

The Privatization of Justice: An Ethnography of Control

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Introduction

On February twelve 1984 the former Chief Justice, Warren E. Burger, presented an alarming report to his colleagues in the American Bar Association. According to Burger, both the courts and the legal profession had experienced a sharp decline in public confidence in the last ten years. It was common knowledge that courts were over burdened, and that the dispute resolution process was time consuming, cumbersome, and expensive. And lawyers enjoyed no better a reputation. In his report, Burger quoted a “responsible and thoughtful” lawyer condemning allegedly common legal practice:

...lawyers have got to stop using the court system as a means to enrich themselves at the expense of their clients. And the courts have got to stop allowing the lawyers to do it (Burger, 1984:65).

Towards the end of his report, Burger identified the adversary contest as the source of the troublesome condition of the legal system and called for basic institutional reform:

Our distant forebearers moved slowly from trial by battle and other barbaric means of resolving conflicts and disputes, and we must move away from total reliance on the adversary contest for resolving all disputes. For some disputes, trial will be the only means, but for many, trials by the adversary contest must in time go the way of ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people. To rely on the adversary contest as the principal means of resolving disputes is a mistake that must be corrected (Burger, 1984:66).

Since Burger’s report, the conception of an alternative dispute resolution model characterized by harmony has emerged. The harmony model¹, as it is sometimes called, eliminates the adversary contest, and presents harmony as an appealing alternative to conflict.

The harmony model gives priority to satisfying the needs of people and maintaining amicable relations rather than proving the guilt of an alleged offender. Purportedly, anthropologists have discovered that the harmony model is pervasive in the non-Western world.² A well-known example of this model is the Kpelle moot in Liberia (Gibbs, 1963). While the Kpelle have access to court, they consider it inept at handling matrimonial disputes. The harsh tone of courtroom proceedings often pulls the spouses further apart, while the moot, encouraging group support, permissiveness, and reconciliation, is effective in dealing with matrimonial disputes and with bringing the spouses together again.

In our society, the harmony model is often portrayed as equivalent to private dispute resolution. For example, in September 1985, the monthly periodical *Reason* featured an article called, "Justice Goes Private," in which the author, Paul Gordon, argues that private dispute resolution is a more humane way of resolving disputes than traditional dispute resolution. The penchant for compromise solutions, or "win-win settlements" in Gordon's terminology (1985:28), within private justice institutions implies a switch in tone and attitude; a more flexible disposition aimed at maintaining amicable relations replaces the harsher, and stricter tone of the traditional legal system where establishing the wrongdoer is given priority. According to one private justice representative; "We panelists try to set the stage so that both sides will think of each other as humans, not opponents" (Gordon, 1985:26). To borrow a term from Justice Burger, representatives of private justice institutions are "healers of conflict" (1984:66). "They just want to meet people's need to work out conflicts," according to Gordon (1985:30). Harmony is pervasive.

What happens when the harmony model is implemented in private dispute resolution in this society, when it operates in a different context than in a society such as the Kpelle? Among the Kpelle, the moot is used to resolve disputes in familiar sittings while the whole village is present. Everyone participates in solving the problem, the history of which is well known in the village. The mediator belongs to the kin group and the disputing parties, spouses, are equally powerful. This situation ensures a full airing of issues, and provides a control on the disputing process.

In private dispute resolution in the United States, on the other hand, group support is absent, the mediator is a third party, and the disputing parties often have unequal power. What makes the harmony model so appealing even in our society? Can it be a viable alternative to our traditional dispute resolution system?

I considered these questions in an ethnographic study of worker's compensation dispute resolution processes of a major San Francisco Bay Area corporation. The corporation,³ Esco has hired a private justice institution, Seneco, to manage its worker's compensation claims and provide benefits to injured workers. Seneco attempts to resolve disputes using the harmony model.⁴

Historical Background and Organization of the Study

Prior to the installation of the worker's compensation law in the beginning of this century (1913, in California), workers injured on the job could only recover lost wages and medical expenses by establishing the negligence of their employers through tort litigation—a process that was costly, often delayed badly needed benefits, and carried the possibility of a zero sum outcome for the injured worker. The current law is designed to facilitate the compensation of injured workers. According to article number fourteen, section four of the California state constitution:

...it provides for the establishment of the worker's Compensation system to the end that the administration of such litigation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character.

Hence, court jurisdiction was replaced with an automatic, "no-fault" insurance plan. Injured workers were to be compensated whether or not their injury could be attributed to their employers' negligence.

However, in return injured workers have had to relinquish their right to bring a law suit against their employers in civil court. Injured workers are, then, no longer plaintiffs, but rather victims. This transformation masks the antagonism that actually persists between the injured employees and their employer.

For, the no-fault insurance plan has by no means completely obviated disputes regarding worker's compensation claims. While employers' potential negligence no longer is disputed, the injury or illness of employees has emerged as the object of dispute. A new set of questions are raised: Was the worker injured (e.g., is stress an injury)? Is the injury work related (e.g., is exacerbation of a preexisting condition due to work conditions)? To what extent is the worker injured (is she 10%, 50%, or 80% permanently disabled)? An antagonistic situation remains in which opposing parties continue to seek different outcomes: minimal expense for the employer and insurance company, and maximal benefits for the injured worker. According to, a worker's compensation judge whom I interviewed:

And make no mistake about it, the insurance company is not a nonprofit organization. They're not in the business to go under. They are in the business to make a profit for their share holders. And it is a realistic fact of life that they do it by...not paying out as much as some people would like them to pay out.

Thus, disputes have been reformulated , not eliminated.

This reformulation of disputes, in which attention is shifted from the employer to the injured worker, sets the stage for the privatization of justice. The focus on workers' injuries or illnesses activates the healers of conflict. These healers attempt to avoid conflict and preserve harmony by interpreting, explaining, evaluating, and defining injured workers' situations for them. In the private worker's compensation scene, injured workers are, then, further transfigured. They are no longer victims; instead, in an environment of healers, they are defined as patients in need of care and treatment. My work focuses on the consequences of this transfiguration.

A critical examination of injured workers' interaction with Seneco representatives reveal that the patient role exacerbates injured workers' dependency upon Seneco representatives. These representatives figure largely as experts within a complex worker's compensation scene. I also examine conceptions of illness among the injured workers, and analyze the sick role within this worker's compensation scene. Both the exacerbated dependency upon healer-experts, and a particular interpretation of illness joined by a particular sick role within this worker's compensation scene, induce injured workers to make themselves visible, i.e. knowable, to a great number of healers. As these healers are, in fact, hired by the Esco corporation to defend its interests, they are in reality antagonists to injured workers. Injured workers are, then, visible to their antagonists. Their visibility makes them controllable through nonviolent, but efficient processes. The privatization of justice increases the efficiency

of control that Esco can exercise upon its worker's compensation claimants and reduces Esco's costs in worker's compensation payments.

Control

The notion of control plays a significant role in this ethnography. I do not merely talk about social control; the control exercised in Esco's worker's compensation scene is cultural as well as social.

In her paper, "Controlling Processes in Western Industrialized Societies," Laura Nader points out that the term "social control" has been used, in most social science literature, to refer to the way people define and respond to deviant behavior (Nader 1985a). In proposing a broader thinking about control, Nader introduces a distinction between social and cultural control. In contrast to social control, cultural control is not merely a response to deviant behavior. In fact, it is not a reactive, but a "proactive" control (Nader 1985a:8) that potentially reaches into the everyday lives and thinking of people. While social control is the maneuvering of people and resources, cultural control is the manipulation of ideas, beliefs, and values (Nader 1983: lecture). Cultural control is invisible for the same reason that culture is invisible: the categories constructed in processes of cultural control become part of our taken for granted world. Hence, cultural control is an efficient form of control.

Examples of cultural control abound. In *No Access to Law*, Nader argues that concepts such as *caveat emptor*, *confidentiality*, and prevailing ideas of the complainant as deviant and the corporation as a person, "can block reform just as cost constraints, technical barriers and vested interests can" (Nader 1980:72). According to Nader:

Together the ideologies induce a passivity that helps reinforce a self-image of the complainant as rule breaker and of the consumer as the person at a smorgasbord who consumes from a wide display but cannot change the menu and would not think of doing so (Nader 1980:72).

These ideologies then, operate as mechanisms of control that inhibit innovative thinking and behavior, thus perpetuating structural continuity.

In Esco's worker's compensation scene, injured workers' situation parallel that of the inmate in the panopticon, an architectural configuration invented by Jeremy Bentham, and analyzed by Michael Foucault in *Discipline and Punish* (1979). As we shall see, the panopticon is an apt analogy for the cultural control exercised by Seneco and Esco.

Law

The discontinuation of the plaintiff role is the most resent step in an evolution of legal relations which has interested Nader for some time. In several papers, she has observed that in criminal law, the state becomes the plaintiff while the "true" plaintiff is relegated to the role of the victim.⁵ In the latest phase of the evolution of legal relations, the plaintiff role does not even survive in civil law. Nader argues that in private (alternative) dispute resolution, "plaintiff users of courts are being shifted to alternative forums" (Nader 1985b:13). She continues: "In terms of the solution of legal relations, once again—this time in civil cases—the

role of the plaintiffs is being amputated, and once again the users of the courts are being narrowed to a select few" (Nader 1985b:13).

