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I. INTRODUCTION

In Hans Christian Andersen's tale *The Emperor's New Clothes*, a monarch who is excessively fond of new clothes parades naked in a great public procession. The Emperor finds himself in this embarrassing position because he is seduced by his own desires and by fraudulent entrepreneurs, but he is also undone because he is surrounded by dependent and self-serving office holders. Once the swindle is set in motion by weavers who claim to be able to create the most wondrous cloth, "of unusually fine colors and patterns . . . that became invisible to every person who was not fit for the office he held, or was impossibly dull," the entire community collaborates in the myth of the Emperor's new clothes. "Nobody would let it appear that he could see nothing." Fearful of losing their status and authority, intimidated by the powerful consensus, and unwilling to be identified as a fool, everyone in the town agreed, from the highest to the lowest, from the Emperor's most trusted ministers, courtiers and chamberlains, to the masses in the streets and windows, "How beautiful the Emperor's new clothes are!"[1]

Andersen's tale, like most fairy tales, is designed to instruct, amuse, warn, and enlighten.[2] Written with "plump didactic purpose,"[3] fairy tales set out to conquer fears generated by natural, human, and bestial terrors that threaten "to destroy free will and human compassion."[4] Relying on simple metaphors and familiar settings, Andersen constructed his morality tales to pay reverence to the virtues of the Protestant Ethic while giving life to the discourses of the dominated. His stories attacked the false pride and greed of pretentious aristocracy, while ignoring the same among bourgeois characters.[5] Many of his narratives expressed ambivalence about his working class origins and dependency upon the patronage of the aristocracy, sensitivity to class struggles, as well as a genuine admiration for the Danish upper classes; of course, not all in every story.

The Emperor's New Clothes concludes with the monarch's corporeal and metaphorical exposure as the fool while the entrepreneurial swindlers, sycophantic retainers, and cowed population go unpunished, nicely illustrating Andersen's ideological commitments and ambivalences. The tale lives, however, because

1. Hans Christian Andersen, *Andersen's Fairy Tales* 263-68 (Mrs. E.V. Lucas & Mrs. H.B. Paull, trans., Grosset & Dunlap Publ. 1945).
2. Jack Zipes, *When Dreams Came True: Classical Fairy Tales and Their Tradition* 2 (Routledge 1999).
3. *Id.* at 81.
4. *Id.* at 1.
5. *Id.* at 99.

Andersen's story has more than biographical interest. *The Emperor's New Clothes* warns us against seeking simple remedies for complex problems, in this case it warns against a litmus test for distinguishing the wise from the foolish and the competent from inept. As importantly, Andersen's tale is an account of how the snake oil salesman manages to survive in so many different places and times, selling home medicines from the back of wagons on the American western frontier or advertising psychic consultation over the global internet. The Emperor ended up without new clothes because "everyone was anxious to see how stupid his neighbor was;" because his good old minister, not seeing the invisible clothes, did not want anyone to know that he was unfit for his post; because his trusted chamberlains feared losing their positions; because each thought the other could see the clothing; and, (with the exception of a child) no one was willing to say there was no there there.[6] *The Emperor's New Clothes* is a very modern tale about carving out market niches, about generating and feeding unreasonable desires, and about the power of conformity within emergent occupations and powerful professions.

II. EXPOSING MEDIATION MYTHOLOGIES

In her review of the extensive research on citizens' preferences for various dispute resolution processes, Professor Deborah Hensler suggests that mediation has become an ideology. By invoking the term ideology to describe the work of mediation proponents, Hensler associates the mediation movement with political propaganda. Although this association is not invariable (one can find several dozen scholarly definitions of the term "ideology"), most uses of the term have historically shared a conception of ideology as abstract and false thought. A pejorative aura generally attaches to the concept, so that "sensible people rely on experience, or have a philosophy, silly people rely on ideology."[7] Silly people are those who are easily seduced by misinformation or disinformation and false thoughts. The ability to manipulate appearances - with abstract and false thought - has been treated as a sign of political power.[8] Mediation, as an alternative to adjudication, has been promoted by claims of greater efficiency as well as greater social responsiveness. Appealing to both the political right and the left, mediation appears, by its proponents' accounts, to lie outside of politics. By labeling mediation advocacy as ideology, Hensler challenges the apolitical, technocratic facade of this very political campaign of law reform. As we learn from Andersen's tale, Hensler also suggests that claims and appearances can be deceptive.

