reported the results of a relatively small qualitative empirical research project involving interviews with parents and school officials involved in special-education mediation sessions. The results suggested that both parents and school officials cared most about the procedural justice offered by the process and making meaningful progress toward resolution. Also, they appreciated *both* facilitative and evaluative interventions, as long as such interventions provided for procedural justice and productively moved discussion toward resolution. Events occurring during caucus turned out to play a very significant role in the parents' and school officials' perceptions.

Every academic hopes their scholarship will have some effect. The first article of this trilogy ("Thinning Vision") influenced state ethics codes and the Uniform Mediation Act, and it was recognized as the third most-cited article in the *Harvard Negotiation Law Review's* first 10 years of publication. The second and third articles ("Making Deals" and "Stepping Back Through the Looking Glass") brought procedural fairness to the fore in discussions of mediation.

By the end of this exploration, I felt that I had a much more realistic picture of how court-connected mediation could encourage dialogue and surface parties' interests while also permitting lawyers' likely dominance and mediators' use of both caucus and evaluative interventions. I

also had come to realize that many people in disputes, at least those in civil litigation, did not necessarily expect the same expansive sort of voice and self-determination that I did.

I was promoted to professor of law with tenure in 2004. A few years later, I was named the William Trickett Faculty Scholar. Over the years, I have continued to return to court-connected mediation—writing about potential misuse of the mediation privilege, whether and how the process addresses prejudice, and even how mediation could be integrated into the treaty-based arbitration process used to resolve disputes between host states and foreign investors.

In 2006, I had the good fortune to be granted a sabbatical and named a Fulbright scholar to explore the Netherlands' institutionalization of court-connected mediation. Even more fortunately, my husband and sons were able to share the experience of living in The Hague. The Dutch institutionalization of court-connected mediation was inspired by the US experience but instructively different. For one thing, their model of mediation tended to be more facilitative and interest-based. Judges stood ready to decide cases if the parties' "self-test" revealed that their dispute would be resolved with the answer to a legal question. More generally, the Dutch conflict resolution culture provided people with access to many more "paths to justice" than in the United States. In court, Dutch trials were more like periodic conversations with a judge. And the Dutch Ministry of Justice had tapped a single well-respected judge to lead the institutionalization of court-connected mediation, in contrast to the decentralized experience of the United States.

Following my sabbatical, Len Riskin and I wrote an article proposing that someone, courts or lawyers or mediators, should be required to ask the parties what model of mediation they wanted and what issues they hoped to

address. On the other hand, Bobbi McAdoo and I wrote an article suggesting that court-connected mediation had to serve courts' goals, not vice versa. Looking back, it's clear that I was still searching for how mediation fit in civil litigation and whom it should serve. More crosscurrents.

Meanwhile, I was growing tired of the crosscurrents I felt inside, as a proponent of mediation who constantly critiqued it. My next steps might have been different if I had been able to experiment with different approaches to institutionalizing the process in the courts, but Pennsylvania was not particularly fertile soil for this. Pennsylvania's state courts had not embraced mediation, except for certain types of divorce and child custody matters, and even in that substantive area, Pennsylvania already had court adjuncts called "divorce masters" who behaved very much like mediators. My most direct engagement with mediation in Pennsylvania—e.g., mediating cases and conducting training outside the law school—was with the US District Court of the Middle District of Pennsylvania and with the Pennsylvania General Counsel's Office.

My law school also was embroiled in conflict that seriously affected my life as a scholar, teacher, colleague, mother, wife, and human being. More crosscurrents. Around the time that I had been awarded tenure, Penn State's president tried to move the law school from its historic home, one that had been guaranteed by contract to continue "in perpetuity," to State College, where Penn State's flagship campus is located. All hell broke loose, with enraged law school alumni, battles in the press, law students being asked difficult questions by potential employers, a lawsuit, and a debilitating sense of uncertainty. The warring parties finally agreed on one law school but with two locations, one in Carlisle and the other in State College.

I was told that I had to move to State College. I did not want to move—I had a husband and young sons who were

happy in their work, schools, and friends—and ultimately I didn't. But there were many more disruptions: moving to a temporary building next to the Pennsylvania Turnpike, teaching by videoconference with some students in the room with me and others in the “remote” classroom two hours away, traveling between Carlisle and State College to develop relationships with students and colleagues, and then going through another upheaval when Penn State decided to have two entirely separate law schools. Adding to the turmoil were the horrible revelations about football coach Jerry Sandusky's abuse of young boys and the potential cover-up by top Penn State officials.

These events certainly were distracting. But they also were instructive, as I experienced the challenges of dispute resolution. I was in the midst of a major conflict, but without meaningful voice. I was one of the faculty's most productive and cited researchers, but because I had chosen to remain in Carlisle, I was stereotyped as insufficiently focused on achieving a world-class profile for the law school. Ironically, for a time, I lost my own self-determination. At various points during those years, I proposed that Penn State bring in outside neutrals—mediators, facilitators, whatever—to help us work through our issues. That never happened, which was also instructive.