In order to acquire consent for the elimination of the plaintiff role, private justice institutions use a "therapeutic" style of law.⁶ As Richard Abel argues in his paper, "The Contradictions of Informal Justice" (1982), therapeutic practices—such as discouraging self-reliance, creating an image of being in favor of the grievants' interests, and displaying paternalism—both attract disputants and neutralize conflict. In the absence of conflict, plaintiffs no longer have a role to play.

Abel argues that in disputes between parties of unequal power the neutralization of conflict, and the elimination of the plaintiff role is detrimental to the party who has less power. With less time, money, and knowledge available to pursue the dispute, this party needs the protection of an independent authority, capable of coercion, in order to balance the power relation. Since such an authority is unavailable in private justice institutions and since the less powerful party in disputes almost always is the party who is advancing the claim, Abel concludes that the therapeutic style of law is detrimental for the would be plaintiff (Abel 1982:267–310). My own study corroborates this argument. As we shall see, in the cases of the injured workers I interviewed, the discontinuation of the plaintiff role has the tangible consequence of depriving them of badly needed benefits.

The Transfiguration of the Injured Worker

In the private worker's compensation scene, in which the harmony model is implemented, the injured worker is transfigured from victim to patient. In this section I will examine the consequences of this transfiguration. Ostensibly it benefits injured workers. As patients, they become the objects of much care and sympathy. Yet, the surprising fact that this care is administered from the injured workers' actual antagonists puts it in quite a different light than one would suspect at first glance. The patient-healer relationship between the injured employee and employer actually facilitates an intensification of control of injured workers.

Dependency

In the formal legal system injured workers' inability to cope is universally acknowledged. They simply do not have the knowledge or the understanding to represent themselves. According to a worker's compensation judge:

...it is difficult for a worker to represent himself in a worker's compensation claim. And the reason for that gets down to...the question of uneven bargaining relationship, the big and the small...An unsophisticated worker dealing with the nuances of a complex system, like the worker's compensation system, is at a very serious disadvantage when trying to deal with an insurance company with seasoned, well-trained claims adjusters...available to help them pursue their interest in the case.

A worker's compensation attorney emphasized the worker's need for guidance. She defined her role as:

a shepherd more than an advocate. In worker's compensation, as opposed to other areas, what people are entitled to is not clear cut. I want to make sure that people get what they are entitled to, nothing less, nothing more...make sure that people understand their actual rights.

Worker's compensation claimants are unable to cope with the demands and uncertainty of the formal legal system, and are dependent upon experts for the processing of their claims. There are two complimentary individual types are created: the *dependent*, and the *expert*.

Seneco representatives portray themselves as liberators from this cumbersome legal system, presenting an image of themselves as knowledgeable and confident actors, loyal to claimants within the worker's compensation system:

...one of our prime objectives is to contact, talk to, and explain to the injured person what the benefits are, so they know what they are getting and what they are entitled to...*We take care of that person.*

By contrast, even in the private worker's compensation scene the worker often has little understanding of what the procedures are. It is doubtful that this ignorance, universal among the claimants I interviewed, is indicative of a limited capacity to understand the issues. Ms. Walker, a holder of a Ph.D. in linguistics, it a case in point:

Uh, well, you know, various forms got filled out and I think [Fred], our director, had to fill out a report of the accident, probably, ah, I don't remember the specifics of who filled out what, but I'm quite sure that a form had to come from our program and a form went in from the doctor, or maybe a request came in from the doctor and then I had supplementary insurance from Prudential—a little bit—so these various forms had to be filled out...I probably had to sign something too, I can't remember.

Not even Ms. Murphy, the union representative, considers herself to be competent in dealing with Esco's worker's compensation procedures. As she maintains:

I know enough about workers comp. Both my husband and his brother has had on the job injuries, and have been involved in worker's comp. And I know enough to know that it is complex, and legally very tricky...So I attempt to have nothing to do with the worker's comp. thing because I'm always afraid I'm going to screw it up, because it is such a morass of, you know, legal nonsense...so I just stay away from it and I get people to get lawyers to handle that part of it.

Out of necessity, healers of conflict figure largely as experts. While, in theory, they have emerged as a means for coping with the complexity of the worker's compensation system, they also, ironically, insure the perpetuation of this complexity. As justice is privatized, knowledge is not disseminated to worker's compensation claimants. Seneco representatives are not concerned with educating their claimants. Instead, the expert-dependent dichotomy, so prevalent in the formal legal system, is exacerbated in the private worker's compensation scene.

A high level of interaction among healer-experts extends their knowledge and control within the worker's compensation system. Despite the fact that Seneco operates within the private sector, their representatives are not isolated from traditional legal agencies. On the contrary, Seneco maintains a dynamic interaction with a number of law firms. According to an office administrator from the law firm Sutton & Joyner:

...we're in constant touch with Seneco of necessity, either in conjunction with a case that we are handling on their behalf, or they may ask us for an opinion that they need for a certain case that hasn't been assigned to us.

Seneco and Sutton & Joyner interact on two levels. First, the attorneys in the law firm constitute a source of knowledge and information for Seneco representatives who are not highly trained legal professionals. According to the law firm representative:

...they [Seneco representatives] might ask us what we would do. We are legally involved with cases. We will inevitably have more knowledge than they of how to effectively respond to any type of injury that a claimant may have.

In the second instance, if it seems that a case will be litigated, Sutton & Joyner may assume the entire handling of the case. However, also in this case, Seneco and Sutton & Joyner interact extensively. As the law firm representative maintains.

...when you defend an insurance company, as we do, and we handle an enormous number of claims for Seneco, we of necessity must adapt to their requirements...If the injury is not so great, they certainly don't want us to put a lot of time and energy into it and increase the fees associated with that claim. But if the injury means long time and enormous future problems for them, then they may recommend that we pursue it to its limits.

Channels of information available to Sutton & Joyner are also available to Seneco. These channels often furnish information about worker's compensation claimants crucial for the outcome of their cases. According to the law firm representative:

...we do the discovery work that is associated with the claim, we set up medical appointments, we take depositions...we work with all kinds of firms that do subpoenaing of records: major legal services, document copy services, any of these services that perform some kind of function for worker's compensation... We will send them the information saying, "Please get the records from St. Francis hospital, or Santa Rosa hospital, or Dr. Jones, or Dr. Smith, or..." and they are the ones who go after the records...And we do films, that's...sub rosa, we actually have investigators go film the individual if there is some question in our minds as to whether the applicant is truly an injured applicant.

In addition to maintaining a dynamic work relationship, Seneco representatives and attorneys from Sutton & Joyner interact socially. As the law firm representative indicates, even this type of interaction extends the experts' knowledge and understanding within the complex worker's compensation system:

...Seneco recently had an open house because they moved. They invited our attorneys to come to their open house to see their new facilities. It gives us a chance to meet with the claims adjusters and talk to them. Aside from being a social function it certainly...you'd be surprised, these attorneys, they all sit around and talk about these cases. They live, breathe, and eat this stuff. They put in twenty hours a day talking about law.

Thus, the private and traditional dispute resolution processes are intimately connected. Interaction and communication, work related as well as social, among the various experts both extend their knowledge and understanding of procedures within a complex worker's compensation system, and potentially afford them with valuable information about the claimants themselves. Such knowledge builds confidence and creates the healer-expert upon whom injured workers can rely for the processing of their claims .

As a high level of interaction and communication among healer-experts extends their knowledge and control within the worker's compensation system, minimal contact among patient-dependents and between experts and dependents in all likelihood perpetuates the ignorance and dependency of the injured workers.

In cases in which Seneco anticipates controversy, their representatives maintain no contact with worker's compensation claimants. Ms. Tracy, an injured Esco employee, contacted Seneco immediately after her accident:

...I called them and said, "my name is [T], and this is what happened, have you received any material?" And I spoke to several people there, and at that time I told them, "What do you want from me? How can we expedite this?" And I indicated that I had an attorney from the second day. And they said at that time, "Well whatever you say will be used..." I hate to say "used against me," but will be used, "...so I'd better really think twice before I say anything over the telephone, and I should get a clearance from my attorney before I talk to them," they advised me. Which I thought was very nice, because I didn't know this. And then I called my attorney and she said, "Yes, please do not talk to them...do not say anything, leave everything alone...I'm going to be in contact with them" Speech becomes the privileged domain of experts. Consequently, rather than actively participating in pursuing their own claim, injured workers tend to be disenfranchised from both knowledge and control of the process; their ignorance compels them to rely upon experts for the processing of their claims. This reliance, in turn, exacerbates their ignorance, further reinforcing their dependency upon healer-experts.

Injured workers are inadvertently placed in an antagonistic position to themselves. A few days after Ms. Tracy's conversation with Seneco representatives she received a letter from them:

...that wants to know, in my words, what happened that day, and it wants to know about me, okay? Really kind of shabby form, something that I wouldn't have thought of to be anything. okay, and I think this is kind of important, because I started to fill this out, okay, not knowing...once again because to me this should be all out in the open, what do I have to hide?...okay, so I fill this out and my husband comes home and says, "[T],

you were told not to do anything, why are you filling this out?" I go "Oh, oh yeah," and I call my attorney the next day and I tell her, "I got this letter did you get a letter?" No, she did not get a copy of this...okay, and she thought it was "pretty sneaky of them,"...And maybe through my ignorance, and I was all doped up with a lot of drugs, I could have just gone along and sent this, which could have been used against me.

