Reclaiming a sociological voice

in mental health law

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Australian sociology has struggled with the ascendancy of neo-liberalism. Neo-liberal economic policy has profoundly altered the tertiary sector, and the neo-liberal ethos has cultivated a broad political and social conservatism (Beilharz and Hogan, 2005). Neo-liberalism has overlaid the emergent development of a dynamic intellectual, institutional, and vocational pluralism in Australian sociology with a sense of crisis (Roach Anleu 2005). In response, sociology has sought to affirm its core and enduring qualities. These have been identified as the adoption of a critical stance, an interest in the empirical world, an interest in social justice, and a commitment to social activism (Bryson 2005; Roach Anleu 2005). The close identification with projects of social justice and social activism embodied in this view of the sociological enterprise reflects the late (albeit contested) institutionalization of sociology in Australia. Australian sociology established itself following the sustained epistemological break with the functionalist sociology of the mid century, and with the ascendancy of radical politics. Attributing the demise of sociology solely to a ‘conservative turn’ is inadequate. To so do fails to acknowledge the ways in which the neo-liberal critique has glossed over of deeper fissures in the Australian sociological enterprise. I wish to argue in the following discussion that some of the gaps in contemporary Australian sociological inquiry are a product of an unreconciled contradiction between the ethical stance of progressive activism and epistemological trends in postmodern scholarship which have produced a clear, but confounding, sociological critiques of rights.

1 Rethinking Mental Health Law Project, Faculty of Law, Monash University. The author wishes to thank the anonymous reviewer for their helpful comments.
The aim of this paper is to encourage the critical reengagement of sociology with the phenomenon of rights through the prism of mental health law. Mental health law provides a case study through which sociology’s relationship to rights can be explored. To begin a broader discussion about sociologies engagement with rights, the following discussion will show how an apt sociological critique of rights worked to disrupt the creative alliance between law and sociology to produce in the Australian context, a deep silence in sociological analysis of mental health law. The paper will set out the traditional connections between law and sociology, trace the disruption between sociology and mental health law reform, and outline the need for a sociological voice in mental health law reform.

**Sociology and the law**

Law has been central to the sociological enterprise. The founding fathers, Karl Marx (1818-83), Durkheim (1858-1917) and Weber (1864-1920), were closely engaged with questions of law. Durkheim and Weber in particular influenced the work of Talcott Parsons (1902-1979). Sociological exploration of the law as a tool of progressive social change is sourced in the creative intersection of law and sociology conjured by the American jurist Oliver Wendell Holmes (1831-1935) in the early twentieth century. Holmes opposed legal formalism as the dominant trend in American legal thought. He argued that legal formalism erroneously conceives the law as logical and internally consistent, thus confusing it with morality and moral values. Holmes believed that the principles and precedents selected by judges reflected subjective and ideological biases. He urged judges to look to relevant facts in a changing society, including public sentiment and the insights drawn from social sciences (Deflem 2008).

Drawing on Holmes work, Roscoe Pound (1879-1964) developed the concept of sociological jurisprudence as the study of law that takes account of the cause and effect of the law in social context. Following the work of American sociologist Edward Ross, Pound argued that law is a form of social control. Pound saw the role of law as the task of balancing six competing categories of social interest in order to achieve social
integration. It followed that the objective of the study of law was needed to improve the effectiveness of the regulatory systems (Deflem, 2008: 101-105).

The legal realist school, best represented in the work of Karl Llewellyn (1893-1962), responded to legal formalism, and to Pound, by arguing that law must be analyzed as a social system, and studied at the level of the everyday, in concrete cases. Llewellyn thought this approach would uncover the divergence between the avowed rule, and law in practice (Deflem, 2008:103). Legal realists were concerned to develop a methodology for the accurate study of law in terms of the interactive context of law and the conduct of legal actors. They sought to build law reform from an empirical base (Deflem, 2008:105). This approach, coupled with the conception of law as created ‘on the ground’ by legal actors ‘in the everyday’, enabled law to be seen as constituent of transient social and political contingencies. This generated sociological analyses of the processes and experiences of the law. It enabled the radical consciousness of the 1960s to conceive the legal process, including the development of legislation and the institutions of the law such as courts accessible, malleable, and capable of being turned to the needs and objectives of political and social innovation. These perceptions underpinned the formulation of the powerfully influential rights movement. Sociological jurisprudence and legal realism together sustained a reconciliation between the activist pursuit of rights and the enlightenment suspicion of rights rhetoric, most famously articulated by Bentham and Marx.