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6. Speaking about Oakland, California, Gertrude Stein is often credited with saying, "There is no there there." Stewart Macaulay adopted Stein's phrase to question whether the social sciences had yet, in 1983, produced any systematic knowledge about the law and legal systems. Stewart Macauly, *Law and the Behavioral Sciences: Is there any there there*, in Law & Policy (1984).

7. Raymond Williams, *Keywords: A Vocabulary of Culture & Society* 157 (Oxford U. Press 1983).

8. Susan S. Silbey, *Ideology, Power, and Justice*, in *Justice and Power in Sociological Studies* 272-308 (Bryant Garth & Austin Sarat eds., Northwestern U. Press 1998) (See extensive literature on ideology cited therein.).

Through her analysis of the literature on procedural justice, and comparative evaluations of court ordered mediation and arbitration, negotiation and settlement, Hensler demonstrates convincingly that enthusiasts misrepresent claims that citizens prefer consensual, informal dispute resolution and that mediation is more responsive to these preferences. There is little evidence that humans generally prefer harmony over conflict or contest, just as there is little evidence in Hensler's thorough survey of consistency with due process protections. Other research has shown that the efficiency claims are also misrepresented. Although mediation is cheaper and faster than litigation or arbitration, it is not clear that the solutions are equivalent or better. Repeated studies have demonstrated that some parties, usually those more socially and institutionally subordinate, are at a significant disadvantage. In divorce, for example, where mediation is commonly used and sometimes mandated, women systematically come out with less financial support and smaller property settlements, often pushing them and their children into serious financial straits.[9] In instances of wife battering, cases are often settled in mediation by focusing on the myriad forms of connection between the parties while failing to address the violence that brought them to mediation in the first place.[10] Studies have also questioned the process claims of advocates that mediation is unofficial, non-binding, with a third party facilitator who is both neutral and powerless; in other words, mediation is misrepresented as a process in which the parties reach their own resolution.[11]

III. MASKING MARKETS AND POWER

If the empirical evidence is so convincing that mediation is not what it is claimed to be by its advocates, what sustains the mediation mythology? What accounts for the spread of mediation (now a mandated as well as voluntary alternative to adjudication) if there is such a disparity between what is claimed and what is achieved? How does the mediation movement persist despite the evidence that in most instances there is no there there? I suspect that the same social forces that led the Emperor to parade naked in a great public procession have been at work promoting mediation as an alternative to adjudication. Mythologies of invisible

9. *See generally* J. Kelly & L. Gigy, *Divorce Mediation: characteristics of clients and outcomes*, in *Mediation Research: The Processes and Effectiveness of Third Party Intervention* (Kenneth Kressel & Dean Pruett eds., Jossey-Bass 1989); J. Kelly & S. Hausman, *Mediated and adversarial divorce: Initial findings from a longitudinal study*, in *Divorce Mediation: Theory and Practice* (Jay Folberg & Ann Milnes eds., Guilford Press 1988); Janet Rifkin, *Mediation in the Justice System: A Paradox for Women*, 1 Women & Crim. L. J. 41 (1989); Martha Albertson Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (U. of Chicago Press 1994).