Ms. Tracy becomes her own enemy. Despite the fact that communication seems natural, and often is enacted spontaneously, "she'd better not speak" with regard to her dispute. She is doubly encouraged to rely upon experts for the processing of her claim. First, her own ignorance forces her to seek help. And second, she will suffer the consequences of speaking if she does not respect the experts' exclusive privilege to communicate.

Ms. Tracy is not entirely dependent upon Seneco for the processing of her claim; she has also enlisted the services of an attorney. Even minimal independence and self reliance of this kind is discouraged by Seneco representatives. According to one of them:

...there are some instances...where the first thing they do is go to their union representative or their attorney, particularly if they are what we call "claim-wise," if they've had disputes in the past, either with Esco or some other employers...there's a certain percentage of those that are unavoidable.

It is possible that such a negative image of the independent, *claim-wise*, claimant is more wide spread, and has more harmful ramifications for the injured worker than one might expect. For Ms. Tracy it seems to have the tangible consequence of stifling communication between her and her former co-workers, and of disenfranchising her from another source of knowledge relevant to her claim:

...I have no support from my work, all co-workers for seven years...when I do see them accidentally, they refrain from saying anything about the office. Especially since I went to the union, everything was hush, hush. Everybody was afraid of saying anything to me...It's very strange and I don't take it personally...I have heard through word of mouth, it's because the management in my office is telling them to leave me alone. Not to say nothing to me because they don't want me to know anything...And who knows why.

Knowledge is, in effect, sheltered. For Ms. Tracy there appears to be either no information, or false information available:

...in my particular office they are supposed to be up on benefits and personnel procedure. Well, I have to go tracking down policies. Also, I get false information from different offices, not even correct information...I never get the right information; that's what my whole thing is...I mean there are just a lot of little things: they were supposed to contact me six months into my disability to tell me about waver of premiums towards my insurances, and that I was supposed to instigate other forms...I started those forms nine months later because no one had contacted me and I just happened to find out on my own...When I finally get the right information,

I'm the one who looks like an idiot because by that time I have made eighteen phone calls, have been under the wrong impression for nine months [laughs] and I am the one who is getting the shaft.

Communication channels are effectively closed to Ms. Tracy. Consequently, knowledge and information is only available for the price of considerable toil and trouble. Claimants who are not as persevering as Ms. Tracy would in all probability submit to the role of the dependent before subjecting themselves to so much trouble.

Minimal interaction and communication among the claimants themselves also perpetuate their ignorance and dependency. Significantly, while the harmony model teaches the disputing parties to see one another as "human beings and not antagonists," the private justice system encourages worker's compensation claimants to view each other with hostility as potential antagonists. Divided from one another, injured workers do not form a community based on common experiences, beliefs, perspectives, and interdependence in opposition to the corporation and the private justice institution. They do not possess the strength which comes from a collective identity.

My difficulties in gaining access to injured workers indicate some of the processes which divide workers from each other. My attempts to gather knowledge about the worker's compensation system was often met with suspicion by injured workers. Why would they share their knowledge with me, when anything they say could potentially be used against them? Because I was known to Esco managers, I was often defined as a potential antagonist by the claimants I sought to interview.

Consequently, and contrary to initial assumptions, the range of actors, defined by differential knowledge, described an uneven surface of research; access to experts, those more confident in their relation to knowledge, was easier. Seneco representatives, judges, and attorneys often welcomed me with open arms, and spoke freely about their position in the worker's compensation system. Those less confident in their relation to knowledge, on the other hand, maintained a more rigorous code of privacy. My attempts to contact claimants through letters, and advertisements in local newspapers invariably failed. I had to be thoroughly represented by the claimants' union representative to achieve any contact at all, and even then I was often denied access to injured workers.

The case of Ms. Clark illustrates my problems of access to injured workers. Initially, I channeled all contact with Ms. Clark through her union representative, Ms. Murphy. In early October 1985, she contacted Ms. Clark who then seemed very apprehensive, and reluctant to talk to me. She needed reassurances. I explained my position—an anthropology student—and the research project, and emphasized to Ms. Murphy that Ms. Clark's confidentiality would be strictly maintained. A couple of weeks later I heard from Ms. Murphy that Ms. Clark was still "thinking about it." Over a month later I spoke to Ms. Murphy again; she told me that Ms. Clark had thought it over and would like to talk to me. I then received her full name and phone number and immediately called her only to find that she still was not sure. The following is a transcript from my field journal at the time:

...she asks me what exactly I am doing. I explain my research project and assure her that whatever she tells me is strictly confidential, and that I will not use any names...She inquires further about how I might use whatever she may tell me, and I say well, for example. I might say, "according to one worker's compensation claimant," She tells me that she has to be very careful, that her thing has been going on for ten years, that she doesn't have as much energy as ten years ago, that she did get her job back, but that it was extremely difficult, that she has lived through a lot of hardship and doesn't want to do that again, that she is a single parent, has to support her children, and cannot afford to lose her job, and that if what she told me got back to [Esco] she would probably lose her job. Furthermore, after all hardship she has gone through, she'd rather just forget about it now...All in all she wanted time to think it over. She'll call me and let me know.

Since I was known to corporate managers, Ms. Clark deemed it unsafe to talk to me despite Ms. Murphy's and my own assurances to the contrary. After another two or three weeks without having heard from her, I called her up again and we finally made an appointment for an interview which would not be tape recorded. At the appointed time and place she never showed up. I have not attempted to contact her since.

In a complex worker's compensation scene, injured workers lack the knowledge and understanding to resolve their own claims; developing dependency upon healer-experts. The less confident they are in their relation to knowledge, the more reluctant they become to share their knowledge, and the less confident they become in their interaction with each other or anyone else known to corporate managers. Minimal interaction and communication among worker's compensation claimants isolate them; there is no sense of community, no group feeling, among claimants. Ms. Tracy, in fact, was surprised when I mentioned to her that there are other claimants who are afflicted by similar hardships. Just as extensive interaction among experts extends their knowledge and control within the worker's compensation system, minimal communication among claimants perpetuates their ignorance and dependency upon healer-experts. Claimants' ignorance and uneasiness, in turn, make them reluctant to associate, or share knowledge, with each other. Thus, the circle perpetuating their ignorance and dependency anew gains momentum.

This circle is not easily broken. Dependency does not allow for alternative solutions. It both suppresses creativity—by disenfranchising claimants from knowledge and control of the processing of their claims—and threatens it: a claimant who speaks must suffer the consequences—what she says can be used against her. A claimant who takes any initiative at all is stigmatized as *claim-wise*. Dependency, then, creates a sense of inevitability among worker's compensation claimants. According to Ms. Murphy:

I would say...that people didn't think that they had any choice, you know. You are injured on the job, you have a job that makes you sick, you know whatever...You don't have any choice. You can't work. you can't perform. You got to have income from somewhere. Someone tells you that it you have an on the job injury, or an illness related to your job, then you are entitled to worker's comp.

Isolation, ignorance, and dependency upon healer-experts becomes part of the taken-for-granted world of injured workers. The absence of visible or tangible alternatives legitimizes private resolution of disputes.

Illness Interpretations

Illness or injury, in deviating from an equilibrium, a state of health, lends itself to speculation and interpretation, prompting the innocent questions “Why me?” or “Why us?” People often create a layer of multiple interpretations which are constrained and informed by, and ultimately reflect, the social context of illness: social roles and relationships, cultural values and understandings, legal codes, religious beliefs, cosmology, etcetera.

These interpretations, however, usually appear to the people who create them as natural and given, rather than as artificial and created. For example, to the people who create it, an interpretation of an epidemic as divine punishment presents the objective reality; God, in fact, punishes them. Although the injured workers I interviewed construct interpretations of illness of an entirely different kind, these interpretations present objective reality no more than the supernatural punishment interpretations of illness. However, many injured workers, especially those with controversial cases are so immersed in their claims that the worker’s compensation scene becomes for them a microcosmos—a natural world, with its own assumptions, beliefs, and conceptions.

Operating with the assumption that these interpretations in fact reflect the social and cultural context of their construction, I will first attempt to denaturalize them—to show that they are, in fact, fabricated within the private worker’s compensation scene—and later, discuss their function within this scene. We will see that there is no homogeneity; injured workers’ interpretations of their injuries are informed both by their type of injury, and by the nature of their worker’s compensation claims—controversial or uncontested.

Ms. Walker’s worker’s compensation case was relatively unproblematic. She injured her shoulder at work, during working hours, and received her worker’s compensation without lengthy and agonizing disputes with Esco. Because of her shoulder injury, she lacks about one third of full mobility in certain directions of ordinary arm motions. It was established that she is 4¾% permanently disabled, and she was given a cash settlement of slightly below one thousand dollars.

To Ms. Walker, her injury jury is simply an unfortunate accident, in need of no further explanation. She describes her accident as follows:

It was a Monday. So, December 21, 1981, I believe. I was simply hurrying into [the] hall, where we were situated at the time, and...I hurried into the hall and around a corner where there had never been anything before and there was either a bulletin board or a black board with its “feet” extended, so my foot got caught in its foot and I went crashing down to the...floor, which is very hard...

Subsequently, she jokingly advised, “Don’t run around corners where things might be changed...[laughing] Don’t do that!” No teleology, no profound explanation, appears to be

necessary. As far as Ms. Walker is concerned, she was simply unlucky the day she hurried around the corner.