The pursuit of rights sat well with the sociological sensibility of the 1960s. Rights were seen as powerful mobilizing forces capable of reconciling the contradictions between individual and collective claims and for guiding the appropriate legal constitution and regulation of agencies and institutions (Rose, 1985:214). Internationally and in Australia the activist alliance was particularly vibrant and sustained in the sociology of health and illness (Bryson 2005; Richmond 2005). This produced a series of pertinent and insightful sociological studies of the law, society and regulation (Freidson 1970; Willis 1989; Germov 1995) especially in the influential work of Marianna Valverde (Valverde, 1998; 2003).
The alliance between law and sociology was dented by the strengthening insights of critical sociology, and its impatience with the efficacy of law, particularly in terms of rights. Concerned to provide an analysis of why major legal ideals have not been realized in capitalist societies, Hunt argued that law reproduces social order through a continue process of the shaping and reshaping dominant structures in society within specific socio-historical contingencies. Hunt saw law as imposing a repressive domination through its link with the State’s capacity for coercion, and ideological domination through its capacity to mobilize the assent of the population (Hunt 1993). In the sociology of health and illness, the entrenchment of medical professional power through law affirmed this theoretical analysis (Willis 1989). Wendy Brown, following Marx analysis in *On the Jewish Question*, argues that the allocation of political rights from the State can only emancipate an ideal representation of the subject and removes from political consideration the material circumstances of the individual. For Brown, rights discourse serves to reinforce the perception that all individual qualities are internal, personal attributes rather than the effect of social relations that iterate class, sexuality, race and gender (Brown 1995). Commenting on the legalization of the human rights movement, Roach Anleu (1999) observes that the force of law demands that human problems be cast in the language of rights, and that rights law inevitably propagates itself by requiring more law and more adjudication to settle legally construed conflicts. In failing to recognize unequal resources, the law inevitably replicates and reinforces social inequalities at both the domestic and global levels (Anleu, 1999).

The disconnection between legal sociology and rights activism implied by the sociological critique of rights outlined above, is echoed the expulsion of law that featured in the early and influential work of Foucault (Hunt and Wickham, 1994). Although Foucault’s later work on governmentality posits a much closer engagement with law, the project of understanding power outside the traditional conceptualization of sovereign and political power occupied Foucauldian scholarship (Foucault 1991). Despite the unparalleled prominence of rights and human rights discourse and its thematic resonance with the contemporary sociological problems, several major streams of sociological
scholarship, such as those concerned with reflexive modernization (Beck, Giddens et al. 1994), risk (Turner, Petersen et al. 1997) (Franklin 1998) and bio-power (Rose, Jones et al. 1994) are similarly disengaged from the study of the law.

Beyond sociology, rights and human rights discourse and practice developed apace. In politics, philosophy, law and legal studies there has grown a sophisticated cross-disciplinary engagement with the complex interconnections between law and society reflected in the strengthening law and society movement (Cotterell 2006). Following this international trend, the study of law, rights and human rights in Australia is the province of lawyers and the legal studies movement (Roach Anleu 1999). While Australian sociologists have contributed ably to this field, there remains room for the contribution of a reinvigorated sociological agenda in the study of law, particularly the study of rights and human rights in post modernity. The following sketch of the sometimes uncomfortable interconnections between critical sociology and the pursuit of rights in the field of mental health provides a brief study of the epistemological tensions that have stymied the sociological contribution, and argues for the injection of a distinctly sociological approach in mental health law reform scholarship.

**Rights activism and mental health law**

As the above survey illustrates, the civil rights and radical social reform movements of the 1960s and 1970s were characterized by creative alliances between political and social activists, and social scientists, both internationally and in Australia. Sociological and political theory mirrored and informed public social movements. New research methodologies that sought to document the ‘view from the ground’ were developed. In health, the elaboration of the sociological analysis of medicine as an institution of social control and the conception of medical dominance combined forces with the feminist, health consumer and anti-psychiatry movements. (Goffman 1961; Szasz 1961; Scheff 1966; Zola 1972; Illich 1976; Taylor 1979), (Freidson 1970a; Freidson 1970b; Johnson 1972; Willis 1989). Theses ideas found particularly compelling expression in the women’s health and midwifery movements (Collective 1973; Ehrenreich and Ehrenreich
1974; Ehrenreich and English 1978; Oakley 1984), and psychiatry (Szasz 1961; Scheff 1966; Kittrie 1972).