10. Sara Cobb, *The Domestication of Violence in Mediation*, 31 L. & Society Rev. 397, 436-437 (1997).

11. Sally E. Merry & Susan S. Silbey, *Mediator Settlement Strategies*, 8 L. & Policy 7 (1986); Susan S. Silbey, *Mediation Mythology*, Negot. J. 349 (1993); Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 L. & Soc. Inquiry 35 (1991). These critiques of mediation have been derived from studies of mediation of interpersonal disputes, divorce, small consumer claims. They do not seem to apply to mediation of labor contract disputes or multi-party mediation and negotiation, for example of environmental issues.

clothes and mythologies of mediation are sustained by similar occupational impulses: to create new markets, or to protect old markets, for professional services.

Hensler argues that mediation advocates are mistaken about citizen preferences for informal alternatives to adjudicative due process. This is certainly true. In a study of popular legal consciousness, in which Patricia Ewick and I conducted interviews with over 400 residents of New Jersey, only two of our respondents mentioned mediation as a possible resource for handling conflicts and neither one spoke positively about it.[12] In general, the people we interviewed voiced a strong commitment to the rule of law, especially as embodied in the American courts. They expressed this confidence alongside an equally vibrant and lively appreciation for the ways in which the legal system did not live up to its pronounced ideals. Nonetheless, people we interviewed incorporated the gamesmanship of lawyers, the aggressive pursuit of self-interest through litigation, and the inadequacies of legal actors and processes as part of the price we pay for law, which they generally applauded and admired. So, yes, Hensler is quite right in her reading of the literature: American citizens are not anxious to give up courts for mediation.

I suggest, however, that the mediation movement is ideological not because it has misread the public's desires. Rather, mediation ideologues (mis)represent those desires to promote professional and occupational interests. Mediation is ideological because it masks its institutionalized exercises of power within claims about justice.[13]

Institutionalized programs of mediation for interpersonal, organizational, family, and consumer disputes arose as part of a professional struggle over the appropriate space of law in contemporary society. It was not generated from below, by consumers demanding more or better law or citizen demands for alternatives to law. Although mediation may be viewed as an alternative to adjudication, mediators and judges competing within a market for dispute resolution services; this is a surface illusion. Mediation for interpersonal, two party disputes is, as the phrase goes, almost entirely a supply side phenomenon.[14] Mediation was promoted as a more up to date product, offering better, more efficient, more responsive justice than the courts could provide. But rather than competition for courts and the legal profession, it is more appropriate to see mediation as an addition to, rather than displacement of, traditional legal services. The dispute processes and programs advocated by a wide array of professionals (e.g. reformers, academic theoreticians, and legal practitioners) turn out to be a "rationalized, formalized, codified practice set entirely

12. Patricia Ewick & Susan S. Silbey, *The Common Place of Law: Stories From Everyday Life* (U. of Chicago Press, 1998).

13. *See* Silbey, *supra* n. 8, for extensive discussion of theoretical relationships among these terms.

14. Low rates of voluntary usage plagued community and court initiated mediation programs providing support for the argument that mediation of interpersonal disputes is a supply side driven phenomenon. Not until mediation was mandated through legislation did the programs begin to flourish. The effort to institute mandated mediation undercut some of the most important claims for mediation as an alternative to adjudication (i.e. that it was non-coercive, voluntary, non-binding). Although much evidence supported criticisms that these claims were unrealized in practice, the illusion of voluntary, non-coerciveness was traded for sustainability as a practice and occupation.

within the scope - albeit in a subordinate place - of the technocratic, professionalization projects of the legal field."[15]

In *The Emperor's New Clothes*, imaginative entrepreneurs create a profitable market niche by offering the monarch an efficient tool for governing that also meets his personal desires. The weavers provide clothes of unusually fine colors and patterns that become invisible to every person who is a fool or is not fit for office, exactly the product that every serious administrator who is also a clothes horse might need and certainly would desire. The weavers are supported in their fraud by dependent office holders who prefer secure positions to loyalty to their monarch.