Ms. Harmon, an accountant, instigated her worker's compensation claim relatively recently. Although there is no outcome to date she firmly believes that her case will be satisfactorily resolved fairly quickly. Thus far, her claim, like Ms Walker's, is not fraught with controversy. However, in contrast to Ms. Walker's injury, Ms. Harmon's injury is not physical but psychological; she has filed a stress claim. In our interview she gave a very vivid and detailed description of the incidents leading up to her injury:

...it originally started when there was an embezzlement case at [Esco]...I was under a lot of stress then. My supervisor and one of my co-workers was arrested for embezzling the payroll. And one thing led to another. I was subpoenaed and put on trial. And I had to leave work because of numbness on the left side of my face, and it was all due to stress. So, ah, I returned back to work, and, one thing led to another and I had to leave again because of stress.

The second time she returned to work she was put on a monotonous job for which she was overqualified. In her own words,

I talked to the [personnel manager and budget officer]...and I told them that I couldn't stand it, that they would have to put me somewhere else. They promised me a similar position when they took my job away from me, and they put it in writing. So this kind of forced them to put me in another position.

Eventually, after Ms. Harmon threatened to sue, she was placed in a more stimulating and challenging position. However, according to Ms. Harmon:

I was only put there to do bad...I worked there for two weeks...for the first week I did nothing but just sort of sit there and do nothing. I didn't do any bills or anything. And [the] second week, they gave me a few bills to do, and introduced me to the service desk, not really training me properly...sort of like saying, "You do this, you do that, you do this," and that's it.

...on the third day of the second week, my brother died, ok. Now, me knowing that I was under pressure, I mean to go to work, and so on and so forth, I knew I couldn't take that. So, I went in late that day my brother passed away and when I walked in, my supervisor called me out into the hall and told me she was going to recommend that I go somewhere else. So I said, "Why?" And she said she didn't think I was giving her my all. I said, "Well how can a person give their all when they are in training and they don't know what they are doing?"...so I proceeded to tell what she should be doing to train me: introduce me to the computer, introduce me to the service desk, telling me every function there is, showing me the bills—why you bill and why you don't bill—give me a price list, and so on and so forth. I think she got kind of angry at that [laughs]... She said nothing, and I told her that I was a very responsible person, I know what I'm here to do. I'm not

here for anyone to like or dislike me, I'm here to do a job, and I'm going to do that job regardless...

... the next day...she has to talk to me again. And she started telling me, "I don't think you like the service desk, I don't think you like the scheduling, I don't think you would be happy here." I told her, "I do like the service desk, the scheduling does not bother me, and I think I would be happy here because of the fact I like dealing with the public..."She then left work for three days to attend her brother's funeral. The day she returned

the personnel manager called me up, told me that there had been some uprisings, and he wanted to talk to me. So I went upstairs to talk to him and he told me...he gave me this letter stating that...I had been in training for two weeks; I was not retaining the training, I couldn't type fast enough, and he recommend that I go somewhere else. He also said that I complain about the schedule, he said I complain about [how] he made me nervous, and so on and so forth. And he placed me on investigatory leave...I thought it was very unfair...without talking to me, asking me what was the problem, you know, just sort of taking their side of it. So it just totally...I mean it just blew my mind, and I began to get numb in the face, and stuttering, and my back went out. And I was just like a nervous wreck, totally, you know. That night I went in to the hospital because I couldn't do anything. I couldn't bend over, I couldn't sit up, I couldn't lay down, I couldn't do nothing. I was just in pain, my back, you know...

Ms. Harmon obviously does not perceive her illness as a haphazard accident, a result of bad luck. In contrast to Ms. Walker, she does seek a more meaningful explanation. Embedded in her account there is a very poignant expression of social criticism; her illness is a sign of, and results from, social distress. She does not locate the source of her illness internally; she, in fact, is a "very responsible person" who only wants to do a job. Instead, the cause of her illness is external: she was unfairly given a boring, low standard job, she was harassed by her supervisor, and finally she was unjustifiably placed on investigatory leave. Within this context of struggles between Ms. Harmon and her supervisor, her interpretation of illness is quite obvious.

Ms. Tracy has a worker's compensation claim which Esco disputes. She injured herself during working hours, though not at the work place, while getting coffee and pastry for her co-workers. This is, according to Ms. Tracy, normal practice for her office:

...And on February ninth—which is very normal for our office to send someone out...to get the pastry in the morning, or coffee, or whateverI was told by one of my co-workers that it's my turn because I never go and do it...and they pushed me into doing it...I went to the shop right across the street. And I got my order, the floor was wet, I noticed it, turned around, and slipped and fell, and injured my spine and numerous other things.

Despite the fact that there has been precedence set to grant worker's compensation in similar cases, Esco disputes Ms. Tracy's claim.

Because I went to get muffins, it was not like I was bringing xerox paper to some place, or I was doing a chore; I was doing something that was not in the personnel manual...But our office at the time was pretty relaxed with rules and policies...But under the circumstances my office is looking bad because you're not really supposed to do that. It's not in the policy.

Because of the controversial nature of Ms. Tracy's claim, Seneco encourages her to interpret her injury differently from both Ms. Walker and Ms. Harmon. Elaborate measures of persuasion are exercised in which medical examiners play a crucial role. Ms. Tracy is obliged to keep numerous medical appointments that are issued by Seneco:

...and the attorneys that are working for [Seneco], okay, constantly send me to...these particular doctors that are hired by [Esco]...And they send me transportation money, each time...I get a cheque for like eight dollars, or something, in the mail for me to go.

The primary purpose of these appointments is obviously not to attend to the health of Ms. Tracy.

They have looked under rocks, I am not kidding, to find out something that would discredit me...these doctors look like that's all they do; they work to discredit...

It is a well known and widely accepted principle within Western medicine that optimal medical practice necessitates a license to expose and study any detail relevant to the treatment of sickness. However, there is every indication that these exhaustive examinations of Ms. Tracy's medical history serve no other purpose than to examine her character and, as she says, to discredit her, to locate the source of her injury—a fractured spine, dislocated disks, a broken tail bone—within her own character.

I feel like, God, they want to know my whole life style, they want to make me look like I am this irresponsible person, and I am so sickly that I have been sick all my life.

A medical medicalization of character. The term *sickly* not only denotes a tendency to often become sick, but also refers to a particular kind of character that itself is abnormal and sick. Even in the absence of perceptible illness, a person with this character is sick; sickness has become a necessary element of being. Such a character, of course, causes perceptible illness as well. What previously could be caused by sinful conduct is, in the private worker's compensation scene, caused by a sickly character. This transformation only seemingly removes the responsibility for illness or injury from the ill person herself. Character, according to popular American mythology, is not unintentional. We choose who we are, and the American ideal is the autonomous individual who "makes himself" independent of outside forces. Ms. Tracy is this "irresponsible person," and had she been more responsible she could have chosen not to be so sickly. Through her own irresponsibility she actually invites illness and injury.

In fact, Ms. Tracy's responsibility for her own injury could, potentially be established even more forcefully. She speculates:

You know, I bet there are some people out there who try to get injured on the job. That's how they make it look...I guess, how can I say it, if I were not a stable person of some sort, they can say, "This woman, she does this for a living..."The more on the job injuries, the stronger the suspicion of deliberate injuries. Hence, an examination of injured workers' medical history may serve not only to classify them as the *sickly* type, but also to establish that they, in fact, intend to acquire injuries. The first step introduces at least indirect responsibility for illness or injury; the second step makes the injured workers explicitly culpable. They are further reclassified. In Ms. Tracy's words, "I am the culprit, not the victim."Ms. Tracy's medical history is not the only source from which her responsibility for her own injury can be derived. According to Ms. Tracy she is:

...very fortunate to have a very good medical background; I was a pretty healthy person. Okay, so I have been lucky—I think that's why they keep searching, that's why they keep sending me to doctors. They are hoping that I may slip or something, and may say something, or do something to incriminate myself. Ms. Tracy indicates that her conversation and interaction with doctors may be analyzed and interpreted to signify illness:...if you say, "Oh I am having a terrible day," or tears may come to your eyes or something, they say, "This woman is going crazy," or..." Oh this woman sounds like she is neurotic," or "This is a very emotional person," or, you know, they don't want you to have any feelings...because they may twist them around.

An image of Ms. Tracy is created: neurotic, crazy, and very emotional. She is encouraged to see herself as sickly, or, at least, abnormal. Again, a causal relation between her character and her injury is established. She is not sickly because injured, but rather injured because sickly.

Ms. Tracy's isolation from other injured workers reinforces her sense of culpability. She maintains no contact with other in injured workers, and, as mentioned earl earlier, expressed surprise when I mentioned to her that other worker's compensation claimants are afflicted by similar hardships. Her isolation does not lend itself to a social analysis of her personal troubles, but encourages self-blame. Alone, she is seemingly abnormal and, therefore, responsible for her own illness.

However, being a zealous fighter and an intelligent woman, Ms. Tracy has learned how to retort effectively. Since the purpose of her medical appointments is to inspect her character, Ms. Tracy's most effective response is to de-personalize herself:

...I have to retain myself; I can't go in like myself and be [T]. I can't be honest with them really. I have to just keep my mouth shut and tell them as little as possible...