The activist alliance was characterized by an optimism and affinity for legal action and law reform as tools for social change. Progressive change was to be achieved through law and legal action. Transformation was needed in both the common law and in legislation. In mental health, the campaign to achieve formal rights proved to be both successful and resilient. Early rights discourse was mobilized around the misuse of psychiatry for the incarceration of political and social dissidents, particularly in the USSR, and in America for the treatment of homosexuality as psychiatric pathology (Kittrie 1972; Bloch and Reddaway 1984). Activists brought cases concerning the rights of people with mental illness before the European Court of Human Rights. In developed western jurisdictions, the human rights bases proclamations of the influential European Court, combined with recognition of human rights obligations flowing from the signature and ratification of the International Covenant on Civil and Political Rights prompted many jurisdictions to revise their outdated mental health laws. In deference to contemporary sociological insights, particularly the medical dominance thesis, these reforms sought to simultaneously embed a therapeutic model, and curtail medical discretion by mechanisms of quasi judicial oversight and review. For example, in Victoria, the Mental Health Act 1983 was regarded as innovative rights based legislation. It was supported by the establishment of the Mental Health Legal Centre as a strategic addition to the Community Legal Service sector and accompanied by a package of reformist legislation that sought to regulate the provision of therapeutic service to people without capacity.

Internationally and in Australia, new waves of law reform in mental health have followed apace. In America, the campaign to achieve recognition of psychiatric advance directives resulted in adoption of legislation in many jurisdictions following the

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2Larry Gostin as the Executive Director of MIND the National Association for Mental Health bought several critical cases against the United Kingdom beginning with the foundation case of Winterwerp v Netherlands heard in 1971 (Gostin, 2000). French sociologist Philippe Bernardet brought 26 of the 36 applications against France.

introduction of the federal *Patient Self Determination Act* in 1991 (Atkinson 2007). Psychiatric Advance Directives are recognized in New Zealand, parts of Canada, Scotland, and in the United Kingdom, reflecting further accommodation of recognized human rights obligations. In Australia legislative revisions in most jurisdictions slowly followed the conduct of a ‘human rights audit’ based on the (controversial) United Nations *Principles for the Rights of Person with Mental Illness and for the Improvement of Mental Health Care* (1991)⁴ (Watchirs, 2005). These events are often read as evidence of a consistent and progressive legal development. Yet the interconnection between law and sociology in the 1960s and 1970s dissipated, leaving the law reform movement in mental health to progress in isolation from sociology as core tensions between sociological and legal analyses of rights were made explicit.

**Sociology and rights in mental health law**

In his seminal piece ‘Unreasonable rights and the limits of the law’ (1985), Nikolas Rose expressly aimed to disrupt the view that the imposition of quasi-judicial review on medical decision, which key strategy put forward by the civil and political rights movement, was an effective means of constraining professional power, and to disrupt the view that posing demands in terms of rights is a useful means of directing social resources (Rose 1985:199). Rose argued that the ‘ideology of entitlement’⁵ offers a flawed sociological critique of the professionalization and medicalisation of social control, that rights entitlement depends on an erroneous conceptions of freedom, that the accusation of a lack of scientificity in psychiatry is misplaced, and that the reliance on quasi-judicial review overestimates the capacity of tribunals to constrain and monitor professional discretion (Rose, 1985:202). First, in criticizing the sociological concept of social control, Rose accepts that social and institutional arrangements form, shape and constrain human capacity and actions. He takes issue with social control analysis on the basis that it lacks a means to conceptualize the nature, objectives and consequences of different mechanism of control in society, and possesses only the crudest tools to evaluate

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⁵ Larry Gostin’s coined the phrase to refer to which are the assertion of entitlements as matters of right, the limiting of medical discretion by legal oversight, and maintenance of the civil status of the mentally ill.
the moral and political implications of different techniques of regulation. He describes the contemporary psychiatry as operating predominantly through contractual relations of choice, rather than coercion, and sees opposition to the coercive aspects of modern psychiatry as being central to the modernization and extension of the psychiatric system to new sites, problems and population (Rose, 1985: 203). Second, following Foucault, Rose refuses a conceptual opposition between coercion and freedom. He sees the invocation of private spaces of freedom or autonomy outside the law as fallacious, because these sites are merely invested with different regulatory modalities such as the psychotherapeutic forms of social guidance deployed in various ‘helping’ professions. Accepting Foucault’s analysis of the invention of the rights bearing individual as the centre-piece of modern western social and political discourse, Rose understands the objective of modern psychiatry to be the restoration of persons who have lost their capacity for freedom by rebuilding their autonomy and individuality. Psychiatry does not seek to destroy the individual ‘but to construct it’ (Rose, 1985:204). Third, in noting the lack of scientificity in both psychiatry and medicine, Rose points out that the professional claim to the higher intuitive skills ‘at the bedside’ are the basis for the assertion of professional authority and competence. Finally, Rose shows that the deliberation of tribunals are heavily reliant on the exercise of subjective discretion. Contrary to their expected contribution, non-medical members of review tribunals are more likely to attribute unusual behavior to mental illness and more likely to associate mental illness with potential dangerousness (Rose, 1985:207). In summary, Rose’s analysis shows that rights claims work to engender shifts in the dominant modalities of control, usually by shifting the emphasis from one professional sector to another. They are unable to contribute the transformation of organization and economic factors that affect the availability of time, staffing level and caseload, or secure adequate funding of community based services. Rose’s damning but cogent analysis marks a parting in the radical alliance between law and sociology, placing the proliferation of law and legal solutions deaf to the insights that might be offered by a sociological approach.
The need for sociological voices