Mediation advocates similarly offered legal elites and law reformers everything they desired and could be persuaded that the public needed. For those who thought modern society's reliance of law was excessive,[16] primarily Chief Justice Warren Burger, insurance companies, the corporate bar and other members of the legal establishment, mediation represented a way of clearing court dockets for more important business litigation. For legal elites, insuring the capacity of courts to protect already existing rights required active resistance to expansionist demands from minorities, women, consumer advocates, and community organizers. Indeed, the ADR movement of the 1970s developed just after American citizens were, in effect, invited into the legal system, *en masse*, as a part of the liberalizing reforms of the Warren court. Maintaining legal legitimacy and judicial capacity required, in the view of the elite bar, a coordinated effort at rationalization in which asking less of courts was an essential first step.

For those at the other end of the political spectrum, adjudication was inaccessible rather than excessive. For these legal services practitioners and law reformers, mediation offered a means to increase access to justice, specifically justice that was built from the ground up on terrain outside the control of legal and economic elites. When the civil rights movement resulted in the extension of new

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15. Yves Dezalay, *Negotiated Justice as Renegotiation of the Division of Tasks Within the Legal Field*, presented to Conference on Dispute Resolution Research in Europe 24 (June 1987); Christine B. Harrington, *Shadow Justice: The Ideology and Institutionalization of Alternatives To Court* (Greenwood Press 1985); Nomos Verlagsgesellshaft, *Negotiated Justice Within the Field of Law: The French Example*, in *Beyond Disputing: Exploring Legal Cultures in Five European Countries* 119-120 (Konstanze Plett & Catherine S. Meschievitz eds., Baden-Baden 1991).

16. The litigation explosion turned out not to be so expansive, but warnings of impending disaster never ceased and continue almost undiminished despite the overwhelming evidence that court loads have not increased disproportionately to population and that settlements are not astronomical. Rather, we have overrepresentation in the press of a few cases and from the nineteenth to the twentieth century a redistribution of subject matter within caseloads, a shift from a predominance of contract cases to tort claims. For an assessment of the dimensions of the non-explosion, see Marc Galanter, *Reading the Landscape of Disputes: What we Know and Don't Know (And Think We Know) About our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983); Marc Galanter, *The Day After the Litigation Explosion*, 46 Md. L. Rev. 3 (1986); Marc Galanter, *News From Nowhere: The Debased Debate on Civil Justice*, 71 Denv. U. L. Rev. 77 (1993); M. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System - and Why Not?*, 140 U. of Pa. L. Rev. 1147 (1992); S. Daniels & J. Martin, *Civil Justice and The Politics of Reform* (Northwestern U. Press 1995). On the matter of the press over reporting, see *Studies in Law Politics and Society* (Susan S. Silbey & Austin Sarat, eds., JAI Press 1991).

legal rights to members of ethnic and religious minorities, women, the aged, the handicapped, and the poor generally, proponents of access to justice sought new means of addressing the needs of these constituencies. Mediation was part of the move by the left wing of the legal profession to extend legal services. The phrase itself, access to justice, is a rhetorical symbol of undeniable attractiveness and mobilizing power. Beyond its symbolic import however, the phrase, and the political movement it named, incorporated an ambivalent attitude toward, and a systematic contradiction within, legal liberalism. Increasing access to justice meant fundamentally changing the structure and procedures of adjudication and dispute resolution processes generally. At the same time such demands reaffirmed faith in law and in legal procedure, and in the justice they provide.[17]

Some criticized adjudication for its alleged inadequacy in addressing the substance of disputes and relationships between disputants rather than for its excessiveness or inaccessibility. For these advocates, mediation was also its favorite product. This group promoted mediation as a process that would get at the underlying trouble from which disputes emerge, claiming that mediation techniques would restore harmony, empower disputants and respond to personal needs. According to these advocates, ideal dispute resolution processes, such as mediation, should be forward looking, constructive, and creative, while being unburdened by precedent, process, or prescribed forms of discourse and argument. That these community empowerment advocates operated with a mistaken, essentialized, and ahistoric conception of the relationships, needs, or desires of modern Americans did not stop them from actively promoting their vision of a better form of dispute resolution.[18]