A de-personalization is strenuous because it also involves a de-humanization:

That's one thing that I have noticed, that I have to be consistent. I can't sway in anything that I say when I go to the doctors. And I have made many mistakes by saying my feelings, I mean by being a human being. I have learned that you can't; you have to go in there like a robot, okay...

In Ms. Tracy's mind her medical appointments have become battles of intellects. She emerges victorious if, behaving like a robot, stripped of human psychology, she does not allow doctors to even implicitly suggest a causal connection between her character and her injury.

In the private worker's compensation scene, there is a multiplicity of interpretations of illness that are informed by, and express, the worker's type of injury and the nature of her worker's compensation case. Ms. Walker, who had a simple shoulder injury and an uncontested worker's compensation claim, interprets her injury as nothing but an unfortunate accident. Ms. Harmon, whose case is new and not fraught with much controversy, but whose injury is ultimately psychological, interprets her illness as a sign of social disorder, clothing her description of illness in a very sharp expression of social criticism. Although stress lends itself to self-blame, to being interpreted as a sign of internal, rather than external disorders and short comings, this interpretation is not immediately apparent to Ms. Harmon. Seneco encourages Ms. Tracy—with a straight forward injury but controversial claim—to adopt precisely this interpretation; to take responsibility for her own illness, to attribute it to her own *sickly* character.

The Sick Role Reconceptualized

From a sociological perspective, illness is a state of deviance which requires specific cultural understandings and sick roles designed for the particular conditions of sick persons. Illness requires from society a certain flexibility, a capacity to accommodate sick people in existing social structures and relationships without straining them too much.

Injured workers cannot work and fulfill their ordinary responsibilities as adults. Ms. Tracy, for example, has been off work for two years at the time she was interviewed. Most likely, she will never again be able to do clerical work, or any other work for which she needs to sit for eight hours a day. Her ordinary course of life is interrupted. She is unable to socialize as much as previously. "I always have to excuse myself and go and lie down," she says. Her son, who is nine years old, "sees his mother being sick," and has to do more for her than previously. Her newly wed husband "thinks he married sickly person."

Ill, Ms. Tracy reverts to child-like behavior. She cannot support herself through work. She cannot drive. She cannot fulfill many social responsibilities appropriate to a newly married woman. Instead, she must rely upon her husband and son for many of the chores that she ordinarily would do. Ms. Tracy's deviancy thus primarily manifests itself in exacerbated dependency.

When responsibility for illness is not attributed to the ill person herself, it follows that she cannot be held responsible for her deviance either. She is sick involuntarily, and through no fault of her own; presumably, her absence from work is also unintentional. Unintentional deviance is, in a healthy and flexible society, legitimate; illness in Talcott Parsons' terminology, is "sanctioned social deviance." The sick person, according to Parsons, has a right to be relieved from usual social duties and obligations. Being exempt from adult responsibilities, and entering a protected space in which dependency is sanctioned, she is accommodated, despite her illness, in existing social structures. In return for her right to be dependent, she has a duty to be a "good" patient and follow orders from medical expertise.

She cannot enjoy illness, but must attempt to get well as soon as possible (Parsons, 1985: 145–155).

When, on the other hand, illness is reinterpreted, as in Ms. Tracy's case, to signify a sickly character, and the ill person herself must bear the burden of responsibility for her own illness, the sick role is also reconceptualized. The deviance, the exacerbated dependency, can no longer be sanctioned. If the patient is responsible for her own illness she is also, by extension, responsible for disregarding her normal social responsibilities. Intentionally exacerbated dependency cannot be legitimized.

The injured worker then becomes acutely aware of her deviance. Both Ms. Harmon, and Ms. Tracy indicate that they feel odd being absent from work and that being dependent is simply inappropriate. Ms. Harmon wants "to go back to work," and is "bored stiff staying at home." And according to Ms. Tracy: "I have to work; I'm not going to be totally disabled for the rest of my life; I will have to go back to work." Incidentally, the injured worker becomes a very good Parsonian patient, desiring to terminate her dependency as soon as possible. However, while fulfilling her duties as a patient, she does not acquire the rights due to her according to the Parsonian analysis.

Instead, the injured worker is further stigmatized for neglecting to fulfill her adult responsibilities. Ms. Tracy, for example, is made to feel guilty for being absent from work and bringing hardships to her office:

...my job said...they could not fill my position with anybody with the qualifications that I have, because I just do such tremendous and great work that they couldn't find anybody to meet my high standards.

However, in the opinion of Ms. Murphy, Ms. Tracy's union representative and former co-worker, her position could easily have been filled by a temporary worker.

...[Esco] has access to all kinds of temporary people. They can solve those problems...Every time they say, "This job simply can't be filled by a temporary," it's bull shit, it's absolute bull shit. And, you know, it could be filled by a temporary. You bring somebody in, you do the job, it can be done.

In effect, the praise and compliments bestowed to Ms. Tracy from her office simply made her feel guilty for abandoning her work place and co-workers.

It made me feel bad, not to feel good, to feel bad. Like I've really caused a hardship to the office because I failed. So they are laying all these guilt trips on me.

The stigmatization is perhaps most clearly accentuated with the determined worker who, simply by following set procedures, attempts to get what seems to be due to her. According to Ms. Tracy,

...everybody is rude to me. And I hate to say it that way, it's just that people in personnel, when I call to find out about my paper work, for my money to come in on time, everybody acts like I am bothering them okay, like why are

you calling...they answer, "Oh, it's you again." I get guilt feelings...no matter what, I'm getting the shaft. And it all comes back to me: I am the bad person, I am the culprit.

Also Ms. Harmon encounters obstacles when she attempts to follow established procedures. When she initially filed for worker's compensation her form was, according to Esco, inadvertently lost. However, according to Ms. Harmon:

No one knows what happened to the first form...I believe it was purposefully lost because of what I put in the form. I stated everything that happened to me, I attached a doctor's statement, I attached the letter that [Ms. F, the supervisor] gave me...

In the opinion of Ms. Murphy:

...[Esco] attempted to deny her right to file a worker's comp claim. The department held on to the papers and wouldn't process them...I called up and I said, "Where are these papers?" "Oh, so and so has got them," I called so and so...you know, and it seemed real clear to me, I mean, people don't lose important documents at [Esco], at least not very often, in my experience. . .

Ms. Harmon, deviant and culpable for being absent from work and abandoning her co-workers, could not possibly act upon her right to file a worker's compensation claim.

Injured workers who are culpable for neglecting their adult responsibilities, cannot obtain worker's compensation simply by claiming it as their right and following set procedures. In contrast to victims, culprits can claim no rights. Instead, they can expect considerable hardship: stigmatization for abandoning their work place. Worker's compensation, then, is often only attainable through much effort and anguish. In accordance with ordinary usage, it becomes an *award* that must be earned. While every claimant initially expects worker's compensation to arrive painlessly and quickly simply because it seems "reasonable and logical, claimants with controversial cases, according to Ms. Murphy, "expressed to me horror down the road...in terms of what it took...how long it took, what you had to do in order to get what seemed like ought to be yours." This reconceptualization of worker's compensation creates, in claimants' minds, a disjunction between injury and compensation. This space, this hesitation, in turn provides Esco with the opportunity to exercise elaborate measures of control upon its worker's compensation claimants.

An Intensification of Control

A picture of injured workers has emerged: they are isolated from both healer-experts and other injured workers, as well as from former co-workers. Left to themselves, they are unaware of the fate of other injured workers. Their original ignorance is exacerbated by means of this isolation, and their consequent discomfort and insecurity compel them to depend upon healer-experts for the processing of their worker's compensation claims.

Seneco stands over injured workers as a protective power, watchful, thoughtful, and kind, its representatives, responsible for securing the fate of injured workers, explain their situation, express sympathy, console relatives, manage the claims, and ultimately provide the benefits. According to one Seneco representative:

Too often I see some poor widow, not knowing what to do, who gets an attorney, and he takes ten percent of her money off the top when he had no need for it, because benefits are payable. And it really makes me feel bad for the poor widow when things like that happen, but it does...so you try to get out there on the death claims and seek out the dependents as quickly as possible, and assure them that you are going to pay the money if at all possible.

In order to shield and protect injured workers and their dependents from the formal legal system, Seneco representatives establish contact with the injured worker as quickly as possible, explain the situation and what they can expect to happen:

Typically, what you'd like to do a a person is injured, you'd like to go out and visit him at the hospital, tell him that we will take care of the hospital bills, tell him what the benefits are, and we give them a letter advising them what they can expect, along with a brochure about what worker's compensation is all about. We tell him, "If the doctor sends you a bill, send them over to us because we will pay them." We try to explain that they are going to go through and what the process is.

After preliminary rapport is established with injured workers, Seneco representatives continue to look after their claimants:

After those initial contacts with an injured person, periodically they call in and ask questions on this or that. And if we haven't heard from them for a while we will call them up, "How are things going?" just trying to keep the rapport going .

Thus, ignorant and insecure injured workers are comforted and reassured by Seneco. In addition, their relatives often receive support. As one Seneco representative maintains: "It is just as important to talk to the wife...and reassure the wife." Both workers with uncontested claims, being dependent upon Seneco representatives for protection, management, and provision, and workers with controversial claims, being dependent upon medical examiners for care and treatment, become accessible and visible to a great number of healer-experts. These healers are in reality antagonists to the injured workers.