In retrospect, I see that much of the turmoil was probably the inevitable result of merging two organizations with different cultures and different hierarchies. Just as a human being has to go through the awkward stage of puberty, Penn State Dickinson had to go through a painful period of adaptation. It was made worse, though, by Penn State's decision to create two locations, one in the favored spot on Penn State's flagship campus aiming for global impact, the other located on a satellite campus presumed to be focused primarily on teaching local students. The

structure and stress almost inevitably resulted in competition and even warfare.

At about this same time, I had also become distressed over the direction that the dispute resolution field was taking, especially in terms of arbitration, as that process became more of a business and less of a calling. Increasingly, dispute resolution organizations were working with companies to insert mandatory pre-dispute arbitration clauses into take-it-or-leave-it contracts and thus force consumers and employees to waive their right to go to court or join a class action. The Supreme Court was encouraging this abandonment of the courts through a series of cases declaring a federal policy supporting arbitration.

Like mediation, arbitration originally was created as an act of party self-determination. Disputing merchants preferred to have their contract disputes decided by one of their own, rather than a judge. But an arbitration clause in a contract negotiated at arms-length between two sophisticated businesspeople is quite different from an arbitration clause hidden in a form contract between a company and one of its consumers or employees. I began researching and writing on this topic, with a focus on procedural due process, structural bias, and dispute system design.

I was also elected to the council of the ABA Section of Dispute Resolution and in 2010, began working with several colleagues, including Lisa Amsler, Homer La Rue, Larry Mills, and Tom Stipanowich, to organize a series of roundtables on consumer and employment arbitration that would involve all the different stakeholder groups. We hoped that developing relationships, sharing information, and identifying issues would create some opportunities to “move the ball forward.” Indeed, our consumer arbitration roundtable informed some of the research later conducted by the Consumer Financial Protection Bureau (CFPB) as it decided whether to bar mandatory pre-dispute arbitra-

tion clauses in consumer contracts for financial goods and services.

Once again, I was playing the role of dispute resolution advocate while also critiquing a process. I became chair of the section in 2016 and very much wanted this leading dispute resolution organization to play a catalytic role, to protect the integrity of arbitration by limiting the use of mandatory pre-dispute consumer and employment arbitration. Many within the section supported such a position. But many others felt that arbitration was being unfairly maligned, and some urged that they did more as arbitrators in debt-collection matters to ensure fairness to debtors than courts would have. Ultimately, the section supported ABA policies critical of mandatory pre-dispute arbitration in certain—but not all—sectors. The section also gained permission from the ABA to submit comments strongly supporting the rule proposed by the CFPB to require reporting and transparency regarding the use and results of mandatory pre-dispute arbitration.

Before this, I had not thought a lot about the need for more transparency regarding institutionalized dispute resolution. But it makes sense. The outcomes of private arbitration receive expedited judicial enforcement—thus borrowing the coercive power of the state. There should be transparency regarding the numbers of cases going to arbitration, the parties involved, the neutrals serving as arbitrators, the parties' perceptions of the fairness of the process, and the outcomes. The same is true for mediation, especially when it is imposed by the courts. Transparency—regarding both arbitration and mediation—has become my most recent focus in terms of scholarship, and it dovetails with those urging greater attention to access to justice, particularly as more people come to court without lawyers or find themselves diverted to private dispute resolution processes.

In 2017, I also made another major transition. I retired from Penn State Dickinson and joined the faculty of Texas A&M University School of Law as professor of law and director of the “Aggie” Dispute Resolution Program. It’s been exciting to experience the rough-and-tumble, the diversity, and the sense of possibility that exists in the very large, very proud, and very “can do” state of Texas. I am lucky to have a wonderful group of colleagues in the Dispute Resolution Program, each with one foot in dispute resolution and the other in a substantive area of law or practice; lucky to be at a law school that requires all its students to take a course in dispute resolution and regularly integrates negotiation, mediation, arbitration, and dispute resolution skills into substantive courses; lucky to be in a state that has fully endorsed court-connected mediation and is now experimenting with online dispute resolution. And I am most lucky to have a supportive husband and family collaborating with me in this latest adventure.

And what about those crosscurrents? I don’t think they will ever be fully reconciled within me. I am one of those people drawn to promising concepts: the mysticism of Catholicism, the clarity of law, the possibilities in mediation if you listen for people’s underlying interests. But I am sufficiently logical and realistic to acknowledge that these promising concepts also need to fit within larger structures. Sometimes there will not be a fit. My hope is to help with the times when a fit *is* possible, but only if we care enough to work for a balance that will keep the promise sufficiently alive.

## References

- Kobbervig, W. 1991. *Mediation of Civil Cases in Hennepin County: An Evaluation*. St. Paul, MN: Minnesota Judicial Center.