More than 20 year on, Rose’s critique remains pertinent. Rights claims have contributed to the acceleration of de-institutionalization, which is the exemplary strategy of neo-liberal economic policy. While people living with mental illness in developing countries continue to experience institutional incarceration in archaic conditions, the dismantling of large and expensive asylums in modern western jurisdictions has rarely been followed by a commensurate allocation of resources to the community. People living with mental illness encounter a fractured, under resourced and pharmacological dependent sector (Rose 2007). Their experiences outside the institution have has been described as ‘re-institutionalization’ in small community units, or ‘trans-institutionalization’ as they struggle across disparate service provision. In Australia, the 2005 report by the Mental Health Council (MHC) “Not For Service” documents serious neglect in the mental health sector across Australia. The report identifies inadequate resources across the board with insufficient early intervention especially for young people, a failure to address issues of dual diagnosis, inappropriate facilities for children, insufficient emergency services and insufficient community support. The report expresses particular concern that the criminal justice system has become a defacto institution (MHC 2005). Little sociological comment has followed in Australia save for a special edition of Health Sociology Review in 2005.

The changed and changing nature of modern mental health system demands empirical sociological analysis about the operation of these new forms of hybrid institutional systems with virtual borders outside delineated spaces and new forms of institutional practices and imperatives. Included in the sociological analysis of the hybrid institutional system should be research that properly documents the subjective experience of consumer of mental health services. This may include experiences of their metal illness, experiences of negotiating the interface between community and institutional treatment, the practical interface between public and private systems, between voluntary in

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6 Mental Health Council of Australia with Brain and Mind Research Institute and HREOC
voluntary commitment procedures, the reception of psychiatric advance directives and or treatment plans, and conditions in the public institution including the prevalence and response to institutional and patient violence. In terms of health personnel the formation and interaction of professional teams, their inter-professional relationships and struggles are rarely documented. This empirical base could inform the development of mental health law reform in new and innovative ways. New approaches in law and legal regulation of the sector, such as the recognition of advance directives or the loosening of the criteria for involuntary civil commitment, each invite empirical analysis of the interface between law rights and the mental health system.

There is precedent for the involvement and contribution of people living with mental illness in the formulation of the law. At the international level, the increased involvement of non-government organizations in the deliberations of the United Nations has influenced the content of the Convention on the Rights of Persons with Disabilities (2007). Its terms reflect an applied legal perspective that acknowledges the limitations of rights strategies by focusing on the legal regulation of decision making processes and the social construction of discrimination and marginalization. The complexity of new international human rights formulations, coupled with the increasingly porous relationship between the international systems and domestic legal systems suggests that the traditional sociological analysis of rights formulation as rhetorical or implicated in the replication of local and global inequality requires fresh consideration.

Human rights are a fundamental feature of social organization in the second half of the twentieth century. They are an important mechanism of globalization because they also constitute a powerful process of simultaneous differentiation and harmonization. Those processes occur simultaneously on the collective and individual level as participants in the process of legal formulation- consumers, practitioners and policy makers- form new alliances and identities. The formulation of legal rules, and the subjectivities contained in

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them, is a field ripe for sociological analysis. It is a field that will enable sociology to grapple with the interrelationship between individualization and informationalization in a legally globalized world, and to examine and redefine Australian sociology’s dependence upon and ambivalent engagement with the sociologies of the ‘metropole’ (Connell 2005; Gilding and Marjoribanks 2007). Sociology could find its voice within a critical reengagement with rights.

**Conclusion**

The struggle to reconcile social activist objectives with sociology’s critical account of rights has contributed to the abandonment of fields of inquiry that should be regarded as sociology’s natural territory. In pursuing a sociological reengagement with law and rights Australian sociology may yet contribute an effective voice from the ‘global periphery’ (Connell, 2005). The mental health field provides a case study of a significant social phenomenon of the second half the twentieth century - the proliferation and replication of rights discourse. In traversing the global and the local, creating a series of subjective reflexive identities in the legal matrix, rights discourse and practice creates an object for contemporary sociological study that can focus on the interrelationships between the individualization and informationalization in a legally globalized world. The mental health field provides an opportunity to explore the sociological matrix in all its complexity.
References


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