The medical examiners are hired by Seneco, which in turn is hired by Esco to manage its worker' s compensation claims and minimize its losses. According to one Seneco representative, "my job here is totally devoted to taking care of [Esco] in worker' s compensation, period. I serve no other plan." Seneco appears to be in a dilemma. Injured workers and Esco often have opposite interests and Seneco is in a position having to serve both. As one of their representatives maintained, "We want to give them [injured workers] a good deal...Uh, at the same time, we have these financial responsibilities [to Esco] that are bottom line, and, uh, these have to be paid a lot of respect."

There is every indication, however, that this dilemma really is only apparent. Esco, being self-insured, deposits funds into a trust account in order to cover their worker's compensation payments. Seneco does not possess independent funds, but uses Esco's funds to pay benefits to injured workers. In this position, Esco's demands must be given priority. As one Seneco representative maintains:

We do not enter into a settlement of [Esco's] claims without...[the Esco worker's compensation coordinator] approving or saying, "Okay, we will settle that claim." We just don't do that. We review with them. We get an okay.

Being visible, i.e. knowable, to healers, injured workers are then, in effect, visible to their actual antagonists.

A remarkable transfiguration has taken place. Prior to 1913, Esco could be convicted for negligence in civil court. Up until recently, their legal representatives could, if deemed necessary, overtly act as antagonists to injured workers. However, now that the corporation's representatives are healers, the original defendant-plaintiff relationship has been transformed to a healer-patient relationship. This relationship conceals the antagonism that actually persists—claimants still seek to maximize their compensation and the corporation still aspires to minimize its expenses—and thereby facilitates an intensification of control of injured workers. It is the injured workers' accessibility and visibility to healers—their actual antagonists—that make them controllable; it permits a non-violent, covert but efficient control, covering the whole range of injured workers with very little expenditure of energy. A protective power like Seneco does not exercise control through force, but through prevention, inhibition and restraint.

While an overtly oppressive power is necessarily forceful, it is usually possible for its subjects to remain in the shade, outside the perimeters of control. Traditionally, the burden of tyranny strikes some select people violently while its extent is limited. And even in the fiercest of regimes, the oppressive power will not reach everyone; inevitably some will remain unaffected and others will join underground resistance movements. A protective power, on the other hand, depends on its subjects visibility to exercise an efficient control. Injured workers do not resist Seneco, and do not wish to keep out of sight, since the control is covert and the power exercising the control conveys an image of benevolence. Ms. Tracy, for example initially contacted Seneco herself in order to expedite the procedures of her worker's compensation claim. She maintains, "to me this should be all [out in the open]," and asks, "What do I have to hide?" Unaware of any antagonism, injured workers are covered by Seneco's protective umbrella, being dependent upon its representatives for management and provision, and upon medical examiners for care and treatment. No injured worker then remains in the shade. And being visible, they are all subject to control.

The Healer's Gaze

The healer's gaze is both penetrating and disseminating, it imposes upon injured workers both a vertical and a horizontal visibility. Being vertically visible, injured workers are subject to a gaze that not only detects and exposes a detailed picture of their current

situation—e. g., their medical history and circumstances surrounding their injury—but also critically selects significant information, and divides and subdivides it into categories determined by their type of injury and the presence or absence of conflict in their worker's compensation claim.

Information about the cases, especially about those fraught with controversy, is disseminated among the healers by means of computerized data and an incessant stream of communication. This dispersal of information about injured workers accounts for their horizontal visibility. While their vertical visibility construes them as knowable cases, their horizontal visibility disseminates this knowledge among the healers. The combination of vertical and horizontal visibility maintains Esco in a position of dominance.

The injured worker is construed as an object of knowledge by means of several techniques of surveillance. As I mentioned, Seneco works closely with legal firms that hire other firms that subpoena the medical records of injured workers. In addition, Seneco has access to investigators who film worker's compensation claimants *sub rosa*. Independent of a hired legal firm, Seneco representatives may take the depositions of injured workers and administer questionnaires to them.

As we have seen, Ms. Tracy has been obliged to keep several appointments with medical examiners who are hired by Seneco. Their meticulous questioning is baffling to Ms. Tracy. She maintains:

...they want to know, "What were you doing when you were in high school?" I am over thirty, and they are asking me what I did in high school. Which doctors did I have when I was growing up? Who was my very first doctor that I ever went to? They want to know who delivered my children, who...I mean, they want to know every single doctor, every illness that I have had.

In addition, Seneco sent Ms. Tracy to a meeting with Esco's attorneys. According to Ms. Tracy, the meeting was "something like mandatory." She continues, "they questioned my life history. They wanted to know about my life from high school until [present]..." By means of careful questioning, Ms. Tracy is construed as an object of knowledge. She is meticulously described and analyzed as a worker's compensation case.

Seneco also operates a computer which is used to accumulate and categorize data on worker's compensation claimants. While subpoenaing records, filming claimants, taking depositions, and administering questionnaires produce information about injured workers imposing on them a vertical visibility, this information would be of extremely limited use if it were not easily accessible to the healer-experts. The function of the computer is to make this information accessible and usable. Terminals are located both in the Seneco office and at the Esco corporation. While all input is done in the Seneco office, the reports on injured workers can be generated at will by both corporation managers and Seneco employees according to one of their representatives. The reports then become usable. As this representative maintains:

...[the reports] are very valuable tools for [Esco] and [Seneco] in the management and in the administration of the worker's compensation program⁷.

Computerized data thus imposes a horizontal visibility on injured workers, making information about them easily accessible to both Seneco and Esco. Information about injured workers is also disseminated among healer-experts by means of regular contacts and communication between Seneco representatives and people from Esco. There is, in fact, a person at Esco whose task is specifically designed to coordinate this contact. This "worker's compensation coordinator" arranges the contact between Seneco staff and infrastructure committees, supervisors, personnel analysts and vocational rehabilitation counselors. According to a Seneco representative:

Once a month we will sit down with a group of their people and our people, and we got maybe three hundred open claims and out of those three hundred we are concerned about maybe thirty of them. So we talk about those claims. Here is the situation on this one, and here is what we are doing, is there anything else we can do? We consider other doctors, anybody know anything sometimes people will come out and tell us, "Oh yeah, he is disabled, but I saw him playing golf last weekend" [laughs]. That's just one thing out [of] the blue we talk about. Maybe a different choice of physician. Maybe the person should be recovered; it hasn't gone as quickly as we thought. These are some of the things that come to mind that we look at and consider.

Injured workers are aware of their visibility and they fear that information about their cases is, or will be, disseminated among Esco personnel. Ms. Tracy, for example, knowing that they know about her case, fears that her reputation will be ruined in the corporation and doubts that she will be rehired.

Who in their right mind is going to hire me knowing that I've had a suit against [Esco] that I have this workman's comp?...You know it's going to be all over. Everybody knows about [T] now. I've called everybody under the sun.

Ms. Tracy feels the healer's gaze. She knows that she is construed as an object of knowledge by means of techniques of surveillance, such as taking depositions and administering questionnaires. In her words, they "make a background of me." She is equally aware of the fact that this knowledge is being disseminated among her antagonists. The healer's gaze makes her uneasy for it is clearly a means of control and a method of domination.

The healer's gaze induces injured workers to self regulation. As Michel Foucault argues in his chapter on Panopticism in *Discipline and Punish*:

He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection (1979:202–203).

The injured worker who feels the healers gaze upon herself either acts with caution or inhibits herself from acting at all. Most significant in this respect is injured workers'

partially self imposed isolation from each other. Ms. Clark does not dare exposing herself to me, or others visible to corporate managers, fearing the loss of her job if her stories got back to Esco. Ms. Tracy, who spends an enormous amount of effort attempting to get the right information and managing her paper work, and who is a good friend of Ms. Murphy, would have to spend relatively little energy contacting other injured workers through her union representative. Her and other injured workers' failing to do so prevents their perception of common grievances, which in all likelihood would extend their knowledge and control within the worker's compensation system.

Subjected to the gaze of the healer, Ms. Tracy restrains yet another action. After her previous appointment with a medical examiner who was hired by Seneco, she wrote a letter of complaint to Esco criticizing the doctor for misrepresenting her actual statements in his medical report. According to Ms. Tracy:

...I was briefed what their findings were, their summary, and I would go through the whole, like three pages, and underline everything that they said wrong. Like I don't say that, that's not me, I didn't say this, they took this out of context...and [I] sent this up to my attorney and I said, "Look at this," and she goes, "Well, this is normal."

Since medical reports play a crucial role in the process of determining whether or not to grant an injured worker compensation, it is possible that the success of Ms. Tracy's worker's compensation claim depends upon this medical report's being either rewritten or erased from the record. Nevertheless Ms. Tracy never mailed her letter of complaint. She explains:

...I was going to mail it, and then I thought, "Oh shoot, if I mail this letter of complaint to [Esco] about how dare they send me to this terrible doctor," you know, I am thinking, "Shoot, this doctor will get wind of it, and he will even write more bad things about me."

Ms. Tracy's attorney also advised her not to mail the letter. Ms Tracy recounts:

She goes, "Maybe after we get the report, if you want to mail the letter," she goes, "But wait until we get the report." Because even she thought they would say something, you know, derogatory against me.

Feeling the healer's gaze, being aware of her own visibility, Ms. Tracy drops the complaint fearing that more harm than good would result if she mailed the letter.