Finally, social scientists joined the mediation movement. They sought a place for themselves in the production of academic legal scholarship by forging a scientifically respectable ground for legal studies. Motivated by intellectual dilemmas specific to their disciplines, and by a desire to bring law within their professional orbits, social scientists tried to reconstitute the subject matter of law by transforming talk about law into talk about disputes. Adopting the concept of dispute as an essential analytic tool, scholars moved from the analysis of law as a system of rules to the study of law as but one process for handling trouble. With this move, formal definitions and institutions of law became unnecessary, theoretically pointless, and sterile.[19] Emphasis was placed on the continuity of law and other

17. Friedman explains that access to justice becomes a noticeable social problem when liberal legalism, with its insistence that law be both general and equal in its application, becomes widespread, as it seems to be following the civil rights movement of the 1950s and 1960s. Lawrence Friedman, *Access to Justice: Social and Historical Context*, in *The Windsor Handbook of Access to Justice* (1978). Indeed, the liberal desire to equalize social relationships, or at least to ensure that the legal order treat all citizens equally, has typically provoked the energy behind the "access to justice" movement.

18. Susan S. Silbey, *Who Speaks for the Consumer?*, 2 Am. B. Found. Res. J. 429, 457 (1984).

19. Simon Roberts, *Order & Dispute: An Introduction to Legal Anthropology* (Oxford 1979); Richard Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 L. & Society Rev. 217 (1973); F. Snyder, *Anthropology, Dispute Processes and Law: A Critical Introduction*, 8 Brit. J. of L. & Society 141 (1981); *The Disputing Process: Law in Ten Societies* (Laura Nader & Harry F. Todd eds., Columbia U. Press 1978).

social institutions and processes rather than on the distinctiveness of law. A proliferating literature emerged and provided theoretical underpinning for the mediation movement. Each of the social sciences contributed their expertise, tracing the evolution of disputes, mapping the landscape of disputing, and inventing techniques and processes of reconciliation. With enormous energy and almost ferocious zeal, they de-constructed relationships, troubles, and dispute processes until what had heretofore been the taken-for-granted stuff of everyday social interaction was reinvented in recipes for productive, integrative, problem solving negotiation. The psychologists and therapeutic community quickly joined in to promote processes that would allow people to air and exchange with each other "the few things burning inside them."[20] Mediation was sold as a process that would more likely meet human needs for autonomy, integrity and dignity.[21]

From different social locations and with different interests, legal elites, social scientists, access to justice and community empowerment advocates, together forged the mediation movement. Each contributed their own critique of adjudication. Those who sought new careers or revitalization for old careers hopped on the bandwagon.[22] Everyone had something to offer, and to gain: more fluid court dockets, accessible means of dispute resolution, community empowerment, sites for research and legitimacy within the legal community. The mediation ideologues promised a magical process that would satisfy fundamental human needs by making participants more self aware, competent and happy. What responsible leader would not purchase what was promoted as an accessible, fair, non-coercive solution for so many needs and desires.

In effect, mediation advocates, like the weavers, advisors, and chamberlains in the Emperor's court, offered comfort and hope to people struggling with perennial problems of social life. On the one hand, people are regularly engaged in conflict and battle. On the other hand, most of the commonly shared mythologies abhor and stigmatize conflict and power. Into this void step the sellers of cloth or consensual dispute resolution, offering the attractive and reassuring suit of clothes, or technique, that will solve all our problems, make us more magisterial or beautiful, more wise, more peaceful and satisfied. Andersen taught us a long time ago that one can make a handsome living selling magic cloth.

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20. William F. Lincoln, *Mediation, a transferable process for the prevention and resolution of racial conflict in public secondary schools: a partial case study with analysis* 16 (Am. Arb. Assoc. 1976).

21. Marguerite Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, 3 Negot. J. 29, (1987).

22. Christine Harrington & Sally Merry, *Ideological Production: The Making of Community Mediation*, 22 L. & Society Rev. 709, 735 (1988).