

# BOOK REVIEW

## Rethinking Rights-Based Mental Health Laws

B. McSherry, P. Weller (editors)

Oxford and Portland, Oregon: Hart (2010)

Reviewed By: Bernard M. Dickens OC PhD LLD FRSC

Professor Emeritus Faculty of Law, Faculty of Medicine and Joint Centre for Bioethics

Co-Director, International Reproductive and Sexual Health Law Programme

University of Toronto, Canada

Skepticism regarding the protective value of “rights” to mentally ill individuals dates back to Treffert’s widely discussed 1973 letter “Dying With Their Rights On”<sup>1</sup> and Appelbaum and Gutheil’s derivatively entitled article “Rotting With Their Rights On” of 1979.<sup>2</sup> This book edited by Bernadette McSherry and Penelope Weller, both of Monash University in Melbourne, Australia, addresses the inadequacy of negative rights for mental health patients, and urges expansion of their positive rights, consistently with the U.N. international human rights Convention on the Rights of Persons with Disabilities, which came into legal effect in May, 2008.

Negative rights are often paraphrased as rights to be left alone. These are valuable to those who resist state or public intrusion into the decisions they make for themselves that do not affect other people in significant ways. Until recent times, for instance, the decision of two unmarried people to live together in a sexual relationship attracted criminal penalties for fornication, and for more serious offences if they were both men. Negative rights may be less valuable, and conceivably harmful, however, for mentally ill people liable to hurt themselves, such as by self neglect and starvation. Positive rights are rights to the assistance and protection provided by others. The book addresses state or governmental interests in intervention to protect individuals from causing harm, particularly to themselves, due to mental illness.

The book is international in its range of references, with heavy reliance on legislation and court judgments from Australia, Canada and the United Kingdom. In this regard, it illuminates comparisons rather than sharp contrasts, although differences in details stimulate thinking about potential improvements, and pitfalls. All of the book’s sixteen contributors, perhaps with an exception, are lawyers, usually of some seniority. They avoid the parochialism to which lawyers are sometimes prone due to preoccupation with the jurisdictions in which they work, however, and make considerable use of leading international human rights instruments.

Groundbreaking is the chapter by Oliver Lewis, Director of the Hungarian Mental Disability Advocacy Centre, entitled “The

Expressive, Educational and Proactive Roles of Human Rights: An Analysis of the United Nations Convention on the Rights of Persons with Disabilities.” This chapter addresses the content and value of the Convention, but identifies areas in which the global disability movement finds the provisions unsatisfactory. It notes some ambivalence towards the Convention (the CRPD), observing that “The adoption of the CRPD provides closure on an intensive global conversation about the notion of disability, the rights of people with disabilities, and the duties on states and others towards them. It is a dusk as well as a dawn ” (pp.105-6).

The book provides an unfolding sequence of chapters, although the chapters can stand by themselves to serve readers’ specialized or prioritized interests. The editors’ introductory chapter explains the questions that contributors were invited to address, and presents an overview of the orientations that the subsequent chapters adopt, probing strengths and weaknesses, successes and failures, of legal rights-based approaches to mental health, and mental illness.

In the second chapter, Philip Fennel, professor of law at Cardiff University, Wales, considers the legal codification of clinical authority and the limits of rights-based approaches. Historical and trans-European in approach, the chapter probes the legitimate scope of clinical authority, meaning the powers over mentally disordered people granted to professionals, primarily doctors but also others. It describes “tutelary” relationships and power, meaning the conferring on others of non-consensual decision-making power over the affairs of adults. Structured around U.K. legislation, the chapter ranges over institutionalized and community-based treatment, and its implications.

The complex relationship between human rights and mental health law reform is considered in the following chapters, under the title “Lost in Translation: Human Rights and Mental Health Law,” by Penelope Weller, a postdoctoral research fellow at Monash. Her chapter’s sub-headings identify its scope, addressing characterizing consumer rights, the ideology of entitlement, the model of rights-based legislation, diagnostic thresholds, the dangerousness ground for civil commitment, limiting consent, the review of

medical decisions, psychiatric advance directives, rights-based legalism and the international community, reinventing a human rights response, and human rights and domestic law. The international community section includes a helpful overview of, and WHO guide to, the U.N. Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, offering a coherent human rights framework for mental health care that the author finds highly persuasive.