A protective power, then, is not dependent upon force to exercise control. Instead, it imposes upon its subjects both horizontal and a vertical visibility; observation and communication become a means of control and a method of domination. The healer's gaze is not violent, but it hinders; it seldom prohibits, but often inhibits action; it does not subject its people to tyranny, but it enervates most of them and frustrates those who persevere and resist.

For a protective power the efficiency of control depends as well upon the degree to which those who exercise control remain invisible or unknown to their subjects. Also in this respect the procedures of a protective power represent a reversal from those exercised by a power dependent on the use of force. No threat of punishment could be posed or realized without displaying the brilliance of those who threaten and exercise control. The oppressive

power, then, is exhibited in all its glory: knights in shining armor, glamorous parades, giant armies, and the splendid sovereign. And even if the sovereign really is not extremely powerful it is nevertheless important that he appears to be so. As Machiavelli explains in *The Prince*,

...men in general judge more by the eyes than by the hands, for everyone can see, but very few have to feel. Everybody sees what you appear to be, few feel what you are...(1950:65-66).

Visibility is of the essence for an oppressive power that attempts to exercise control and maintain order through force.

For the agents of a protective power, however, invisibility is vital to maintain control. Seneco's very existence depends on their concealing antagonism and portraying an image of benevolence. If misleading and deluding its subjects is vital for the existence of a protective power, it cannot display itself openly. Instead, as far as possible, it must remain unknown, obscured by the ignorance of the subjects themselves.

The Patient's Gaze

The patient's gaze is as muddled as the healer's gaze is clear. Patients can neither locate nor define Seneco. Seneco's function in the worker's compensation scene is not adequately comprehended by either injured workers, or the union representative whom I interviewed. Although there appear to be more theories, more wild guesses, about Seneco than there are injured workers, no one explicitly expressed antagonism towards this institution.

Ms. Walker is unaware of the fact that Seneco is a dispute resolution agency. She maintains:

...as near as I can see, they are [Esco's] insurance company, but I don't fully understand the setup, if that's what you are asking, I really don't.

She was however, not satisfied with this definition. Ms. Walker notes, "...it didn't occur to me, 'How come there is an insurance company just for [Esco]?' I thought this was kind of bizarre."

While Ms. Walker's theory is clear but incorrect, Ms. Tracy's notions about Seneco are quite confused. In our first interview she did not distinguish between Seneco and the formal worker's compensation board. According to Ms. Tracy:

...[Seneco] and the workman's comp. board...are tied in as one. They are supposed to be one...[they are] in cohorts [laughs] with each other.

In our second interview she did distinguish between Seneco and the formal worker's compensation board. However, while pointing out that Seneco representatives are arbitrators only within Esco's worker's compensation system, Ms. Tracy is still unaware of the fact that these "arbitrators" are hired by Esco and not impartial. According to Ms. Tracy, Seneco is

our workman's comp....The way I understand it "workman's comp" is the label from the state. The state says, "If you are injured on the job, you are a workman's comp person." Well, within [Esco's] system, [Seneco

representatives] are like arbitrators of some sort. They are just like workman's comp.

While Ms. Walker believes that Seneco is an insurance company, and Ms. Tracy initially could not distinguish this private justice institution from the formal worker's compensation board, Ms. Harmon sees no distinction between Seneco and Esco's benefits office. "It's all sort of together: [Seneco] and the benefits office...a certain part [of the benefits office] is [Seneco]."

Finally, not even Ms. Murphy, the union representative, has a clear idea of the role of Seneco. She notes, "Frankly, I don't know enough about them, so I don't understand what their role is. It is a mystery to me."

Ms. Murphy is in a position to see the effects of Seneco's actions. However, the procedures themselves are invisible to her. A case in point: In one instance Ms. Murphy contacted an attorney about a case of harassment at Esco. The attorney in turn, brought the complaint to Seneco which, according to Ms. Murphy, "whatever magic they did made the supervisor back off..." The harassment was discontinued; yet, Ms. Murphy does not know what measures were taken in order to stop the harassment. Though the procedures of Seneco in this case are opaque to Ms. Murphy, she did conclude that their representatives in all probability work for Esco. Seneco representatives, afraid that the harassed woman would bring a suit against the company, convinced the woman's supervisor to terminate the harassment. Ms. Murphy speculates, "I guess they work for [Esco]...and I suppose they were worried that their employer was going to get in trouble." Later in the interview Ms. Murphy tentatively developed her ideas:

...it's my impression that they [Seneco representatives] represent [Esco], and it is also my impression, from talking at least to claimants and a couple of worker's comp. attorneys, that the way they perceive their job is to keep the [corporation's] costs as low as possible, and to see to it that as many claims are denied as possible.

The opaqueness of Seneco is a direct function of the ignorance of injured workers. Since maintaining their own invisibility is necessary for Seneco representatives to conceal the antagonism between themselves and worker's compensation claimants, perpetuating the ignorance of the latter becomes an issue of utmost importance for Seneco. As noted earlier, minimal contact and interaction between healer-experts and patient-dependents exacerbate the ignorance and dependency of the latter. Seneco representatives, in fact, actively prevent injured workers with controversial worker's compensation claims from establishing this type of contact. Ms. Tracy describes it as follows:

...I am not allowed really to call [Seneco]. For when I did, you know, that was a year or so ago, you know, everyone is very evasive. They are playing games with you.

Injured workers, such as Ms. Tracy, are then disenfranchised from knowledge and control of the processing of their claim. Their ignorance both compels them to depend upon Seneco for the processing of their claim, and also allows Seneco's representatives to operate in invisibility.

Bureaucracy and hierarchy also, in effect, conceal the procedures of Seneco from injured workers. Bureaucracy—labyrinths, referrals, complications—effectively controls the diffusion of knowledge to injured workers. When Ms. Harmon initially attempted to find out what was happening with her claim, she first called the benefits office. This office could not provide her with any information. Subsequently, the following maze of referrals began. According to Ms. Harmon:

She [a benefits office employee] then called the personnel office, and talked with someone there; I don't know who she talked with. They referred her to [J]... Why they referred her to him, I don't know. He referred her to [F], the supervisor who told me she didn't want me there. [F] referred her to [L], and of course [L] was gone for the day. No-one knew anything. I then called [M] and asked [her] to get on it for me, and she called [W]...the personnel manager. He said he knew nothing about it, but he'd get back to her. He never got back to her. She called back again and talked to [C]. She said she knew nothing about it, but she'd check in to it and she'd get back to her...

This maze of referrals traps information in corridors to which only healer-experts have access. The patient-dependents' ignorance is perpetuated; their gaze is obscured.

No one would know better than Ms. Tracy what it takes to fight a bureaucracy, to wriggle through a labyrinth of referrals, to try to attain information.

...after six to seven months I went back to read my books again to get a better understanding of what the hell was going on. And I still didn't get a good understanding until I started calling people again to try to find out what was going on...And then nine months went by; I never got the right information again. I never get the right information; that's what my whole thing is...from the time I was injured up until now, I have had to go out and fight everyone...

Bureaucracy, in effect, becomes a shield protecting Esco and Seneco from the patient's gaze. There is also evidence that a highly structured hierarchy at Esco, in which each person is continually supervised by the person(s) in the position immediately above, also controls the diffusion of knowledge to injured workers. A general hierarchy at Esco consists of workers, working supervisors, a management service officer who is a general supervisor, directors of various programs, the vice presidents, and finally the chairman of the board of directors. This complicated hierarchy constitutes a shelter for information. Ms. Tracy characterizes it as,

...like when you are calling the personnel office to ask for information...they are leery to tell you that they are all dealing for their own director. They are afraid to give you the information because they are afraid...they are going to get in trouble or something so they always stop, and tell you as little as possible.

Members of a carefully supervised hierarchical organization are trained to follow established procedures in their everyday activities, and often cannot, or dare not, respond to unusual circumstances such as an inquisitive worker's compensation claimant. Hierarchy,

then, by stifling independent activity controls the diffusion of knowledge to injured workers. It obscures the patient's gaze, sustaining the healer's invisibility.

At this point, a complete picture of the injured worker has emerged. Incidentally, this picture is identical to the picture of the inmate in Bentham's Panopticon, an architectural figure described and analyzed by Foucault. The Panopticon consists of a central tower "pierced with wide windows" (1979: 200) that open onto a surrounding ring-shaped building. This building is divided into cells each of which has two windows: one which faces the tower, and another, on the opposite side of the cell, which allows light to traverse the entire length of the cell, erasing any possibility of shade. A supervisor is placed in the tower, and one inmate is located in each cell. By the effect of back lighting, the inmates can be observed from the tower, while the supervisor is concealed from their vision. Furthermore, the inmates can maintain no contact with each other, because they are separated by the side walls of their cells. The inmate in the Panopticon then, "is seen, but cannot see; he is the object of information, never the subject in communication" (Foucault, 1979:200).

This, it seems to me, is a frighteningly accurate description of the injured worker. What Bentham thought an architectural configuration could make possible, is achieved in the private worker's compensation scene by means of the concealment of antagonism between employer-employee in the patient-healer relationship, and the creation of a specific type of worker's compensation claimant dependent upon a protective power to manage and process her claim, and diagnose and cure her illness. This concealment of antagonism, combined with the injured workers' dependency upon healer-experts, allows the protective power to effectively exercise techniques of surveillance, while camouflaging itself in a confusing bureaucracy and a complicated hierarchy. Injured workers then become *objects of information*. They are seen, but, they cannot see; they are isolated both from other injured workers and from healer-experts.

Like the Panopticon, the private worker's compensation scene permits an intensification of control. The patient's gaze is obscured; there is no, or little, danger of resistance. And the patients themselves, subjected to the penetrating and disseminating gaze of the healer, exercise self regulation inhibiting independent actions. Visibility then is a means of control and a method of domination which allows Esco to minimize its expenses in worker's compensation payments.

Conclusion

I have argued that the privatization of justice increases the efficiency of control that Esco can exercise upon its worker's compensation claimants. The harmony model of dispute resolution transforms the original plaintiff-defendant relationship between the injured workers and their employer into a patient-healer relationship. This relationship conceals antagonism which—despite the harmony model—persists, facilitating an intensification of control of injured workers who are visible to healers—their actual antagonists. Thus, Esco exercises a covert and efficient control upon its worker's compensation claimants.

Clearly, the conception of the harmony model as an alternative to traditional dispute resolution has had significant consequences for Esco's worker's compensation claimants. In

this ethnography, I have attempted to elucidate and analyze these consequences. In conclusion, I would like to address a speculative question which thus far has been sidestepped: what has made the conception of the harmony model possible?

I would like to suggest a two-stage answer. In privatized areas of civil law, there is a transition of ethics. This is a transition from the ethic of *right and wrong* to the ethic of *treatment*. That is to say, the moral imperative to resolve disputes by means of seriously considering moral issues and establishing a wrong doer is receding; in its place, an imperative to avoid conflicts, treat and care for disputing parties is emerging. The harmony model thrives in this kind of environment; its aim, to maintain amicable relations, is compatible with the ethic of treatment. The transition of ethics, in turn, was made possible by an ideological transformation in the beginning of this century.

What kind of ideological transformation? By *ideology* I do not mean something that is imposed on the masses by the ruling class, nor the integrated assertions, theories and aims that constitute a sociopolitical program, but rather, a manner of thinking, of understanding which makes sense to people and therefore permeates public life. So, for example, the ideology of *cultural absolutism* seemed all too obvious to the imperialists of the nineteenth century. Strange people in remote corners of the world were discovered and evaluated on a Eurocentric scale. It was thought that all people evolve through the cultural stages of savagery, barbarism, and civilization. The Australian aborigines, for instance, were classified as savages, the classical Greeks as barbarians, and the current western world represented civilization. Civilized people saw things the right way, and the views of savages and barbarians could easily be shown to be false. In the realms of science, aesthetics, and ethics, the true and false, beautiful and ugly, and moral and immoral were clearly distinguishable. In this ideological climate, the ethic of right and wrong was pervasive. There were indisputable moral standards to judge the disputing parties, and their conflicts were, at least purportedly, resolved by means of a serious consideration of what constitutes right and wrong conduct.

Cultural absolutism justified the Western world's air of superiority and provided the ideological basis for colonialism. However, as colonialism involved exploitation and war, cultural absolutism, in some intellectual circles, was revealed as *racist* and *hierarchical*. There was a growing awareness that all human beings are equal and should enjoy the same human rights. Franz Boas, in the beginning of this century, formulated the culture concept as an attack on cultural absolutism. He rejected the grand scale of evolutionism and shattered the vertical order. Instead he established a horizontal order, in which each culture was as valuable as any other. There is, he said, a multiplicity of cultures, each the result of a unique historical development, that cannot be put within one standard of explanation, or evaluation. Each people is distinctive; each people has its own genius.

The ideology of cultural absolutism, the basis for colonialism, exploitation, and war, was undermined. In its place emerged the ideology of *cultural relativism* which stresses the dignity and validity of every culture, and every set of norms. Boas' intention had been to create greater tolerance for human differences; however, differences became not merely tolerable, but fascinating. The local reality was questioned, traditional truths and norms doubted and juxtaposed with exotic alternatives and traditional moral standards were seen as local and artificial.

In this ideological climate the ethic of right and wrong recedes. In the absence of objective moral standards it becomes increasingly difficult to resolve disputes through a serious consideration of questions of right and wrong, and the establishment of a wrongdoer. Instead, the treatment mode gains in popularity; disputes are not resolved through an ethic of right and wrong, but dissolved through an ethic of treatment.

When the ethic of treatment is dominant, the existence of conflict is no longer relevant for determining a course of action. This ethic is perhaps most often associated with the so called insanity defense. The theory is that unless people are fully rational and conscious of what constitutes wrong and rightful behavior, they are not morally responsible for any crime they may commit and should not be punished, but rather treated for insanity. In 1742, drawing upon the writings of Henry de Bracton in the thirteenth century, Justice Tracy formulated the so called "wild beast" test, suggesting that a man must be "totally deprived of his understanding and memory," and not know what he is doing "no more than an infant, than a brute, or a wild beast..." to be relieved of criminal responsibility for his conduct (Allen 1968:273-277). In such a case, the fact that there is a conflict is irrelevant; instead, the fact that someone is not morally responsible for his or her conduct is what determines the course of action .

Clearly, the ethic of treatment is not a novelty. However, its use in the privatization of justice affords this ethic with its peculiarly modern twist. For here, it is not the legally insane defendant in criminal law cases, but the legally sane plaintiff in civil law cases that is supposed to be treated. For the former, treatment is an alternative to punishment; the bracketing of moral claims is of secondary importance to the legally insane criminal. However, for the legally sane plaintiff, it is precisely a serious consideration of questions of right and wrong that is sacrificed for treatment.

Such a sacrifice can only be justified if the existence of conflict once again is considered irrelevant. But why should it? The two cases are completely asymmetrical. In the one case, conflict is ignored because the person at fault is not morally responsible for his or her actions. In the second case, on the other-hand, it would be irrational to ignore the existence of conflict for the sake of the plaintiff whether or not she is morally responsible for her conduct. After all, it is not the plaintiff's actions that are morally questionable. How, then, can the ethic of treatment be justified even in the private worker's compensation scene? The concept of conflict is once again the key. It is not possible to justify the irrelevance of conflicts should there be any. However, it is possible to avoid conflicts altogether.

According to Seneco representatives, their program is not designed to resolve conflicts, but *geared to avoid conflict*. And this is done most effectively by means of erasing the very concept of conflict. Injured workers are encouraged to see conflict as nothing but confusion and misunderstanding that can be dissolved by means of careful communication. According to Seneco representatives:

...it's well known, if you don't communicate with claimants initially and quickly, ah, confusions arise, crisis points develop, and you get the claimant, ah, seeking help...

This is why the principal tasks of Seneco representatives are to clarify, interpret, and explain the worker's situation to the worker. They maintain that

...when an injury occurs, a person goes off work there is a certain amount of confusion, there is a certain lack of information about what is going to happen to them. So the task of [Seneco] is to get in there fast and say, "Okay. Here's what your situation is..."

Seneco representatives are "masters of conflict avoidance".⁸ With careful and thorough communication, there is no confusion, and hence, no conflict. In such a situation there is, according to Seneco representatives, "no reason for advocacy." The confusion or misunderstanding which is dissolved, or cured, by healers of conflict by means of careful communication, thus replaces the real conflict which is resolved by lawyers through the adversary contest. It is this fictionalization of conflict that justifies the ethic of treatment in the private worker's compensation scene. A serious consideration of questions of right and wrong is no longer necessary.

It seems that the ideological transformation in the beginning of this century has had significant consequences. It weakens the position of the ethic of right and wrong, and opens the door to the ethic of treatment. This is why some contemporary lawyers, including Chief Justice Burger, has come to doubt the equity of the adversary contest as the principal means of resolving disputes. And this is also why the harmony model, as an alternative to the adversary contest, has become so appealing in this society. The harmony model, in giving priority to satisfying the needs of people and maintaining amicable relations rather than proving the guilt of an alleged offender, is compatible with the ethic of treatment.

Does the harmony model provide us with the most equitable way of resolving disputes in the contemporary society? This ethnography indicates that the answer to this question, at least in disputes between parties of equal power, is "no." In the worker's compensation scene that I studied, the harmony model is implemented in private dispute resolution and facilitates an intensification of control of injured workers. In fact, it should make us a bit wary that dispute resolution, in some areas of the law, is becoming a business. While it is possible that businesses can be more efficient than public agencies, it is not as clear that businesses can combine this efficiency with equity.

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Notes

1. This term was first used by James L Gibbs (1963).
2. See Nader (1990).
3. All names are fictitious in order to maintain the confidentiality of the informants.
4. The data for this study consists of two extensive interviews with the vice president of Seneco, during one of which the Esco contact was present; one informal talk with another Seneco representative; interviews with two worker's compensation attorneys and a worker's compensation judge; observations at the Oakland Worker's Compensation Appeals Board; one interview with an office administrator at a legal firm which interacts extensively with Seneco; and several extensive interviews and informal talks with three injured workers and their union representative.
5. See, for example, Nader (1984:83).
6. This style—I use the term *harmony model* in this ethnography to refer to the same concept—is one of four styles of law that Donald Black outlines (1976). While the legal system of any particular society may be too complex to fit neatly into any of Black's categories, I did find his notion of a therapeutic style of law useful for thinking about Esco's worker's compensation scene.
7. This quote is from a report written by Seneco representatives.
8. Joke among Seneco representatives.

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