Neil Rees, who chairs the Law Reform Commission of the state of Victoria, Australia, presents the fourth chapter on whether the next step of development of mental health law should be, or will be, the fusion in Australia of mental health and guardianship of laws. Addressing the different histories of mental health law and guardianship law, and their different historical purposes, the author considers the arguments for and against fusion, and tentatively suggests that a trial of a fused system merits discussion.

The fifth chapter, by Oliver Lewis, considered above, opens consideration of the international human rights framework. Annegret Kämpf, a doctoral candidate at Monash, follows this in a chapter entitled “Involuntary Treatment Decisions: Using Negotiated Silence to Facilitate Change?”. This places the CRPD in wider contexts, making clear that the “silence” addressed in the chapter’s title concerns failures of decisiveness in the Convention’s language. The author observes, for instance, that Article 17 of the Convention, on the right to physical and mental integrity, is vague, and that therefore “[t]he silence of Article 17 suggests that States Parties [to the CRPD] must rethink their involuntary treatment schemes in the light of CRPD principles. Consideration of dangerousness will, in particular, have to be justified in departing from the general principle that treatment should be voluntary-based” (p.148).

Tina Minkowitz, of the USA’s Center for the Human Rights of Users and Survivors of Psychiatry, in chapter 7, radically addresses abolishing mental health laws to comply with the CRPD. The chapter includes a section on forced or non-consensual psychiatric interventions as torture, which focuses on the possible perspective of treatment recipients rather than on legally relevant tests of actors’ intentions. The following three chapters, by law professors Geneva Richardson (King’s College, London), Ian Freckelton (Monash), and Jill Peay (London School of Economics) more substantively address gaps between law and practice by reference to insightful legal analysis. The chapters consider respectively research on rights-based legalism, extra-legislative factors in involuntary status decision-making, and civil admission following a finding of unfitness to plead.

Similarly, the following four chapters are by lawyers who address assessment review processes and the role of tribunals. Terry Carney, professor at Sydney Law School, Australia, considers whether there are competing models of involuntary treatment laws; Mary Donnelly, senior lecturer at University College Cork, in Ireland, addresses protection of rights in treatment decision reviews; Joaquim Zuckerberg, of the University of Toronto Faculty of Law presents a reappraisal of Canadian experience of discontent with mental health law; and John Dawson, professor at the University of Otago, New Zealand, places compulsory outpatient treatment orders in a human rights context.

The concluding three chapters are devoted to aspects of access to

mental health services. John Petrila, law professor at the University of South Florida, reviews limits of mental health law in the U.S.A., Bernadette McSherry, law professor at Monash, addresses the role of the law in voluntary mental health treatment, and Peter Bartlett, professor at the University of Nottingham, England, presents an overview of mental health and legal rights outside so-called “First World” countries.

This book is a rich source of information, analysis and criticism of how national mental health laws fit within the framework of contemporary human rights values, principles and international treaties. It will instruct, challenge and stimulate readers, who will find guidance to their particular interests through its helpful Index. Its publication is a valuable contribution to the literature, and to advancement of further research.

## Notes:

1. D.A. Treffert “Dying With Their Rights On” (letter) (1973) 130(9) *Amer. J. Psychiatry*, 1041.
2. P.S. Appelbaum, T.G. Gutheil “ ‘Rotting With Their Rights On’: constitutional theory and clinical reality in drug refusal by psychiatric patients.” (1979) 7(3) *Bulletin of the Amer. Acad. Psychiatry and the Law*, 306-15.

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**Address for Correspondence:**

84 Queen’s Park Crescent  
Toronto, Ontario CANADA M5S 2C5

**Email:** [bernard.dickens@utoronto.ca](mailto:bernard.dickens@utoronto.ca)

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